

CRS Report for Congress

Competitive Sourcing Statutes and Statutory Provisions

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Competitive Sourcing Statutes and Statutory Provisions

Summary

As a federal government policy, competitive sourcing debuted in 1966 with the publication of Office of Management and Budget (OMB) Circular A-76. Under the circular, commercial activities performed by federal employees are subjected to public-private competition. Until the late 1990s, the executive branch, namely OMB, almost exclusively, led the competitive sourcing effort, issuing revisions to the circular, overseeing implementation of the policy, and providing guidance to agencies.

In recent years, congressional interest and involvement in competitive sourcing, as measured by legislation that has been enacted, has grown. Throughout the 1980s and 1990s (93rd through the first session of the 106th Congresses), a total of 10 bills with competitive sourcing provisions were enacted, including, for example, the Federal Activities Inventory Reform (FAIR) Act (P.L. 105-270). The 108th and 109th Congresses experienced a marked increase in the number of bills enacted with competitive sourcing provisions. Nine bills with competitive sourcing provisions were passed, and signed by the President, during the 108th Congress. Protest rights for federal government employees, funding limits on competitive sourcing activities, and reporting requirements were some of the issues addressed by these provisions. A requirement for agencies to develop a most efficient organization (MEO) and to apply the conversion differential to competitions that involve more than 10 full-time equivalents (FTEs) was included in five statutes (P.L. 108-87, P.L. 108-108, P.L. 108-199, P.L. 108-287, and P.L. 108-375). (The MEO is the staffing plan of the agency tender, which is the government's response to a solicitation. The conversion differential, \$10 million or 10% of the government's personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent's proposal. An FTE is the staffing of a federal civilian position expressed in terms of annual productive work hours (1,776 hours).) Eight bills containing competitive sourcing provisions were enacted during the 109th Congress. Although some provisions were the same or similar to legislation enacted previously (P.L. 109-54, P.L. 109-90, P.L. 109-97, P.L. 109-148, P.L. 109-289, and P.L. 109-295), P.L. 109-115, in amending the FAIR Act, added agencies with fewer than 100 full-time employees to the list of government entities not subject to the FAIR Act. Additionally, the competitive sourcing language included in P.L. 109-163 revised and reorganized certain competitive sourcing provisions in Title 10 of the *U.S. Code* (Department of Defense). To date, three bills with competitive sourcing provisions have been enacted during the 110th Congress: P.L. 110-28, P.L. 110-161, and P.L. 110-181. This report will be updated if relevant legislation is enacted.

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Competitive Sourcing Statutes and Statutory Provisions

Background

Competitive sourcing is a government-wide initiative that subjects commercial activities performed by federal government employees to public-private competition.¹ A commercial activity is “a recurring service that could be performed by the private sector,” whereas “an inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.”² In a public-private competition, federal agency employees prepare an “agency tender,” which is, in effect, the government’s equivalent of a contractor’s bid or proposal.

The primary source of the policy and procedures (including revisions and other changes) involving competitive sourcing has been the executive branch, namely the U.S. Office of Management and Budget (OMB) and its predecessor, the Bureau of the Budget. The bureau issued the original Circular A-76, dated March 3, 1966. OMB has published six revisions to the circular and issued additional guidance, generally in the form of memoranda, on various subjects related to competitive sourcing.³ The Administrations of Presidents Ronald Reagan and George W. Bush also have been directly involved in competitive sourcing policy and guidance. In 1987, President Reagan signed an executive order that directed federal agencies, beginning in FY1989, to subject at least 3% of their civilian positions to public-private competition each fiscal year until all commercial activities had been studied.⁴ In 2001, President Bush identified competitive sourcing as one of the five major components of the *President’s Management Agenda* (PMA).⁵ In an effort “to achieve efficient and effective” public-private competition, the Bush Administration “committed itself to simplifying and improving the procedures for evaluating public

¹ Competitive sourcing is one of the *President’s Management Agenda* (PMA) initiatives. See [<http://www.whitehouse.gov/results/agenda/index.html>].

² U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. D-2 and A-2, available at [http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf].

³ Revisions were published in 1967, 1979, 1983, 1996, 1999, and 2003. The 1999 and 2003 revisions are available at [<http://www.whitehouse.gov/omb/circulars/index.html>].

⁴ U.S. President (Reagan), “Performance of Commercial Activities,” Executive Order 12615, *Federal Register*, vol. 52, no. 225, November 23, 1987, p. 44853.

⁵ See [<http://www.whitehouse.gov/results/agenda/index.html>].

and private sources, to better publicizing the activities subject to competition and to ensuring senior level agency attention to the promotion of competition.”⁶

Legislation

Congressional involvement in the policies and procedures governing competitive sourcing, as measured by legislation that has been enacted, has increased over the years, from the 93rd Congress through the present.⁷

Table 1. Statutes That Include Competitive Sourcing Provisions, 93rd Congress — Present

Congress	Number of Statutes	Scope of Statute(s) ^a
93 rd	0	
94 th	0	
95 th	0	
96 th	0	
97 th	1	Department of Veterans Affairs (VA)
98 th	0	
99 th	0	
100 th	0	
101 st	2	Department of Defense (DOD)
102 nd	3	DOD
103 rd	1	DOD
105 th	1	Government-wide
106 th	2	DOD and government-wide
107 th	0	

⁶ Executive Office of the President, Office of Management and Budget, *The President's Management Agenda, FY2002*, p. 17, available at [<http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>].

⁷ The identification of statutes that include competitive sourcing provisions is made possible by the Legislative Information System (LIS), available at [<https://www.congress.gov>]. LIS includes all Congresses beginning with the 93rd Congress.

Congress	Number of Statutes	Scope of Statute(s) ^a
108 th	9	Government-wide, DOD, Department of the Interior (DOI), Department of Agriculture (USDA), Department of Energy (DOE), Department of Homeland Security (DHS), U.S. Equal Employment Opportunity Commission (EEOC)
109 th	8	DOI, USDA, DHS, Government-wide, DOD
110 th	3	DOE, Department of Labor, USDA, Department of Justice, DOD, DHS, DOI, and Government-wide

Source: Legislative Information System, available at [<http://www.congress.gov>].

Notes:

- a. Within each statute, the applicability of competitive sourcing provisions varies. Some provisions apply to the entire agency; other provisions apply to a specific function, activity, or, for the Department of Defense, military installation.

As **Table 1** shows, three or fewer statutes with competitive sourcing provisions were enacted during each Congress until the 108th and 109th Congresses, when nine and eight statutes were enacted, respectively.

The competitive sourcing provisions of measures enacted during the 97th through 110th Congresses are summarized below, in **Table 2**. Following the table is a discussion of selected topics related to competitive sourcing legislation that has been enacted.

Table 2. Competitive Sourcing Statutes and Provisions

Statute	Scope	Duration	Summary ^a
P.L. 97-66, Section 601 Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments of 1981	Department of Veterans Affairs (VA)	Indefinite	<ul style="list-style-type: none"> — Funds appropriated to the accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses may not be used for conducting public-private competitions unless funds are specifically appropriated for this purpose.
P.L. 101-189, Sections 1131-1134 National Defense Authorization Act, FY1990 and FY1991	Department of Defense (DOD)	Varies	<ul style="list-style-type: none"> — Commanders of military installations have the authority and responsibility to enter into contracts that resulted from A-76 competitions. Commanders are to prepare an inventory of commercial activities; decide which commercial activities will be subjected to A-76 competitions; issue solicitations for commercial activities selected for conversion to contractor performance; and, for activities selected for conversion, assist in finding suitable employment for any DOD employees displaced as a result of the contract. — A DOD commercial or industrial type of function that is included on the procurement list of goods and services produced and provided pursuant to the Javits-Wagner-O'Day (JWOD) Act is exempt from A-76 competition. — Commercial activities performed by government personnel at Ft. Benjamin Harrison, IN, may not be converted to private sector performance under Circular

