

CHAPTER 37

COMPETITIVE SOURCING AND PRIVATIZATION

I.	Competitive Sourcing.....	1
A.	Origins and Development.....	1
B.	Past Legislative Roadblocks.....	1
C.	DOD and Competitive Sourcing.....	2
D.	Program Criticism.....	3
E.	Recent Development.....	3
II.	Agency Activity Inventory.....	5
A.	Key Terms.....	5
B.	Inventory Requirement.....	5
III.	“Old” Circular A-76.....	8
A.	Resources.....	8
B.	Key Players/Terms.....	9
C.	Competition Procedures.....	10
D.	Seeking/Evaluating Offers in Cost Comparisons.....	10
E.	Choosing the Winner.....	12
F.	Post-Award Review.....	12
G.	Final Decision and Implementation.....	18
IV.	Circular A-76 (Revised).....	20
A.	Key Players/Terms.....	20
B.	Competition Procedures.....	21
C.	Post Competition Accountability.....	25

V. Civilian Personnel Issues.....	26
A. Employee Consultation.....	26
B. Right-of-First-Refusal of Employment.....	26
C. Right-of-First-Refusal and the Financial Conflict of Interest Laws.....	26
VI. Housing Privatization.....	30
A. Generally.....	30
B. Authority.....	29
C. Implementation.....	31
D. Issues and Concerns.....	32
VII. Utilities Privatization.....	33
A. Authority.....	33
B. Implementation.....	33
C. Issues and Concerns.....	35
VIII. Conclusion.....	35
Attachment 1 - "Old" Circular A-76 Process.....	37
Attachment 2 - Streamlined Competition Process.....	39
Attachment 3 - Standard Competition Process.....	41

## CHAPTER 37

### COMPETITIVE SOURCING AND PRIVATIZATION

#### I. COMPETITIVE SOURCING.<sup>1</sup>

##### A. Origins and Development.

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)].
2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that “[i]n the process of governing, the Government should not compete with its citizens.” The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.
3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.<sup>2</sup>

##### B. Past Legislative Roadblocks.

1. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 11319a(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C.

---

<sup>1</sup> While referred to in the past as “contracting out” or “outsourcing,” the current, and preferred term-of-art, is “competitive sourcing.”

<sup>2</sup> The Circular A-76 (1999), Revised Supplemental Handbook, and associated updates issued through OMB Transmittal Memoranda are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

§ 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DOD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.<sup>3</sup>
3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

### C. DOD and Competitive Sourcing.

1. 1993: National Performance Review (NPR). Part of Vice President Gore's "reinventing government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).
2. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).
3. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DOD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

---

<sup>3</sup> While not a "roadblock," a recurring limitation in recent DOD Appropriations Acts prohibits the use of funds on Circular A-76 studies if the DOD component has exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8022 (2003). The thirty-month limitation represents a change this year, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002). In the

4. Between Fiscal Year (FY) 1997 and FY 2001, DOD had completed approximately 780 sourcing decisions involving more than 46,000 government positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* [www.gao.gov](http://www.gao.gov).

D. Program Criticism.

1. In response to increasing criticism of the Circular A-76 process by both the public and private sectors, Congress, in Section 832 of the National Defense Authorization Act for FY 2001, tasked the Comptroller General to convene a panel of experts to study the Circular A-76 policies and procedures and to make appropriate recommendations as to possible changes. Pub. L. No. 106-398, 114 Stat. 1654, 1654A-220 (Oct. 30, 2000).
2. On 30 April 2002, the Commercial Activities Panel (CAP) released its final report, identifying weaknesses, as well as strengths, in the Circular A-76 procedures and making recommended changes. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002), *available at* [www.gao.gov](http://www.gao.gov).
3. Proposed Revision to Circular A-76. Based in part on the recommendations made by the CAP, on 19 November 2002, OMB published proposed changes to Circular A-76 and sought comments. See Office of Management and Budget; Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002). Over 700 individuals/organizations/agencies submitted comments to OMB regarding the proposed changes.<sup>4</sup>

E. Recent Development.

1. Following the receipt and consideration of the numerous comments received in response to the Proposed Revision, the OMB issued the “new” Circular A-76, effective 29 May 2003, superseding and rescinding the prior Circular A-76, the Revised Supplemental Handbook, OMB Circular A-76 Transmittal Memoranda Nos. 1-25, and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental*

---

<sup>4</sup> The Proposed Revision to OMB Circular A-76 and the public comments received in response during the thirty-day notice period are available at <http://www.whitehouse.gov/omb/circulars/index.html>.

