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Updated June 2, 2020

# A-76 Competitions in the Department of Defense

## OMB Circular A-76

Office of Management and Budget (OMB) Circular A-76, "Performance of Commercial Activities," establishes policy for the performance of recurring commercial services by federal agencies, stating that the policy of the "federal government has been to rely on the private sector for needed commercial services," and that those "commercial activities should be subject to the forces of competition."

In the context of federal procurement, *competition* indicates a marketplace condition in which two or more entities, each acting independently, attempt to obtain business by submitting bids or proposals to provide goods or services. Requiring competition may serve to motivate reduced costs and improved performance. In the context of the A-76 process, *competition* also indicates "a formal evaluation of sources to provide commercial services that uses pre-established rules" and procedures.

Circular A-76 categorizes services performed by government employees as either *commercial* or *inherently governmental* in nature. *Commercial* services – such as medical care or maintenance of real property – are those that could be obtained through the private sector, but could also be provided by a government employee (i.e., the public sector). Two definitions of *inherently governmental* services exist in federal law and policy: a statutory and a policy-focused definition. The statutory definition (as enacted through P.L. 105-270, the FAIR Act) describes an inherently governmental activity as one "so intimately related to the public interest as to require performance by Federal Government employees." The policy-focused definition (as established by Circular A-76) describes an inherently governmental activity as one "so intimately related to the public interest as to mandate performance by government personnel." Inherently governmental functions may include activities such as commanding U.S. military forces or determining U.S. foreign policy. Other sources of law or policy that define inherently governmental functions do so either by referencing the FAIR Act or Circular A-76. Most notably, the Federal Acquisition Regulation incorporates by reference the definition of Circular A-76, while the Office of Federal Procurement Policy's Policy Letter 11-01 adopts the FAIR Act's definition.

The general concept underlying Circular A-76 began as a statement of policy – that the federal government "will not start or carry on any commercial activity to provide a service or product for its own use if such service or product can be procured from" the private sector – issued by the Eisenhower Administration-era Bureau of the Budget (later OMB). That 1955 policy provided a framework for the development of Circular A-76, which was first issued in 1966. Circular A-76 has been revised and amended over time, and was last substantially amended in 2003.

## The A-76 Competition Process

Circular A-76 outlines a complex process for conducting managed competitions, sometimes referred to as *A-76 competitions* or *public-private competitions*. Services categorized as inherently governmental in nature are not subject to A-76 competitions. Executive branch agencies, such as the Department of Defense (DOD), may use the Circular's guidance and procedures to determine whether government sources or private-sector sources should perform recurring commercial-type services (i.e., those that are required on a consistent, long-term basis). In carrying out a public-private competition under Circular A-76, executive branch agencies are required to:

- develop a performance work statement that defines the technical aspects of the work to be performed; then
- determine the most efficient organizational structure to perform the work using the current government workforce (called the "Most Efficient Organization," or MEO) through realignment of existing management structures, personnel requirements, and procedures; and finally
- conduct *cost comparison studies* among the private sector, other public agencies, and the current MEO to determine the most cost effective option for work performance.

Circular A-76 provides two forms of public-private competitions: a *streamlined* competition that must be completed within 90 calendar days (extendable by no more than 45 calendar days) and a *standard* competition that must be completed within 12 months (extendable by no more than 6 months). Section 2461 of Title 10, United States Code (U.S.C), also specifies that DOD public-private competitions may not exceed 24 months (or 33 months, upon determination of the Secretary of Defense).

In order to compare public sector and private sector personnel, materiel, and overhead costs on a relatively consistent basis, Circular A-76 provides a number of standard factors to calculate public sector costs. For example, general and administrative overhead rates are calculated at a set rate of 12% of labor costs, with no allowance for inflation. In order to prevent conversion of commercial-type services from the public to the private sector for marginal estimated savings, private sector bids are also subject to an conversion differential calculated as the lesser of 10% of agency labor costs or $10 million.

DOD may not decide in favor of the private sector unless the private sector bid equals or exceeds the lesser of $10

million or 10% of public-sector personnel costs for performance of the commercial-type services in question. Outcomes of individual public-private competitions are thus highly variable and dependent upon unique local factors. Some industry observers object to these predetermined and standardized cost comparison rates, seeing them as unfairly favoring the government in public-private competitions. On the other hand, some federal employees and labor organizations view the comparison rates as incentivizing the private sector to submit artificially low bids in order to win the competition. Some oversight entities, such as the DOD Inspector General and the Government Accountability Office have also questioned the validity of using a set rate to calculate overhead that does not allow adjustment to reflect actual onsite overhead costs.