Statute	Scope	Duration	Summary ^a
			<p>A-76 until the Secretary of the Army completes a commercial activities study for the installation.</p> <p>— Commercial activities performed by government personnel at the Niagara Falls Air Force Reserve Base, NY, may not be converted to private sector performance under Circular A-76 until the Comptroller General evaluates the most recently completed commercial activities study for the base and submits a report to the Secretary of the Air Force; and the Secretary, in turn, submits a report to the Committees on Armed Services.</p>
<p>P.L. 101-511, Title II (Navy and Marine Corps), Sections 8072, 8087, and 8129</p> <p>Department of Defense Appropriations Act, FY1991</p>	<p>DOD</p>	<p>FY1991</p>	<p>— Funds from the appropriation for the alteration, overhaul, and repair of naval vessels and aircraft shall be available to acquire these functions by competition among public and private shipyards, naval aviation depots, and private companies.</p> <p>— None of the funds appropriated for the operation and maintenance of the Marine Corps may be used for converting facilities maintenance, utilities, and motor transport functions at Cherry Point Marine Corps Air Station, NC, to performance by a private contractor under Circular A-76 until the U.S. General Accounting Office^b (GAO) completes its audit and validates the decision.</p> <p>— The Secretary of Defense may acquire the modification, depot maintenance, and repair of aircraft, vehicles, and</p>

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Statute	Scope	Duration	Summary ^a
			<p>vessels through competition between DOD depot maintenance activities and private firms. Circular A — 76 shall not apply to these competitions.</p> <ul style="list-style-type: none"> — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 48 months (multifunction study). — None of the funds available during FY1991 to DOD, any of its components, or any other federal department, agency, or entity may be used to complete an A-76 competition for firefighting or security guard functions at Indian Springs Air Force Auxiliary Field, NV.
<p>P.L. 102-172, Title II, Sections 8069 and 8120</p> <p>Department of Defense Appropriations Act, FY1992</p>	<p>DOD</p>	<p>FY1992</p>	<ul style="list-style-type: none"> — Funds from the appropriation for the alteration, overhaul, and repair of naval vessels and aircraft shall be available to acquire these functions by competition among public and private shipyards, naval aviation depots, and private companies. — None of the funds appropriated for the operation and maintenance of the Marine Corps may be used for converting facilities maintenance, utilities, and motor transport functions at Cherry Point Marine Corps Air Station, NC, to performance by a private contractor under Circular A-76 until GAO completes its audit and validates the decision. — None of the funds appropriated by this act may be used

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Statute	Scope	Duration	Summary ^a
			<p>for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 48 months (multifunction study).</p> <p>— The Secretary of Defense may acquire the modification, depot maintenance, and repair of aircraft, vehicles, and vessels through competition between DOD depot maintenance activities and private firms. Circular A-76 shall not apply to these competitions.</p>
<p>P.L. 102-396, Title II (Marine Corps), Sections 9065 and 9095</p> <p>Department of Defense Appropriations Act, FY1993</p>	<p>DOD</p>	<p>FY1993</p>	<p>— None of the funds appropriated for the operation and maintenance of the Marine Corps may be used for converting facilities maintenance, utilities, and motor transport functions at Cherry Point Marine Corps Air Station, NC, to performance by a private contractor under Circular A-76 until GAO completes its audit and validates the decision.</p> <p>— None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 48 months (multifunction study).</p> <p>— The Secretary of Defense may acquire the modification, depot maintenance, and repair of aircraft, vehicles, and vessels through competition between DOD depot maintenance activities and private firms. Circular A-76 shall not apply to these competitions.</p>

Statute	Scope	Duration	Summary ^a
P.L. 102-484, Section 312 National Defense Authorization Act, FY1993	DOD	FY1993	<ul style="list-style-type: none"> — The Secretary of Defense is prohibited from entering into any contract that is the result of a public-private competition under Circular A-76. — This prohibition does not apply to any contracts for work performed at a location outside the United States where U.S. military personnel would have to perform the commercial activity at the expense of unit readiness, or any contracts (including renewals) for a commercial activity under contract as of Sept. 30, 1992.
P.L. 103-160, Section 313 National Defense Authorization Act, FY1994	DOD	November 30, 1993 through April 1, 1994	<ul style="list-style-type: none"> — The Secretary of Defense is prohibited from entering into any contract that is the result of a public-private competition under Circular A-76. — This prohibition does not apply to any contracts for work performed at a location outside the United States where U.S. military personnel would have to perform the commercial activity at the expense of unit readiness, or any contracts (including renewals) for a commercial activity under contract as of Sept. 30, 1992.
P.L. 105-270 Federal Activities Inventory Reform (FAIR) Act	Government-wide, excluding GAO, government corporations, nonappropriated funds instrumentalities, and certain DOD depot-level maintenance and repair	Indefinite	<ul style="list-style-type: none"> — Agencies are required to submit inventories of commercial activities to OMB by June 30. — Inventories are sent to Congress and made available to the public. — Interested parties may appeal the omission of an activity from, or the inclusion of an activity on, an agency's list.^c — An inherently governmental activity is a function that is

Statute	Scope	Duration	Summary ^a
	functions		so intimately related to the public interest as to require performance by federal government employees.
<p>P.L. 106-79, Sections 8026, 8037, 8108, and 8109</p> <p>Department of Defense Appropriations Act, FY2000</p>	DOD	FY2000	<ul style="list-style-type: none"> — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 48 months (multifunction study). — Circular A-76 can not be used for competitions between DOD depot maintenance activities and private firms for certain functions, including depot maintenance and repair of aircraft, vehicles, and vessels. — The total amount appropriated in Title II of this act is reduced by \$100,000,000 to reflect savings that resulted from reviews of DOD missions and functions conducted pursuant to Circular A-76. — The Secretary of Defense is required to submit a report within 90 days of enactment of the act that provides specified information about DOD public-private competitions that had been conducted since 1995. The report also is to include information about any A-76 competitions held for work that had been converted from contractor performance to government performance, and recommendations for maximizing the possibility of effective competitions for work that had been contracted out previously. — The Comptroller General is required to submit to the

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Statute	Scope	Duration	Summary ^a
			House and Senate Appropriations Committees his or her views on whether DOD has complied with the reporting requirements.
P.L. 106-398, Section 832 Floyd D. Spence National Defense Authorization Act, FY2001	Government-wide	Report due by May 1, 2002	<ul style="list-style-type: none"> — GAO is directed to convene a panel of experts to study the policies and procedures governing the transfer of commercial activities to contractors, including how to determine what functions should continue to be performed by federal employees, how costs of public and private performance should be compared, and how DOD has implemented the FAIR Act and Circular A-76.^d — Commercial Activities Panel (CAP) is required to study A-76 procedures, implementation by DOD of the FAIR Act, and DOD procedures for public-private competitions.
P.L. 108-7, Section 647 Consolidated Appropriations Resolution, FY2003	Government-wide	FY2003	<ul style="list-style-type: none"> — None of the funds appropriated by the Treasury and General Government Appropriations Act, FY2003, may be used to establish, apply, or enforce any numerical goal, target, or quota for public-private competitions unless the goal, target, or quota is based on considered research and sound analysis.
P.L. 108-87, Sections 8014 and 8022	DOD	FY2004	<ul style="list-style-type: none"> — None of the funds appropriated by this act may be used to convert a function that had more than 10 DOD civilian employees from government performance to contract

Statute	Scope	Duration	Summary ^a
Department of Defense Appropriations Act, FY2004			<p>performance unless a most efficient organization (MEO) is developed and the conversion differential is applied.^e</p> <ul style="list-style-type: none"> — This section does not apply to Javits-Wagner-O’Day (JWOD) Act suppliers, Indian tribes, Native Hawaiian organizations, and depot contracts or contracts for depot maintenance.^f — Any conversions to contractor performance under this section count toward any competitive sourcing goal or target. — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study).
P.L. 108-108, Section 340 Department of the Interior and Related Agencies Appropriations Act, FY2004	Department of the Interior, Forest Service (Department of Agriculture (USDA)), and Department of Energy (DOE) programs and activities for which funds are appropriated by this statute	Varies	<ul style="list-style-type: none"> — Beginning with FY2005, the Departments of the Interior and Energy and the Forest Service are to identify separately in their budget requests funds needed to perform competitive sourcing studies. — Beginning in 2003, the Secretaries of Agriculture (Forest Service), Energy, and the Interior are to submit reports on their competitive sourcing studies to the Committees on Appropriations no later than December 31 each year. — For FY2004, each Secretary named above is to submit a report that identifies planned competitive sourcing studies. — In FY2004, the Department of Energy and the Department