*Functions*, Sept. 23, 1992. See Federal Office of Management and Budget Circular A-76 (Revised), Performance of Commercial Activities, ¶ 2 (May 23, 2003) [hereinafter Circular A-76 (Revised)].<sup>5</sup>

2. In general, the Circular A-76 (Revised) aims to:
  - a. provide new guidance for developing inventories of commercial and inherently governmental functions;
  - b. strengthen application of public-private competition;
  - c. incorporate “FAR-like” provisions; and
  - d. increase accountability.<sup>6</sup>
  
3. **Applicability.** The Circular A-76 (Revised) applies to all inventories required and streamlined and standard competitions initiated after the “effective date” (i.e., 29 May 2003). Circular A-76 (Revised) ¶ 6.
  - a. Direct conversions initiated but not completed by the effective date must be converted to the streamlined or standard competitions under Revised Circular A-76. Circular A-76 (Revised) ¶ 7.a.
  - b. Initiated cost comparisons for which solicitations have not been issued prior to the effective date must also be converted to standard competitions under the Circular A-76 (Revised), or, at the agency’s discretion, converted to streamlined competitions under the new rules. Circular A-76 (Revised) ¶ 7.b.

---

<sup>5</sup> For additional discussion of the procedures and changes implemented by the Circular A-76 (Revised), see discussion infra at Part IV. The full text of Circular A-76 (2003) is available on-line at <http://www.whitehouse.gov/omb/circulars/index.html>.

<sup>6</sup> See Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). The Federal Register notice provides a good overview of the changes made by the issuance of the Circular A-76 (Revised), as well as OMB’s reasoning for some of the changes.

- c. The rules in effect prior to issuance of the Revised Circular A-76 shall apply to all cost comparisons for which solicitations have already been issued, unless agencies elect to convert to the new procedures. Circular A-76 (Revised) ¶ 7.c.

## II. AGENCY ACTIVITY INVENTORY.

- A. Key Terms. The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.
  1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2.
  2. Inherently Governmental Activities. An activity so intimately related to the public interest as to mandate performance by government personnel. Such “activities require the exercise of substantial discretion in applying government authority and/or making decisions for the government.”<sup>7</sup> Circular A-76 (Revised), Attachment A, ¶ B.1.a. Inherently governmental activities fall into two broad categories:
    - a. The exercise of sovereign government authority.
    - b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements.
- B. Inventory Requirement. Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).
  1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).
    - a. Codifies the definition of “inherently governmental” activity.

---

<sup>7</sup> Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)), which states the term “inherently governmental function” includes activities that merely require the “exercise of discretion.”

- b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.
- c. Provides “interested parties” the chance to challenge the list within 30 days after its publication. The “interested party” list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

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

- a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.
- b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.
- c. Categorization of Activities.
  - (1) The agency competitive sourcing official (CSO)<sup>8</sup> must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.

---

<sup>8</sup> The CSO is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003).

- (2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.<sup>9</sup> When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

- (1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.
  - (a) Inventory Challenge Authorities. Must be “agency officials at the same level as, or a higher level than, the individual who prepared the inventory.” Circular A-76 (Revised), Attachment A, ¶ D.1.a.
  - (b) Inventory Appeal Authorities. Must be “agency officials who are independent and at a higher level in the agency than inventory challenge authorities.” Circular A-76 (Revised), Attachment A, ¶ D.1.b.
- (2) Inventory challenges are limited to “classification of an activity as inherently governmental or commercial” or to the “application of reason codes.” Circular A-76 (Revised), Attachment A, ¶ D.2.<sup>10</sup>

---

<sup>9</sup> The six reason codes include the following:

Reason code A – “commercial activity is not appropriate for private sector performance”;  
Reason code B – “commercial activity is suitable for a streamlined or standard competition”;  
Reason code C – “commercial activity is subject of an in-progress streamlined or standard competition”;  
Reason code D – “commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years;  
Reason code E – “commercial activity is pending an agency approved restructuring decision (e.g., base closure, realignment).  
Reason code F – “commercial activity is performed by government personnel due to a statutory prohibition against private sector performance.”