While some view A-76 competitions as an effective cost-savings mechanism that also increases government efficiency, others believe that the government has overestimated or improperly calculated the substantial savings sometimes attributed to public-private competitions. Critics see the A-76 process as a vector for undue and improper privatization of government functions.

A-76 competitions are sometimes described as *outsourcing* or *privatizing* government commercial-type services if the private sector prevails at the end of the competitive evaluation process—however, the terms are not interchangeable. *Outsourcing* generally refers to a decision by a department or agency to obtain these services under contract with the private sector, in lieu of providing those services using government resources. *Privatization*, on the other hand, generally refers to instances in which a department or agency ceases to provide these services, and transfers their performance to the private sector.

## Moratorium on DOD A-76 Competitions

Following the conclusion of the Cold War and a drawdown in military force structure, DOD embraced the use of A-76 competitions during the 1990s under the Clinton Administration, in part as a cost-savings mechanism in spite of limited commensurate reductions in DOD operations and support costs. The general increase in DOD's use of A-76 competitions accelerated in the early 2000s, encouraged by the focus of the George W. Bush Administration's Presidential Management Agenda on reducing costs and improving federal government performance.

In 2007, the debate over A-76 competitions took on a highly public dimension after the *Washington Post* published a series of articles documenting poor conditions and administrative mismanagement at the Walter Reed Army Medical Center (WRAMC) in Washington, D.C. Some – including some Members of Congress – attributed these issues in part to the impact of an unusually lengthy A-76 competition conducted at WRAMC between 2000 and 2006 that was subject to a number of bid protests and appeals.

Congress responded by including various related provisions in the FY2008 National Defense Authorization Act (NDAA, P.L. 110-181), which in part served to place a temporary moratorium on DOD's use of A-76 competitions, including public-private competitions for medical services. The FY2009 Omnibus Appropriations Act (P.L. 111-8) prohibited government-wide use of appropriated funds to conduct A-76 competitions through the end of the fiscal year; similar restrictions have been included in subsequent appropriations acts. In the FY2010 NDAA (Section 325 of P.L. 111-84), Congress suspended all DOD public-private competitions, and established a review and approval process that, once complete, would allow DOD to resume such competitions. While DOD has complied with the statutory requirements, Congress has not yet acted to repeal or otherwise modify the suspension, meaning that the moratorium effectively remains in place.

## Other Related Statutory Provisions

A number of provisions in Chapter 146 of Title 10, United States Code, may also affect DOD's use of public-private competitions. DOD is required to perform a public-private competition in order to convert functions performed by civilian DOD employees to performance by a contractor (10 U.S.C. §2461). DOD may not conduct a public-private competition for new or expanded DOD functions before assigning such functions to DOD civilian employees (10 U.S.C §2463). DOD generally may not use A-76 competitions to contract for the performance of core logistics capabilities (10 U.S.C. §2464). DOD is prohibited from using appropriated funds to enter into a contract for the performance of firefighting or security guard functions at any military installation or facility (10 U.S.C. §2465). DOD must ensure that not more than 50% of annually appropriated funds for depot-level maintenance and repair is used to obtain contracted support for these functions (10 U.S.C. §2466). DOD may not transfer depot-level maintenance and repair workloads valued not less than $3 million to the private sector except through a competitive evaluation process; Circular A-76 procedures may not be used to conduct these competitions (10 U.S.C. §2469).

## Considerations for Congress

In considering whether to repeal, retain, or modify the FY2010 suspension of DOD public-private competitions, Congress may consider the following oversight issues:

- To what extent should existing law and policy guidance for public-private competitions be modified to reflect best practices and prior lessons learned?
- What benefits might be realized in requiring a phased rollback of the moratorium, or in allowing selected public-private competitions to proceed as pilots?
- Should certain government performed commercial-type functions beyond those already exempted by statute and policy be protected from public-private competitions? If so, which functions?
- Has DOD developed consistent methodologies and procedures for comparing public sector and private sector costs—as well as consistent methodologies for capturing and reporting cost savings or performance improvements from a public-private competition?
- Noting that it has been more than 10 years since DOD has carried out a public-private competition, does the current DOD workforce have sufficient knowledge of the public-private competition process to be able to fairly and effectively evaluate A-76 competitions?

**Heidi M. Peters**, Analyst in U.S. Defense Acquisition Policy

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