Statute	Scope	Duration	Summary ^a
			<p>of the Interior may spend only \$500,000 and \$2.5 million, respectively, on competitive sourcing activities unless a reprogramming proposal is processed. No more than \$5 million of the funds appropriated by this act may be used in FY2004 for Forest Service competitive sourcing studies.</p> <p>— None of the funds appropriated by this act may be used to convert a function with more than 10 federal employees from government performance to contract performance unless an MEO is developed and the conversion differential is applied. Exceptions include JWOD suppliers, Indian tribes, and Native Hawaiian organizations. Any conversions to contractor performance that occurs under this section is to be counted toward any competitive sourcing goal or target.</p>
<p>P.L. 108-136, Sections 334-337 and 906</p> <p>National Defense Authorization Act, FY2004</p>	<p>DOD</p>	<p>Varies</p>	<p>— Any deadline or other schedule-related milestone for the completion of a DOD public-private competition shall be established solely on the basis of considered research and sound analysis regarding the availability of sufficient personnel, training, and technical resources for conducting a competition in a timely manner. The DOD official responsible for the managing the department's competitions shall extend any deadline or schedule if insufficient resources are available for timely completion of the competition.</p> <p>— The Secretary of Defense is required to submit a report to</p>

Statute	Scope	Duration	Summary ^a
			<p>Congress on the effect of the May 29, 2003, revisions on DOD competitions and employees. No A-76 competition may be conducted until 45 days after the Secretary submits his report to Congress.</p> <ul style="list-style-type: none"> — The Secretary of Defense is authorized to conduct a pilot program whereby the best-value source selection method may be used for A-76 competitions involving information technology services. The pilot program expiration date is Sept. 30, 2008. GAO is to review the pilot program and submit a report to Congress. — The Secretary of Defense is authorized to establish a pilot program under which high-performing organizations (HPO) may be created or continued at selected military installations and facilities through the department's Business Process Reengineering initiative. The Secretary may not require any organization to conduct an A-76 competition or other public-private competition involving any function of the organization covered by the reengineering initiative. — Regarding the transfer of personnel security investigation functions from DOD to the Office of Personnel Management (OPM), any function performed by DOD employees as of the date of enactment of this act may not be converted to contractor performance until the Director of OPM reviews the function, determines that the function is not inherently governmental, and

Statute	Scope	Duration	Summary ^a
<p>P.L. 108-199, Divisions A and F</p> <p>Consolidated Appropriations Act, FY2004</p>	<p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Transportation and Treasury, and Independent Agencies (Division F)</p>	<p>Varies</p>	<p>conducts an A-76 competition.</p> <ul style="list-style-type: none"> — None of the funds in this act may be obligated for FAIR Act or Circular A-76 activities until the Secretary of Agriculture submits a report to the Committees on Appropriations that describes the department’s contracting-out policies, including agency budgets for contracting out. — Unless USDA receives specific authorization in subsequent legislation, the department may not use the funds made available in this statute to study a competitive sourcing activity relating to rural development or farm loan programs. — None of the funds appropriated by this statute may be used to convert a function with more than 10 federal employees from government performance to contractor performance unless an MEO is accomplished and the conversion differential is applied. — Annually, the head of each executive agency is to submit to Congress a report on competitive sourcing activities in his or her agency. — Agency heads are not required to limit the performance period in a letter of obligation issued to an MEO to five years or less.^h — Agency heads may use appropriated funds, and any other funds made available to their agencies, for monitoring the performance of an activity that has been subjected to

Statute	Scope	Duration	Summary ^a
			<p>a public-private competition.</p> <ul style="list-style-type: none"> — Any work converted to contractor performance cannot be moved to a location outside the United States if the work has been previously performed by federal government employees within the United States.
<p>P.L. 108-287, Sections 8014 and 8022</p> <p>Department of Defense Appropriations Act, FY2005</p>	<p>DOD</p>	<p>FY2005</p>	<ul style="list-style-type: none"> — None of the funds appropriated by this act may be used to convert a function that has more than 10 civilian employees from government performance to contract performance unless an MEO is developed, the conversion differential is applied, and the contractor does not receive an advantage for his or her proposal by not making a health insurance plan available to employees who are to be employed in the function or study, or by offering a health insurance plan that costs the contractor less than the amount paid by DOD. — This section does not apply to JWOD suppliers, Indian tribes, Native Hawaiian organizations, or depot contracts or contracts for depot maintenance. — Any conversions to contractor performance occurring under this section are to count toward any competitive sourcing goal or target. — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study).

Statute	Scope	Duration	Summary ^a
<p>P.L. 108-334, Section 527</p> <p>Department of Homeland Security Appropriations Act, FY2005</p>	<p>Department of Homeland Security (DHS)</p>	<p>FY2005</p>	<p>— None of the funds appropriated by this statute may be used to approve or conduct a public-private competition involving employees of U.S. Citizenship and Immigration Services (USCIS) who are known as immigration information officers, contact representatives, or investigative assistants.</p>
<p>P.L. 108-375, Sections 326-328</p> <p>Ronald W. Reagan National Defense Authorization Act, FY2005</p>	<p>Government-wide (Section 326); DOD (Sections 327 and 328)</p>	<p>Varies</p>	<p>— Amends 31 U.S.C. §§ 3551(2), 3552, and 3553, which means, in effect, that an agency tender official (ATO) may file a protest in connection with a public-private competition.^h The determination to file, or not file, a protest is not subject to administrative or judicial review. An agency tender official is to notify Congress when he or she determines there is no reasonable basis for a protest.</p> <p>— For any competition that is required to include a formal comparison of the cost of federal employee performance with the cost of contractor performance, the function is to remain in-house unless the competitive sourcing official (CSO) determines that contractor performance would be less costly by an amount that equals or exceeds the lesser of the following: 10% of the MEO's personnel-related costs or \$10 million.ⁱ</p> <p>— The Secretary of Defense is to ensure that no DOD organization, function, or activity is altered in any way for the purpose of exempting the department from the requirement to formally compare the cost of federal</p>

Statute	Scope	Duration	Summary ^a
			<p>government performance with the cost of contractor performance. This provision does not apply to any competitions conducted as part of a pilot program authorized by Section 336 of P.L. 108-136 (National Defense Authorization Act for Fiscal Year 2004).</p> <p>— The DOD Inspector General (IG) is required to submit a report no later than February 1, 2005, to Congress that addresses the questions of whether DOD has a sufficient number of adequately trained civilian employees to conduct public-private competitions and to administer any resulting contracts, and whether the department has implemented a comprehensive, reliable system to track and assess the cost and quality of work done by service contractors.</p>
<p>P.L. 108-447, Divisions A, B, and E</p> <p>Consolidated Appropriations Act, FY2005</p>	<p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (Division A); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies (Division B); Department of the Interior and Related Agencies (Division E)</p>	<p>FY2005</p>	<p>— None of the funds in this act may be obligated for the FAIR Act or Circular A-76 activities until the Secretary of Agriculture has submitted a report to the Committees on Appropriations and the House Committee on Government Reform that describes the department’s contracting out policies, including agency budgets for contracting out.</p> <p>— Unless the Department of Agriculture receives specific authorization in subsequent legislation, the department cannot use the funds made available in this statute to study a competitive sourcing activity relating to rural development or farm loan programs.</p>

Statute	Scope	Duration	Summary ^a
			<ul style="list-style-type: none"> — The EEOC cannot implement any workforce repositioning, restructuring, or reorganization until the Committees on Appropriations have been notified of such proposals. — None of the funds provided under this act or under previous appropriations acts for these agencies is to be used, through a reprogramming of funds, for contracting out or privatizing any functions or activities presently performed by federal employees, unless the Appropriations Committees are notified 15 days in advance of such reprogramming of funds. — In FY2005, the Department of Energy and the Department of the Interior may spend only \$500,000 and \$3.25 million, respectively, to continue or initiate competitive sourcing studies until a reprogramming proposal has been processed. No more than \$2 million of the funds appropriated by this act may be used in FY2005 for Forest Service competitive sourcing studies and related activities. — Section 340(b) of P.L. 108-108 is repealed. — For any competitions conducted by the Forest Service prior to FY2005 that meet the criteria outlined in Section 332(d), the Forest Service is exempt from implementing a letter of obligation and post-competition accountability guidelines.^j — Agencies funded by this act are to include, in any