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

<sup>10</sup> Originally the Circular A-76 (Revised) stated interested parties could only challenge “reclassifications” of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word “reclassification” and inserting “classification.” Office of Mgmt. & Budget, Technical Correction to Office of

### III. “OLD” CIRCULAR A-76.

#### A. Resources.

1. OMB Guidance. Circular A-76 (1999), Revised Supplemental Handbook, OMB Transmittal Memoranda 1-25.
2. DOD Guidance.<sup>11</sup>
  - a. U.S. Dep’t of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
  - b. U.S. Dep’t of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).
  - c. U.S. Dep’t of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).
3. Military Department Guidance.
  - a. U.S. Dep’t of Army, Reg. 5-20, Commercial Activities Program (1 Oct. 1997).
  - b. U.S. Dep’t of Army, Pam. 5-20, Commercial Activities Study Guide (31 Jul. 1998).
  - c. U.S. Dep’t of Air Force, Instr. 38-203, Commercial Activities Program (19 Jul. 2001).

---

Management and Budget Circular No. A-76, “Performance of Commercial Activities,” 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

<sup>11</sup> The DOD Directive, Instruction, Interim Guidance, as well as the applicable regulations, instructions, and guidance of the various Armed Services are available at DOD’s SHARE A-76 website located at <http://emissary.acq.osd.mil/inst/share.nsf>.

- d. U.S. Dep't of Navy, Instr. 4860.7C, Navy Commercial Activities Program (7 June 1999).
- e. Marine Corps Order 4860.3D W/CH 1, Commercial Activities Program (14 Jan 92).

B. Key Players/Terms.

1. Congress. The DOD must notify Congress “before commencing to analyze” a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).<sup>12</sup>
2. Performance Work Statement (PWS). The PWS defines the agency’s needs, the performance standards and measures, and the timeframe for performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ C.
3. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ D.
4. Cost Comparison Study Team. A group of functional experts in the agency who prepare plans and develop the agency’s cost estimate. The team is responsible for developing:
  - a. The Management Plan, which defines the overall structure for the MEO. This organizational structure serves as the government’s proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.1.
  - b. The Most Efficient Organization, which describes the way the government will perform the commercial activity and at what cost. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.2.
5. MEO Certification Official. An individual, organizationally independent of the function under study or at least two levels above the most senior official included in the MEO, who certifies the Management Plan as

---

<sup>12</sup> As this is a statutory requirement it still applies to DOD under the Circular A-76 (Revised) procedures.

reflecting the government's MEO. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.3.

6. Independent Review Officer (IRO). The PWS, Management Plan, QASP, cost estimates, and supporting documentation are forwarded to the agency IRO. The IRO certifies compliance with applicable procedures and ensures the data establishes the MEO can perform the requirements of the PWS and that all costs are justified. Revised Supplemental Handbook, Part I, Chapter 3, ¶ I.
7. Administrative Appeal Authority (AAA). An individual, independent of the activity under review or at least two organization levels above the MEO certification official, responsible for the administrative appeal process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.3.

C. Competition Procedures.

1. Direct Conversions. Activities with 10 or fewer full time equivalent employees (FTEs) may be converted without a cost comparison study. Revised Supplemental Handbook, Part I, Chapter 1, ¶ C.6.
2. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of the Circular A-76. Revised Supplemental Handbook, Part II, Chapter 5.<sup>13</sup>
3. Cost Comparisons. If direct conversion or streamlined cost comparison procedures are inapplicable, the agency must conduct a full cost comparison study. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ A.1.