Statute	Scope	Duration	Summary ^a
			<p>competitive sourcing reports submitted to the Committees on Appropriations, incremental costs directly attributable to conducting competitions.</p>
<p>P.L. 109-54, Section 422 Department of the Interior, Environment, and Related Agencies Appropriations Act, FY2006</p>	<p>Department of the Interior and the Forest Service (USDA)</p>	<p>FY2006</p>	<ul style="list-style-type: none"> — In FY2006, the Department of the Interior can spend only \$3.45 million from this act or any other act on competitive sourcing activities, unless a reprogramming proposal is processed. No more than \$3 million of the funds appropriated by this act can be used by the Forest Service in FY2006 for competitive sourcing activities. — For any public-private competition conducted by the Forest Service that involves 65 or fewer full-time equivalents (FTEs), that is decided in favor of the agency provider, that does not yield a net savings, and that was completed prior to the date of this act, the Forest Service is exempted from implementing the letter of obligation and post-competition accountability guidelines. — Agencies funded by this act shall, in preparing any reports to be submitted to the Committees on Appropriations, include all costs directly attributable to conducting public-private competitions, including costs attributable to paying outside consultants and contractors. — For any competitions involving Forest Service employees, the Secretary of Agriculture is to determine whether any of the employees concerned are also qualified to participate in wildland fire management activities and to

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Statute	Scope	Duration	Summary ^a
			consider the effect that outsourcing would have on the Forest Service’s ability to fight and manage wildfires.
<p>P.L. 109-90, Section 520</p> <p>Department of Homeland Security Appropriations Act, FY2006</p>	DHS	FY2006	<p>— None of the funds appropriated by this act may be used to process or approve a public-private competition for services provided as of June 1, 2004, by employees of Citizenship and Immigration Services who are known as immigration information officers, contact representatives, or investigative assistants.</p>
<p>P.L. 109-97, Title I (specifically, “Office of the Chief Financial Officer”) and Section 786</p> <p>Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, FY2006</p>	USDA	FY2006	<p>— None of the funds provided by this act may be obligated for the FAIR Act or Circular A-76 activities until the Secretary has submitted a report to the Committees on Appropriations and the House Committee on Government Reform that describes the department’s contracting out policies, including agency budgets for contracting out.¹</p> <p>— Unless the department receives specific authorization in subsequent legislation, the department cannot use the funds made available in this statute to conduct a competition of an agency activity relating to rural development or farm loan programs.</p>
<p>P.L. 109 -115, Sections 840 and 842</p> <p>Transportation, Treasury,</p>	Government-wide	Varies	<p>— The FAIR Act does not apply to executive agencies with fewer than 100 full-time employees. However, if such an agency plans to conduct a public-private competition, it is subject to Section 2 of the FAIR Act.</p>

Statute	Scope	Duration	Summary ^a
<p>Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, FY2006</p>			<ul style="list-style-type: none"> — None of the funds in this act or any other act can be used to convert a function with more than 10 federal employees from government performance to contractor performance unless an MEO is accomplished and the conversion differential is applied. This provision does not apply to, for example, DOD, commercial or industrial type functions that can be provided by JWOD organizations, and depot contracts. — Nothing in Circular A-76 shall prevent an agency head from conducting public-private competitions to evaluate the benefits of converting work performed by contractors to the federal government. Circular A-76 is to provide procedures and policies for these types of competitions that are similar to the procedures and policies applied to competitions where the government is the incumbent.
<p>P.L. 109-148, Sections 8014 and 8021 Department of Defense Appropriations Act, FY2006</p>	<p>DOD</p>	<p>FY2006</p>	<ul style="list-style-type: none"> — None of the funds provided by this act can be used to convert a DOD function that has more than 10 civilian employees from government performance to contract performance unless an MEO is developed, the conversion differential is applied, and the contractor does not receive an advantage by not making a health insurance plan available to employees who are to be employed in the function, or by offering a health insurance plan that costs the contractor less than the amount paid by DOD for the affected civilian

Statute	Scope	Duration	Summary ^a
			<p>employees.</p> <ul style="list-style-type: none"> — This section does not apply to JWOD suppliers, Indian tribes, Native Hawaiian organizations, depot contracts, or contracts for depot maintenance. — Any conversions to contractor performance occurring under this section are to count toward any competitive sourcing goal or target. — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study).
<p>P.L. 109-163, Sections 341-344 and 672^m</p> <p>National Defense Authorization Act, FY2006</p>	<p>DOD</p>	<p>Indefinite</p>	<ul style="list-style-type: none"> —Public-private competitions that involve 10 or more DOD civilians cannot be converted to contractor performance unless the public-private competition includes a formal comparison of the cost of government performance and the cost of contractor performance, an agency tender (including an MEO), a solicitation, a determination of whether submitted offers meet DOD’s needs with respect to non-cost factors, the application of the conversion differential, estimated costs of government performance and contractor performance, an estimate of all costs and expenditures the government would incur if the work was converted to contractor performance, and an examination of the effect contractor performance would have on the military mission associated with the

Statute	Scope	Duration	Summary ^a
			<p>function to be competed.</p> <ul style="list-style-type: none"> — A DOD function that is, for example, reengineered or reorganized, but still provides essentially the same services is not to be considered a new requirement.ⁿ — A DOD function cannot be changed in any way for the purpose of exempting the function from the requirements of Section 341, and a function cannot be converted to contractor performance to circumvent a civilian personnel ceiling. — The Secretary is no longer permitted to delegate report preparation pursuant to 10 U.S.C. § 2461(b)(1). — The Secretary is required to submit a report for each public-private competition conducted by DOD to Congress. A decision made on the basis of a public-private competition cannot be implemented until after the report has been submitted to Congress. — The Secretary is required to submit an annual report to Congress by June 30 each year with information about, for example, the cost of conducting competitions and the actual savings. — The Secretary is required to monitor the performance of functions that have been the subject of public-private competitions. — 10 U.S.C. 2461(a)(1)(E), as amended by P.L. 109-163, does not apply to the pilot program for best-value source selection for information technology services.

Statute	Scope	Duration	Summary ^a
			<ul style="list-style-type: none"> — 10 U.S.C. § 2463 is repealed.^o — Section 327 of P.L. 108-37 is repealed.^p — The description of how a contractor may help fund health care for employees has been broadened to include payments that could be used in lieu of a health care plan, a health savings account, and a medical savings account. An inadequate contractor-provided health plan is one that does not comply with any federal law that governs the provision of health care benefits by government contractors. — The Secretary is required to prescribe guidelines and procedures for ensuring that consideration is given to federal employees for work that is currently performed or would otherwise be performed under DOD contracts. The guidelines and procedures are to provide special consideration to certain contracts, such as contracts that were not awarded on a competitive basis or are associated with the performance of inherently governmental functions. — The expiration date of the Secretary’s authority to award contracts for increased performance of security guard functions at military installations or facilities under the Secretary’s jurisdiction is extended from 2006 to 2007. — The Defense Commissary Agency is exempt from performing any public-private competitions until December 31, 2008.

Statute	Scope	Duration	Summary ^a
<p>P.L. 109-289, Sections 8013, 8019, and 8026</p> <p>Department of Defense Appropriations Act, FY2007</p>	<p>DOD</p>	<p>FY2007</p>	<ul style="list-style-type: none"> — None of the funds provided by this act can be used to convert a DOD function that has more than 10 civilian employees from government performance to contract performance unless an MEO is developed, the conversion differential is applied, and the contractor does not receive an advantage by not making a health insurance plan available to employees who are to be employed in the function, or by offering a health insurance plan that costs the contractor less than the amount paid by DOD for the affected civilian employees. — This section does not apply to JWOD suppliers, Indian tribes, Native Hawaiian organizations, depot contracts, or contracts for depot maintenance. — Any conversions to contractor performance occurring under this section are to count toward any competitive sourcing goal or target. — None of the funds appropriated by this act may be used for a public-private competition carried out under Circular A-76 if the competition exceeds 24 months (single function study) or 36 months (multifunction study). — Circular A-76 shall not apply to competitions between DOD depot maintenance activities and private firms that involve the acquisition of the modification, depot maintenance, and repair of aircraft, vehicles, and

Statute	Scope	Duration	Summary ^a
			vessels, and the production of components and other DOD-related articles.
P.L. 109-295, Section 516 Department of Homeland Security Appropriations Act, FY2007	DHS	FY2007	— None of the funds appropriated by this act may be used to process or approve a public-private competition for services provided as of June 1, 2004, by employees of USCIS who are known as immigration information officers, contact representatives, or investigative assistants.
P.L. 110-28, Sections 6201 and 6602 U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, FY2007	DOE and Department of Labor	Varies	— Employees of the National Energy Technology Laboratory are classified as inherently governmental for the purposes of the FAIR Act. ⁹ — None of the funds made available to the Mine Safety and Health Administration by P.L. 109-289, as amended by P.L. 110-5, can be used to pay for a contract awarded as the result of a public-private competition under Circular A-76.
P.L. 110-161, Divisions A, B, C, D, E, F, and G Consolidated Appropriations Act, 2008	USDA, Department of Justice, DOD, DHS, Department of the Interior, Department of Labor, and Government-wide	Varies	— None of the funds provided by this act may be obligated for the FAIR Act or Circular A-76 activities until the Secretary has submitted a report to the Committees on Appropriations and the House Committee on Government Reform that describes the department's contracting out policies, including agency budgets for contracting out. ¹ — Unless USDA receives specific authorization in subsequent legislation, the department may not use the funds made available in this act to study a competitive sourcing activity relating to rural development or farm

Statute	Scope	Duration	Summary ^a
			<p>loan programs.</p> <ul style="list-style-type: none"> — None of the funds appropriated by this act may be used for any activities related to conducting a public-private competition under Circular A-76, or any successor administrative directive, policy, or regulation, for work performed by employees of the Bureau of Prisons or Federal Prison Industries. — None of the funds appropriated by this act may be used for conducting a Circular A-76 competition or for converting a function from government to private sector performance (without a competition) unless the following condition is met: a representative selected by a majority of the affected employees is treated as an interested party for the purpose of submitting a protest to GAO. — None of the funds in this act, or previous acts, available for energy and water development can be used for any competitive sourcing activities under Circular A-76, or for implementing high-performing organizations for the Army Corps of Engineers. — None of the funds in this act or any other act can be used to convert a function with more than 10 federal employees from government performance to contractor performance unless an MEO is accomplished; a public-private competition is held; the conversion differential is applied; and the contractor does not receive an advantage by not making a health insurance plan available to employees who are to be employed in the function, by offering a health insurance plan that costs

Statute	Scope	Duration	Summary ^a
			<p>the contractor less than the amount paid by the federal government for the affected civilian employees, or by offering to such workers a retirement benefit that costs less than the annual retirement cost factor applicable to federal employees. This provision does not apply to, for example, DOD, commercial or industrial type functions that can be provided by JWOD organizations, and depot contracts.</p> <ul style="list-style-type: none"> — Nothing in Circular A-76 shall prevent an agency head from conducting public-private competitions to evaluate the benefits of converting work performed by contractors to the federal government. Circular A-76 is to provide procedures and policies for these types of competitions that are similar to the procedures and policies applied to competitions where the government is the incumbent. — Amends 31 U.S.C. §3551(2) to include under the definition of “interested party” any official who submits an agency tender in a Circular A-76 competition (regardless of the number of “full-time equivalent employees” in the affected agency work center^{r, s}), and any one person who has been designated by a majority of agency employees in the affected work center as their representative for the purpose of representing them in a protest. — An interested party (as defined in 31 U.S.C. §3551(2), as amended by this statute) is entitled to intervene in a civil action that was initiated by a private sector interested party.

Statute	Scope	Duration	Summary ^a
			<ul style="list-style-type: none"> <li data-bbox="1262 435 1976 727">— 31 U.S.C. §3551(2)(B) and 28 U.S.C. §1491(b) apply to protests and civil actions that challenge final selections of sources of performance that are made pursuant to a Circular A-76 competition begun on or after January 1, 2004, and any other protests and civil actions related to Circular A-76 competitions or decisions to convert performance of an agency function from government employees to a contractor on or after the date of enactment. <li data-bbox="1262 735 1976 995">— None of the funds available in this act may be used by OMB to require an agency to prepare for or conduct a public-private competition or direct conversion under Circular A-76 or any other directive, policy, or regulation. Additionally, none of the funds available in this statute may be used by an agency to take any of the specified actions as a result of direction or requirement by OMB. <li data-bbox="1262 1003 1976 1393">— None of the funds available under this act or any other act may be used to conduct a public-private competition or direct conversion under Circular A-76 or any other directive, regulation, or policy for the human resources lines of business (LOB) initiative until 60 days after OMB submits a report on the use of competitions and direct conversions for the human resources LOB initiative to the Senate and House Appropriations Committees and GAO. The report is to include, for example, an estimate of the annual and recurring savings the initiative is expected to generate. GAO is to review the report and brief the Appropriations

Statute	Scope	Duration	Summary ^a
			<p>Committees within 45 days after receiving the report.</p> <ul style="list-style-type: none"> — None of the funds appropriated by this act may be used to conduct a Circular A-76 competition for services provided as of June 1, 2004, by immigration information officers, contract representatives, or investigative assistants employed by USCIS. — None of the funds appropriated by this act may be used to conduct or implement the results of a Circular A-76 competition for Coast Guard National Vessel Documentation Center functions or activities. — The Department of the Interior cannot spend more than \$3,450,000 of the funds made available by this act or any other act to the department in FY2008 on competitive sourcing studies for programs, projects, and activities for which funds are appropriated by this act. — None of the funds made available by this act or any other act may be used for competitive sourcing studies in FY2008 that involve Forest Service personnel. — The Forest Service is exempted from implementing the letter of obligation and post-competition accountability guidelines for certain competitive sourcing studies conducted prior to FY2006. This exemption applies to competitive sourcing studies that involved 65 or fewer FTEs; resulted in decisions in favor of agency performance; did not achieve any net savings; and were completed prior to the date of this act. — In preparing any reports to the Committees on Appropriations regarding competitive sourcing activities, agencies funded in this act are to include all

Statute	Scope	Duration	Summary ^a
			<p>costs attributable to conducting public-private competitions including, for example, any costs attributable to outside consultants and contractors.</p> <ul style="list-style-type: none"> — The Secretary of the Interior shall, for any competitive sourcing study involving department employees, determine whether any of the employees concerned are also qualified to participate in wildland fire management activities and consider the effect that contracting with a private sector source would have on the ability of the department to fight and manage wildfires effectively and efficiently. — None of the funds available in this act may be used to conduct a public-private competition or a direct conversion until 60 days after GAO provides a report to the Committees on Appropriations on the Department of Labor’s use of competitive sourcing.
<p>P.L. 110-181, Sections 326 and 327</p> <p>National Defense Authorization Act, FY2008</p>	<p>DOD and Government-wide</p>	<p>Indefinite</p>	<ul style="list-style-type: none"> — Amends 10 U.S.C. §2461(a)(1). DOD cannot convert a function that has more than 10 civilian employees from government performance to contract performance unless the contractor does not receive an advantage by not making a health insurance plan (or a health savings account or medical savings account) available to employees who are to be employed in the function, by offering a health insurance plan that costs the contractor less than the amount paid by the federal government for the affected civilian employees, or by offering to such workers a retirement benefit that costs less than the annual retirement cost factor applicable to federal employees.

Statute	Scope	Duration	Summary ^a
			<ul style="list-style-type: none"> — Each officer or employee of DOD who is responsible for determining under Circular A-76 whether to convert a DOD function to contractor performance shall consult at least monthly with the civilian employees who will be affected by the determination and consider their views on the performance work statement and management efficiency study. Under certain circumstances, consultation with representatives of the appropriate labor organization, or other representative(s) of the employees, shall satisfy this requirement. — Amends 10 U.S.C. §2461(a). A military department or a defense agency may not be required to conduct a public-private competition at the end of the performance period specified in a letter of obligation or other agreement. — Amends Title 10 of the <i>U.S. Code</i> by adding a new section (Section 2463). The Under Secretary of Defense for Personnel and Readiness is required to issue guidelines and procedures designed to ensure that consideration is given, on a regular basis, to using DOD civilian employees to perform new functions and work that is being performed by contractors. Special consideration is to be given to certain functions and activities. Under certain circumstances, conducting a public-private competition is conditional. For example, a public-private competition cannot be conducted for a new function until performance of the function has been assigned to DOD civilian employees. The Secretary of Defense is to implement the guidelines and procedures within 60 days of the date of enactment of this statute.