D. Seeking/Evaluating Offers in Cost Comparisons.

---

<sup>13</sup> A recurring provision in the Defense Appropriations Act prohibits the DOD from converting to contractor performance any function involving more than 10 employees until a "most efficient and cost effective organization analysis is completed . . ." Congress has granted the DOD a waiver to this analysis requirement, if directly converting performance of those functions to: 1) a Javits-Wagner-O'Day (JWOD) Act firm that employs blind or severely handicapped employees; or 2) a firm that is under fifty-one percent ownership of an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods provided under the FAR (e.g., sealed bidding, negotiated procurements). Revised Supplement Handbook, Part I, Chapter 3, ¶ H.1.
2. Solicitation/Evaluation. The agency issues a solicitation based on the PWS to seek bids/offers from the private sector. FAR 7.304(c).
  - a. For sealed bid procurements, the contracting officer opens all bids and the government's in-house cost estimate and enters the apparent low bid on the Cost Comparison Form. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.1; FAR 7.306(a).
  - b. For negotiated procurements, the Source Selection Authority (SSA) evaluates and selects the private sector offeror that represents the "most advantageous proposal" in accordance with the solicitation's stated evaluation criteria. The cost of this proposal is compared against the government's in-house cost estimate. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.3; FAR 7.306(b).
3. "Cost/Technical Trade-Offs" in Negotiated Procurements. Negotiated procurements contemplating a "cost/technical trade-off" evaluation involve an additional step. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.
  - a. Source Selection Authority. After the SSA reviews the private sector offers and identifies the offer that represents the "best value" to the government, the contracting officer submits to the SSA the government's management plan (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶¶ H.3.c-d; see also, NWT, Inc.; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158.

- b. Independent Review Officer. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the IRO. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the "best value" private sector offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.e.

E. Choosing the Winner.

1. The private offeror "wins" if its proposal costs beat the in-house cost estimate by a minimum cost differential of:
  - a. 10 percent of personnel costs, or
  - b. \$10 million over the performance period, whichever is less.

The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part II, Chapter 4, ¶ A.1.

2. Otherwise, the MEO "wins" and the agency continues performance of the commercial activity in-house, using the staffing proposed by the MEO.

F. Post-Award Review.

1. Administrative Appeals Process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K; DODI 4100.33, ¶ 5.7; DOD Interim Guidance, Attach. 5; FAR 7.307.
  - a. Circular A-76 (1999) requires agencies to develop an internal administrative appeal process for challenges to cost comparison decisions.
    - (1) Generally, the agency must receive the appeal within 20 calendar days of announcement of tentative decision, which may be extended for complex studies. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.1.b. See FAR 52.207-2 (providing for a public review period of 15-

30 working days, depending upon the complexity of the matter).

- (2) The appeal must be based on noncompliance with the requirements and procedures of Circular A-76 or specific line items on the Cost Comparison Form.
- b. All “interested parties” need to review the tentative cost-comparison decision and all supporting documentation and immediately identify and bring to the attention of the Administrative Appeals Board any potential errors that, if corrected, would provide for a more accurate determination. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). “Interested parties” in this context includes affected federal employees/unions and the apparent winner of the tentative decision. Id. See also Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.2.
  - c. Decision on Appeal. The agency should provide for a decision within 30 days after the Administrative Appeal Authority receives the appeal. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.8.
2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.
    - a. Standing.
      - (1) Only an “interested party” as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).

- (2) Affected federal employees/unions do not have standing to challenge Circular A-76 decisions at GAO, because affected employees/unions are not “actual or prospective bidders” and thus not “interested parties” under CICA. American Fed’n of Gov’t Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed’n of Gov’t Employees, B-223323, 86-1 CPD ¶ 572; American Fed’n of Gov’t Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.<sup>14</sup>

b. Timing.

- (1) The protester must exhaust the agency appeal process. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). See also BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 (stating GAO adopted as policy, for the sake of comity and efficiency, the requirement for protestors to exhaust the available appeal process); Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process).
- (2) The protester must file the protest with GAO within 10 working days of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3); See Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (continuing to pursue protest with agency does not toll 10 day limit).

c. Standard of Review.

- (1) When reviewing cost comparison decisions, the GAO applies the following standard of review:
  - (a) whether the agency conducted the cost comparison reasonably;

---

<sup>14</sup> Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an “agent” for affected employees. General Accounting Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003). The GAO has not yet issued an opinion or additional guidance on this matter.

- (b) whether the agency complied with applicable procedures; and
- (c) if the agency failed to follow procedures, whether the failure could have materially affected the outcome of the cost comparison. See Trajen, Inc. B-284310.2, Mar. 28, 2000, 2000 U.S. Comp. Gen. LEXIS 44.

- (2) Within reason, agencies will be accorded discretion in their cost comparison studies. See, e.g., RTS Travel Serv., B-283055, Sept. 23, 1999 (finding the agency properly adjusted the contractor's price for contract administration costs); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the Management Plan and MEO).

### 3. Federal Court Challenges.

- a. **Jurisdiction.** The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provides the U.S. Court of Federal Claims (COFC) jurisdiction to hear pre-award and post-award bid protests.