Statute	Scope	Duration	Summary ^a
			<p>DOD’s inspector general shall report on the implementation of this section within 180 days after the date of enactment.</p> <ul style="list-style-type: none"> — OMB may not direct or require the Secretary of Defense or the Secretary of a military department to prepare for, undertake, continue, or complete a public-private competition or direct conversion of a DOD function. — The Secretary of Defense and the Secretaries of the military departments may not prepare for, undertake, continue, or complete a public-private competition or direct conversion of a DOD function by reason of any direction or requirement provided by OMB. DOD’S IG shall conduct a review that addresses the department’s compliance with this restriction, and shall report to the congressional defense committees on this matter. — Amends 31 U.S.C. §3551(2) to include under the definition of “interested party” any official who submits an agency tender in a Circular A-76 competition, and any one person who has been designated by a majority of agency employees in the affected work center as their representative for the purpose of representing them in a protest.^{r, s} — An interested party (as defined in 31 U.S.C. §3551(2), as amended by this statute) is entitled to intervene in a civil action that was initiated by a private sector interested party. — 31 U.S.C. §3551(2)(B) and 28 U.S.C. §1491(b) apply to protests and civil actions that challenge final selections of sources of performance that are made pursuant to a

Statute	Scope	Duration	Summary ^a
			<p>Circular A-76 competition begun on or after January 1, 2004, and any other protests and civil actions related to Circular A-76 competitions or decisions to convert performance of an agency function from government employees to a contractor on or after the date of enactment.</p> <p>— Amends 41 U.S.C. §403 et seq. by adding a new section (Section 43). A public-private competition involving 10 or more civilian employees may not be converted to contractor performance unless the public-private competition includes the following: a formal comparison of the cost of performance by agency employees with the cost of performance by a contractor; an agency tender (including an MEO); a solicitation; a determination that submitted offers meet the agency’s needs with regard to non-cost factors; an examination of the cost of performance by agency employees and the cost of performance by one or more contractors to show whether conversion to contractor performance will result in savings to the government over the life of the contract; and an examination of the effect of contractor performance of the function on the agency mission. Additionally, continued performance of the function by agency personnel is required unless it has been determined that contractor performance would be less costly by an amount that equals or exceeds the lesser of the following: 10% of the MEO’s personnel-related costs or \$10 million. An agency function that has been, for example, reengineered or reorganized, but still</p>

Statute	Scope	Duration	Summary ^a
			<p>provides essentially the same service shall not be considered a new requirement. A function being performed by executive agency personnel cannot be altered for the purpose of exempting the conversion of the function from the requirements of this section. Each civilian employee of an agency who is responsible for determining under Circular A-76 whether to convert an agency function to contractor performance shall consult at least monthly with the civilian employees who will be affected by the determination and consider their views on the performance work statement and management efficiency study. Under certain circumstances, consultation with representatives of the appropriate labor organization, or other representative(s) of the employees, shall satisfy this requirement. Before an agency begins a public-private competition, the agency head shall submit a report to Congress containing, for example, the number of civilian employees who might be affected by the competition and an examination of the potential economic effect of contractor performance of the function on agency civilian employees who would be affected by a conversion to contractor performance. The report must include a certification that proposed performance of the function by a contractor is not a result of an agency official's decision to impose predetermined constraints or limitations on agency employees. A representative individual or entity at a facility where a public-private competition is conducted may submit an objection to the agency head on the</p>

Statute	Scope	Duration	Summary ^a
			<p>grounds that the report to Congress has not been submitted or the certification was not included in the report. If the agency head determines that the report was not submitted or did not include the certification, a contract may not be awarded until a (complete) report is submitted. This section does not apply to an agency's commercial or industrial type of function that is included on a list established pursuant to JWOD, or during war or a national emergency declared by the President or Congress.</p> <p>— A public-private competition cannot be conducted pursuant to 10 U.S.C. §2461 for a DOD function at a military medical facility until the Secretary of Defense submits a certification and a report to the Armed Services Committees. The Secretary of Defense is to certify that he or she has taken steps to ensure that the quality of medical care and the availability of qualified personnel to carry out DOD functions related to military medical care will not be adversely affected by the process of considering the function for possible conversion to contractor performance or the conversion of such a function to contractor performance. Within 180 days after the date of enactment of this act, the Secretary of Defense shall submit a report to the Committees on Armed Services regarding public-private competitions for DOD functions that are in progress at military medical facilities. The report shall include for each competition, for example, the cost of conducting the competition, the estimated savings, and the savings actually achieved.</p>

Notes:

In an omnibus appropriations statute, a reference to “this act” generally refers to a specific division in the statute. For example, at the end of Division E in P.L. 110-161, Consolidated Appropriations Act FY2008, it is noted that the division may be cited as the “Department of Homeland Security Appropriations Act, 2008.” (Division E of P.L. 110-161; 121 Stat. 1844, at 2097.)

- a. In the earlier years of Circular A-76, several different terms, such as “cost comparison study,” were used to refer to a competition between an agency and private companies. For the sake of consistency, the terms currently used, such as “public-private competition,” or simply “competition,” are used throughout the table.
- b. In 2004, the General Accounting Office was renamed the Government Accountability Office.
- c. For the purposes of filing a challenge or appeal under the FAIR Act, an interested party is, in brief, a private sector source, a representative of a business or professional association, an officer or employee of an organization within an executive agency, or the head of a labor organization. See Sec. 3(b) of P.L. 105-270 for the specific criteria that qualify an individual or an organization as an “interested party.”
- d. Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002).
- e. The most efficient organization (MEO) is the staffing plan of the agency tender, which is the government’s response to a solicitation. It is the entity that would perform the work if the government wins the competition. The conversion differential, \$10 million or 10% of the government’s personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent’s proposal.
- f. The Javits-Wagner-O’Day Act (JWOD; 41 U.S.C. § 47) directed that, when government agencies purchase goods, priority is to be accorded to qualified nonprofit agencies for the blind and qualified nonprofit agencies for other severely handicapped individuals.
- g. A letter of obligation is “a formal agreement that an agency implements when a ... competition results in agency performance (e.g., MEO).” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, p. D-6.)
- h. An agency tender official (ATO) is “an inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection.” (Ibid., p. D-2.)
- i. A competitive sourcing official (CSO) is “an inherently governmental agency official responsible for the implementation” of Circular A-76 within his or her agency. (Ibid., p. D-3.)
- j. Post-competition accountability guidelines may be found in *Circular No. A-76 (Revised)*, pp. B-19-B-20.
- k. A full-time equivalent (FTE) is “[t]he staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776 [hours]) rather than annual available hours that includes non-productive hours (2,080 hours).” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, p. D-5.)
- l. Contracting out is one of several possible outcomes of a public-private competition. Considering the context in which the term “contracting out” is used here, it is likely that this term actually refers to, or means, competitive sourcing.
- m. Sections 341-344 of P.L. 109-163 amend 10 U.S.C. §§ 2461-2463; and, therefore, it may be necessary to closely examine the statute and the *U.S. Code* in order to fully understand the changes.
- n. A new requirement is an “agency’s newly established need for a commercial product or service that is not” being provided or performed by federal government personnel or a contractor. A public-private competition “is not required” for a new requirement if an agency decides that a contractor should perform the work. However, government personnel cannot perform work associated with a new requirement until and unless a public-private competition has been held. (U.S. Office of Management and Budget, *OMB Circular No. A-76*, pp. 2 and D-7.)