- b. **Standing.**

- (1) Only an "interested party" under the ADRA has standing to challenge procurement decisions. The Court of Appeals for the Federal Circuit (CAFC) established that "interested party" should be limited to those parties covered by CICA. American Fed'n of Gov't Employees, et al v. United States, 258 F.3d 1294 (2001). Adopting the same CICA standard used by GAO, this case definitively answered the question of which standard to use in determining whether federal employees have standing in the Court of Federal Claims.

- (2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities.
- (a) AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000) (holding federal employees/union lacked standing as they were not within the zone of interests protected by the statutes they alleged were violated). *Cf.* AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding federal employees/unions at Rock Island Arsenal did not have standing under 10 U.S.C. § 2462 to challenge the Army's decision to award two contracts to private contractors, but had standing under the Arsenal Act (10 U.S.C. § 2542)).
  - (b) AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding federal employees/union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).
  - (c) NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding displaced federal workers/unions do not have standing to challenge the A-76 cost comparison process); *cf.* Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).

- (d) Grievances. Circular A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, *IRS v. Federal Labor Relations Authority*, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, *IRS v. Federal Labor Relations Authority*, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, *Fort Carson*, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

4. Problem Areas/Issues.

- a. Ensuring the government Management Plan/MEO can meet the PWS requirements. See e.g., BAE Systems, B-287189, May 14, 2001, 2001 CPD ¶ 86 (finding the IRO failed to properly carry out his responsibility to ensure the MEO met the minimum PWS requirements and that it was properly adjusted to meet those performance levels).
- b. Ensuring the accuracy and fairness for the costs of in-house and contractor performance. See e.g., Del-Jen Inc., B-287273.2, Jan. 23, 2002, 2002 CPD ¶ 27 (determining the agency understated the administration costs of in-house performance and overstated the administration of contractor performance).
- c. Ensuring a “level playing field” in “cost/technical trade-off” negotiated procurements. See e.g., DynCorp Tech. Services, LLC, B-284833.3, July 17, 2001, 2001 CPD ¶ 112 (sustaining protest where the agency identified an “accelerated performance schedule” as a strength in the selected private sector proposal but did not require the MEO to equal this performance level).
- d. Avoiding Organizational Conflicts of Interest (OCI). An OCI arises when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR Subpart 9.5.

- (1) Historically, OCI rules were applied to contractors; however, in 1999 the GAO found that government employees involved in Circular A-76 cost comparison study had an OCI that tainted the evaluation process, rendering it defective. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19 (finding an OCI where 14 of 16 agency evaluators held positions that were the subject of the study).
- (2) In 2000, OMB amended the Revised Supplemental Handbook and implemented new rules prohibiting employees whose positions are subject to a cost comparison study from participating as evaluators in the study. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000).
- (3) In December 2001, the GAO found an OCI where an agency employee and private consultant wrote and edited both the PWS and the in-house Management Plan. The Jones/Hill Joint Venture, B-286194.4, B-286194.5; B-286184.6, Dec. 5, 2001, 2001 CPD ¶ 194. Upon reconsideration, the GAO modified its recommended corrective action for addressing the OCI issue in the Jones/Hill decision, stating its recommendation only applied prospectively. Department of the Navy – Reconsideration, B-286194.7, May 29, 2002.

G. Final Decision and Implementation.

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2461(a). The FY 2003 National Defense Authorization Act amends 10 U.S.C. § 2461 to require the SECDEF to notify Congress of the outcome of a competitive sourcing study, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.<sup>15</sup>

---

<sup>15</sup> Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 331, 116 Stat. 2458, 2512 (2002). Again, as this is a statutory requirement it still applies to the DOD under the Circular A-76 (Revised) procedures.

2. If the private sector offer wins, the contracting officer awards the contract. If the MEO wins the cost study, the solicitation is cancelled and the MEO implemented in accordance with the Management Plan.
3. Contractor Implementation.
  - a. Reviews. Contracted commercial activities are monitored to ensure that performance is satisfactory and cost effective.
  - b. If the contractor defaults during the first year:
    - (1) The contracting officer will award the work to the next lowest offeror that participated in the cost comparison study, if feasible.
    - (2) If it is not feasible to award to the next lowest offeror, the contracting officer “will immediately resolicit to conduct a revised and updated cost comparison.” Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.
    - (3) If the contractor defaults after the first year, the contracting officer should seek interim contract support. If interim support is not feasible, in-house performance may be authorized by the commander on a temporary/emergency basis. See AFI 38-203, para. 19.7.
4. MEO Implementation.
  - a. When performance is retained in-house, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented or the MEO fails to perform, the contracting officer will award to the next lowest offeror if feasible, or immediately resolicit to conduct a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1, 7.