- o. 10 U.S.C. § 2463 had required the Secretary to collect and retain cost information on DOD functions converted to contract performance, and DOD functions converted from contract performance to government performance. Apparently, cost data are or will be collected pursuant to some other provision, because the title of Sec. 341(f), which repealed 10 U.S.C. § 2463, is “Repeal of Redundant Provision.”
- p. Section 327 of P.L. 108-375 had required, under certain conditions, the application of the conversion differential to public-private competitions and had prohibited modifying DOD functions in order to avoid having to formally compare the cost of government performance and the cost of contractor performance of a function. Section 327 was rendered moot by Section 341(a) of P.L. 109-163, which requires, when 10 or more DOD civilian employees are involved, the use of the conversion differential and a formal comparison of the cost of government performance and the cost of contractor performance.
- q. Although this legislative provision states that *employees* shall be classified as inherently governmental, it is actually activities and full-time equivalents that are designated as inherently governmental, or commercial. (Italics added for emphasis.)
- r. Prior to the passage of P.L. 110-161, the relevant portion of the definition of “interested party” was as follows: an interested party “includes the official responsible for submitting the Federal agency tender [also known as the agency tender official] in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency.” (31 U.S.C. §3551(2).) The correct term is “full-time equivalent” (FTE). It is unclear why the word “employees” was inserted, or whether the inclusion of this word would alter the meaning of “full-time equivalent” in this case. A full-time equivalent is the “staffing of [a] Federal civilian employee [position], expressed in terms of annual productive work hours (1,776) rather than annual available hours that includes non-productive hours (2,080 hours).” (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, available at [<http://www.truckload.org/pressroom/2005/ISAC%20050919.pdf>], p. D-5.)
- s. As discussed in the preceding note, prior to the passage of P.L. 110-161, an agency official who submitted a tender was an interested party, but only for a competition that involved an agency function or activity that had more than 65 FTEs. The inclusion of the FTE criterion is consistent with Circular A-76: the circular permits protests for standard competitions, and a standard competition must be used for competitions involving more than 65 FTEs. (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, pp. B-1 and B-20.) Under Circular A-76, protests are not permitted for streamlined competitions, which an agency may use for a competition involving 65 or fewer FTEs. (Ibid., p. B-20.) The effect of Sec. 739(c)(1) of P.L. 110-161, which permits an agency tender official for a streamlined competition to be considered an interested party for the purpose of filing a protest, is unclear. One possible interpretation is that, by amending 31 U.S.C. §3551(2), Sec. 739(c)(1) will enable an agency tender official to file a protest in a streamlined competition.

Selected Topics Related to Competitive Sourcing Legislation⁸

Commercial Activities Inventory

The requirement for federal agencies to compile inventories of their commercial activities, or functions, dates to the original Circular A-76 in 1966. Passage of the FAIR Act in 1998 transformed this requirement into a statutory one and directed agencies to submit their commercial activities inventories to OMB by June 30 each year. The FAIR Act is also notable for including a definition of “inherently governmental,” a term that previously had been defined only in OMB guidance.⁹ The subject of inventories was revisited in 2003, when OMB, in its revision of Circular A-76, included a requirement for agencies to compile and forward to OMB lists of their inherently governmental activities.

Applicable statutes: P.L. 105-270, P.L. 109-115.

Commercial Activities Panel (CAP)

During the 106th Congress, Senator John Warner proposed an amendment to S. 2549,¹⁰ S.Amdt. 3464, that directed GAO to convene a panel to study the policies and procedures governing the transfer of commercial activities from the federal government to a contractor. Taking note of concerns voiced by federal employee unions and private industry about Circular A-76, Senator Warner concluded that an objective, systematic study of the competitive sourcing process was needed. The 13-member Commercial Activities Panel (CAP), which was chaired by the Comptroller General, issued its report, *Improving the Sourcing Decisions of the Government*, on April 30, 2002. The panel recommended that the government adopt a series of 10 sourcing principles, make limited changes to Circular A-76, develop and demonstrate an integrated competition process that would draw from both the *Federal Acquisition Regulation* (FAR) and Circular A-76, and promote the development of high-

⁸ For additional information on competitive sourcing, see CRS Report RL32017, *Office of Management and Budget Circular A-76: Selected Issues*; CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*; CRS Report RL31024 *The Federal Activities Inventory Reform Act and Circular A-76*, by L. Elaine Halchin; and CRS Report RS21489, *OMB Circular A-76: Explanation and Discussion of the Recently Revised Federal Outsourcing Policy*, by John R. Luckey.

⁹ Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated September 23, 1992, available at [http://www.whitehouse.gov/omb/procurement/policy_letters/92-1_092392.html].

¹⁰ S. 2549 was a defense authorization bill. It was incorporated as an amendment to H.R. 4205, which was enacted as the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (P.L. 106-398, 114 Stat. 1654A-1, at 1654A).

performing organizations (HPOs).¹¹ The panel's work may have served as an impetus to OMB, which issued a revised Circular A-76 on May 29, 2003.¹²

Applicable statute: P.L. 106-398.

Competitive Sourcing Targets¹³

When the Bush Administration launched its competitive sourcing initiative in 2001, it established competitive sourcing targets for federal government agencies: subject 5% of the full-time equivalents (FTEs)¹⁴ listed on their commercial activities inventories to public-private competition by the end of FY2002; and compete an additional 10% by the end of FY2003.¹⁵ An OMB memorandum indicated that the long-term goal for the federal government was to subject at least 50% of the FTEs listed on FAIR Act inventories to public-private competition.¹⁶ Criticism of these targets arose in 2002; the primary criticism was that the goals were arbitrary. Senator George V. Voinovich commented, in March 2002, that the targets were "arbitrary and potentially damaging."¹⁷ Eventually, in 2003, OMB dropped the 5% and 10% targets while encouraging agencies, with the promise of earning the highest grade for competitive sourcing on the President's PMA scorecard, to develop a competition schedule that would show that all agency commercial activities from FY2004 through FY2008 were slated for competition.¹⁸

¹¹ Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* (Washington: U.S. General Accounting Office, 2002), pp. 46-53.

¹² The Office of Federal Procurement Policy (OFPP) Administrator, who headed the effort to revise the circular, was a member of the panel.

¹³ See CRS Report RL32079, *Federal Contracting of Commercial Activities: Competitive Sourcing Targets*, by L. Elaine Halchin.

¹⁴ A full-time equivalent (FTE) is "[t]he staffing of Federal civilian employee positions, expressed in terms of annual productive work hours (1,776 [hours]) rather than annual available hours that includes non-productive hours (2,080 hours)." (U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, p. D-5.)

¹⁵ U.S. Office of Management and Budget, "Performance Goals and Management Initiatives for the FY2002 Budget," memorandum M-01-15, March 9, 2001, p. 1, available at [<http://www.whitehouse.gov/omb/memoranda/index.html>]; information provided electronically by the Office of Federal Procurement Policy, Jan. 14, 2003.

¹⁶ U.S. Office of Management and Budget, "Performance Goals and Management Initiatives for the FY2002 Budget," p. 1.

¹⁷ U.S. Congress, Senate Committee on Governmental Affairs, *Who's Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce*, 107th Cong., 2nd sess., Mar. 6, 2002 (Washington: GPO, 2002), pp. 19-20.

¹⁸ U.S. Office of Management and Budget, *Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner*, July 2003, pp. 4-5; Clay Johnson III, Deputy Director for Management, U.S. Office of Management and Budget, "Development of 'Green' Plans for Competitive Sourcing," memorandum to the President's Management Council, Dec. 22, 2003, available at [http://www.whitehouse.gov/omb/procurement/index_comp_sourcing.html].

Applicable statute: P.L. 108-7.