- b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year, although adjustments may be made for formal mission or scope of work changes. Revised Supplemental Handbook, Part I, Chapter 3, para. L.2.
  
- c. Agencies must review at least 20 percent of the functions retained in-house as the result of a cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

#### **IV. CIRCULAR A-76 (REVISED).**

##### **A. Key Players/Terms.**

1. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes an MEO, agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.
  
2. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the MEO team and is considered a “directly interested party” for contest purposes. The ATO must be independent of the contracting officer, SSA/SSEB, and the PWS team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.
  
3. Contracting Officer (CO). An inherently governmental official who is a member of the PWS team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO team, and the human resource advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ a.8.b and Attachment D.
  
4. PWS Team Leader. An inherently governmental official, independent of the ATO, HRO, and MEO team, who develops the PWS and QASP, determines government-furnished property, and assists the CO in developing the solicitation. Circular A-76 (Revised), Attachment B, ¶ a.8.c.

5. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, SSA, PWS team, and SSEB. As a member of the MEO team, the HRA assists the ATO and MEO team in developing the agency tender. The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ a.8.d.
6. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team.

B. Competition Procedures.

1. Previously, agencies could “directly convert” to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of “direct conversions.” Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).<sup>16</sup>
2. Streamlined Competitions. The new “streamlined competition” process must be used for activities performed by 65 or fewer FTEs “and/or any number of military personnel,” unless the agency elects to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b and C. The streamlined competition process includes:
  - a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; “however, an agency is encouraged to develop a more efficient organization, which may be an MEO.” Circular A-76 (Revised), Attachment B, ¶ C.1.a.<sup>17</sup>

---

<sup>16</sup> While the Circular A-76 (Revised) eliminates “direct conversions” recall that Congress permits the DOD to directly convert performance of functions to: 1) a Javits-Wagner-O’Day (JWOD) Act firms that employ blind or severely handicapped employees; or 2) firms that are under fifty-one percent ownership of an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003). Additionally, this year Congress stated that if the DOD directly converts functions pursuant to the authority under § 8014, the DOD must receive credit for any OMB established competition goals. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

<sup>17</sup> Though civilian agencies may determine the estimated cost of in-house performance without creating an MEO, the DOD’s ability to do so is limited. Recall that the DOD generally must complete a “most efficient and cost effective organization analysis” prior to converting any function that involves more than 10 employees. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

- b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).
  - c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.
  - d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a “letter of obligation” with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.
3. Standard Competitions. The new “standard competition” procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.
- a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.
    - (1) The solicitation must state the agency tender is not required to include certain information such as a subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).
    - (2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

b. Source Selection.

- (1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:
  - (a) Phased Evaluation Source Selections.
    - (i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.
    - (ii) Phase Two – the SSA makes the performance decision after a price/cost realism analyses on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.
  - (b) Cost-Technical Tradeoff Source Selections. May only be used in a standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.
- (2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.
  - (a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must

maintain records of all such correspondence.  
Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.

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

- (3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or \$10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.<sup>18</sup>

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

d. Contests.

- (1) A “directly interested party” (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a standard competition. Circular A-76 (Revised), Attachment B, ¶ F.1.

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

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

---

<sup>18</sup> Although the “10% or \$10 million” conversion differential does not apply in streamlined competitions for civilian agencies, Congress requires the DOD to apply the differential in all competitions involving 10 or more civilian employees. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

4. Timeframes.

- a. Streamlined Competitions. Must be completed within 90 calendar days from “public announcement” to “performance decision,” unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.
- b. Standard Competitions. Must not exceed 12 months from “public announcement” to “performance decision,” unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.
- c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)<sup>19</sup> of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

C. Post Competition Accountability.

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.
2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6.

---

<sup>19</sup> Recall that the DOD has a statutory requirement to notify Congress “before commencing to analyze” a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).

## V. CIVILIAN PERSONNEL ISSUES.

- A. Employee Consultation. By statute, the DOD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2467(b).
  
- B. Right-of-First-Refusal of Employment.
  - 1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.
  