Conversion from Contractor to Government Performance

Although Circular A-76 does not prohibit conducting a public-private competition for a function or activity that is being performed by a contractor, this type of competition apparently is rarely held.¹⁹ The government's competitive sourcing initiative focuses exclusively on inventorying work — both commercial and inherently government — that is being done by federal government employees and, where appropriate, subjecting commercial activities to public-private competition. A recent example where OMB declined an opportunity for federal government employees to participate in a public-private competition for work being performed by a contractor involved the Defense Logistics Agency (DLA).²⁰ According to a 2005 article in *Federal Times*, a private firm won a public-private competition in 2001 for distribution operations at DLA's Defense Distribution Depot at Cherry Point, North Carolina (DDCN).²¹ The contract was allowed to expire because the agency and the contractor had disagreed over pricing and workload. To keep distribution operations functioning, DLA hired temporary civilian employees to work at DDCN. When it was suggested that the temporary employees be permitted to continue working for two years so that their performance could be compared to a contractor's, OMB objected. Reportedly, the then-head of the Office of Federal Procurement Policy (OFPP) responded to this idea by saying:

A second public-private competition so soon after the first would not likely yield significantly different results in terms of public-sector performance.... By contrast, a recompetition among private-sector sources should enable [the Defense Logistics Agency] to enter into a better contract.²²

The head of competitive sourcing for the Department of Homeland Security, who previously had been the focal point at OMB for competitive sourcing, offered the following rationale for focusing on commercial activities:

Managers ought to know enough about their business to have a sense where competition for contracted work and competition for in-house work has the greatest probability of payback to the taxpayer.... It's an economic decision by

¹⁹ Apparently, a function was insourced (that is, converted from contractor performance to government performance) approximately 20 years ago. As reported in *Federal Times*, after the General Services Administration had outsourced building maintenance at the Interior Department's headquarters, agency officials came to believe that the contractor was charging too much for its services. A new public-private competition was held, and GSA employees won the competition. (Tichakorn Hill, "Competitive Sourcing Manager Also 'Insourcing' Advocate," *Federal Times*, Jan. 9, 2006, available at [<http://www.federaltimes.com/index2.php?S=1451960>].)

²⁰ The term "insourcing" refers to converting a function from contractor performance to government performance as a result of a public-private competition.

²¹ Tichakorn Hill, "DLA Employees Barred from Competing for Jobs; OMB: Past Study Already Proved Outsourcing Is the Better Deal," *Federal Times*, June 27, 2005, p. 4.

²² *Ibid.*

competent managers to study that [commercial activities being performed by government employees] which has never been studied before.²³

On the other side of the issue of insourcing, some are concerned that the lack of support for allowing federal government employees to compete for work that was done previously by a government agency is unfair to the employees. Critics also use the infrequency of insourcing to argue that the purpose of competitive sourcing is to outsource government work.

Applicable statutes: P.L. 109-115, P.L. 109-163, P.L. 110-161, P.L. 110-181.

Funding Limits on Agency Competitive Sourcing Activities

Over the years, since the inception of Circular A-76, there does not appear to have been any coordinated, government-wide effort to calculate the costs of competitive sourcing to agencies, and to provide them, in turn, with funding for this initiative.²⁴ Addressing this apparent lack of financial support, the conference committee that was convened for H.R. 2691 (P.L. 108-108) wrote:

The managers support the underlying principle of the Administration's competitive sourcing initiative.... The managers are concerned that this far-reaching initiative appears to be on such a fast track that the Congress and the public are neither able to participate nor understand the costs and implications of the decisions being made. The managers remain concerned that the Administration has failed to budget adequately for the cost of the initiative and to justify such costs in budget documents. As a result, significant sums are being expended in violation of reprogramming guidelines and at the expense of critical, on-the-ground work such as the maintenance of Federal facilities.²⁵

Other efforts to address the funding of competitive sourcing include a statutory prohibition involving the Department of Veterans Affairs (VA) and certain reporting requirements levied on federal agencies. 38 U.S.C. § 8110(a)(5) states that “funds appropriated for the Department [of Veterans Affairs] under the appropriation accounts for medical care, medical and prosthetic research, and medical administration and miscellaneous operating expenses may not be used for” any public-private competition. Among the information agencies are required to report annually to Congress under Section 647(b) of P.L. 108-199 is “the incremental cost directly attributable to conducting [public-private] competitions ... including costs attributable to paying outside consultants and contractors.”

²³ Ibid.

²⁴ Competitive sourcing activities include, but are not limited to, the development and maintenance of inventories of commercial activities and inherently governmental activities; responding to challenges and appeals concerning the inventories; preparing for, and conducting competitions; and carrying out post-competition tasks and activities.

²⁵ U.S. Congress, Conference Committee, 2003, *Making Appropriations for the Department of the Interior and Related Agencies for the Fiscal Year Ending September 30, 2004, and for Other Purposes*, conference report to accompany H.R. 2691, H.Rept. 108-330, 108th Cong., 1st sess. (Washington: GPO, 2003), pp. 85-86.

Applicable statutes: P.L. 97-66, P.L. 108-108, P.L. 108-447, P.L. 109-54, P.L. 110-161.

MEO and Conversion Differential Requirement

Under the 2003 circular, the instructions for standard competitions and streamlined competitions vary concerning, among other things, MEOs and the conversion differential.²⁶ An MEO and the conversion differential are required for standard competitions.²⁷ An MEO is not required for, and the conversion differential is not applied to, streamlined competitions.²⁸

An argument for requiring an MEO is that government employees should have an opportunity to prepare an agency tender that is competitive. In developing an MEO, agency employees may draft a staffing plan that is more efficient and effective than the current plan, incorporates innovative practices or procedures not used by the incumbent function, and/or includes new or different equipment that would enhance the function's productivity or quality of work. If an MEO is not developed, then an agency bases its agency tender on an estimate of the cost of the incumbent activity. As described in Circular A-76, the rationale for having and applying a conversion differential is that it "preclude[s] conversions based on marginal estimated savings, and captures non-quantifiable costs related to a conversion, such as disruption and decreased productivity."²⁹

Applicable statutes: P.L. 108-87, P.L. 108-108, P.L. 108-199, P.L. 108-287, P.L. 108-375, P.L. 109-115, P.L. 109-148, P.L. 109-163, P.L. 109-289, P.L. 110-161, P.L. 110-181.

Protest Rights

Private sector sources, but not federal employees, have been eligible to file protests involving Circular A-76 competitions with GAO.³⁰ By amending 31 U.S.C. §§ 3551(2), 3552, and 3553, P.L. 108-375 has made it possible for an agency tender official (ATO) to file a protest on behalf of agency employees whose work is the

²⁶ A standard competition must be performed for functions that have more than 65 FTEs. An agency may use streamlined competition procedures for functions that have 65 or fewer FTEs.

²⁷ The MEO is the staffing plan of the agency tender, which is the government's response to a solicitation; and it is the entity that would perform the work if the government wins the competition. The conversion differential, \$10 million or 10% of the government's personnel costs for the function under study, whichever is less, is added to the price or cost of the non-incumbent's proposal.

²⁸ U.S. Office of Management and Budget, *Circular No. A-76 (Revised)*, May 29, 2003, pp. B-4, C-2.

²⁹ *Ibid.*, p. B-16.

³⁰ GAO does not have bid protest jurisdiction over the Federal Aviation Administration (FAA), which has its own procurement system. FAA's Office of Dispute Resolution for Acquisition (ODRA) handles bid protests involving the FAA.

subject of a public-private competition. Individual employees and unions are not allowed to file protests.

Applicable statute: P.L. 108-375, P.L. 110-161, P.L. 110-181.

Reporting to Congress

A longstanding problem of competitive sourcing has been the dearth of accurate, reliable, useful, and comprehensive information about agency competitive sourcing activities and outcomes. Information has been made available, or otherwise obtained, on an ad hoc basis. Notable exceptions are DOD's Commercial Activities Management Information System (CAMIS) and the release of FAIR Act inventories and inherently governmental inventories. The statutory requirement for agencies to provide the same competitive sourcing information on a regular basis to Congress might aid in conducting oversight of the competitive sourcing initiative.³¹

Applicable statutes: P.L. 106-79, P.L. 108-108 (relevant section subsequently repealed), P.L. 108-199, P.L. 109-54, P.L. 109-163, P.L. 110-161, P.L. 110-181.

Concluding Observations

For many years — since the original circular was issued in 1966 — the executive branch has led the competitive sourcing effort. Circular A-76 was developed by OMB, and this agency has been actively involved in its implementation, particularly since 2001, when competitive sourcing was identified as one of the components of the *President's Management Agenda*. Increasing interest on the part of Congress in competitive sourcing is demonstrated by the legislation that has been enacted, particularly during the 108th and 109th Congresses. Legislation has touched upon a variety of topics, such as protest rights for federal employees, competitive sourcing targets, and the circular itself. It remains to be seen whether this trend of competitive sourcing legislation continues throughout the current Congress and, if so, what kinds of issues Members elect to address.

³¹ Sec. 647(b) of P.L. 108-199; 118 Stat. 361.