  - 2. The clause, at FAR 52.207-3, requires:
    - a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.
  
    - b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.
  
    - c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.
  
- C. Right-of-First-Refusal and the Financial Conflict of Interest Laws.
  - 1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.

2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.
  - a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.
  - b. Reporting Employment Contacts (41 U.S.C. § 423(c)).
    - (1) FAR 3.104-1(iv) generally excludes from the scope of “personally and substantially” the following employee duties during an OMB Cir. A-76 study:
      - (a) Management studies;
      - (b) Preparation of in-house cost-estimates;
      - (c) Preparation of the MEO; or
      - (d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.
    - (2) PWS role. Consider the employee’s role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not “personally and substantially” participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.
  - c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.
    - (1) Applies to contracts exceeding \$10 million, and
      - (a) Employees in any of these positions:
        - (i) Procuring contracting officer;

- (ii) Administrative Contracting Officer;
  - (iii) Source Selection Authority;
  - (iv) Source Selection Evaluation Board member;
  - (v) Chief of Financial or Technical team;
  - (vi) Program Manager; or
  - (vii) Deputy Program Manager.
- (b) Employees making these decisions:
- (i) Award contract or subcontract exceeding \$10 million;
  - (ii) Award modification of contract or subcontract exceeding \$10 million;
  - (iii) Award task or delivery order exceeding \$10 million;
  - (iv) Establish overhead rates on contract exceeding \$10 million;
  - (v) Approve contract payments exceeding \$10 million; or
  - (vi) Pay or settle a contract claim exceeding \$10 million.

- (2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding \$10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.
3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a “particular matter” affecting the officer or employee’s personal or imputed financial interests.
  - a. Cost comparisons conducted under OMB Cir. A-76 are “particular matters” under 18 U.S.C. § 208.
  - b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a “direct and predictable” effect on their financial interests. This determination is very fact specific.
4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the “intent to influence.”
  - a. The ban may be lifetime, for two years, or for one year, depending on the employee’s involvement in the matter.
  - b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves “specific parties.”
  - c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

## VI. HOUSING PRIVATIZATION.

- A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.
  
- B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2012.<sup>20</sup>
  - 1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.
  
  - 2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:
    - a. Direct loans and loan guarantees to private entities.
  
    - b. Build/lease authority.
  
    - c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.
  
    - d. Rental guarantees.
  
    - e. Differential lease payments.
  
    - f. Conveyance or lease of existing properties and facilities to private entities.

---

<sup>20</sup> Originally granted in 1996, this authority was extended by the FY 2002 National Defense Authorization Act. Pub. L. No. 107-107, § 2805, 115 Stat. 1012 (2001).

3. Establishment of Department of Defense housing funds.
  - a. The Department of Defense Family Housing Improvement Fund.
  - b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

C. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.
2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.
3. The contractual agreement may include provisions regarding:
  - a. The amount of rent the contractor may charge military occupants (rent control).
  - b. The manner in which soldiers will make payment (allotment).
  - c. Rental deposits.
  - d. Loan guarantees to the contractor in the event of a base closure or realignment.
  - e. Whether soldiers are required to live there.
  - f. The circumstances under which the contractor may lease units to nonmilitary occupants.

D. Issues and Concerns.<sup>21</sup>

1. Making the transition positive for occupants; including keeping residents informed during the process.
2. Loss of control over family housing.
3. The affect of long-term agreements.
  - a. Future of installation as a potential candidate for housing privatization.
    - (1) DOD must determine if base a candidate for closure.
    - (2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.
  - b. Potential for poor performance or nonperformance by contractors.
    - (1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.
    - (2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

---

<sup>21</sup> See General Accounting Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June 2002); General Accounting Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); General Accounting Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

4. Effect on federal employees.
  - a. The privatization of housing will result in the elimination of those government employee positions that support family housing.
  - b. Privatization is not subject to Circular A-76.
5. Prospect of civilians living on base.
  - a. Civilians allowed to rent units not rented by military families.
  - b. This prospect raises some issues, such as security concerns and law enforcement roles.

## **VII. UTILITIES PRIVATIZATION.**

- A. Authority. 10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.
- B. Implementation.
  1. In 1998, DOD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).
  2. In October 2002, DOD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which “Defense Components shall

complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law.” In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

- a. updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;
  - b. DOD’s position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government’s utility systems;
  - c. new instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DOD for “utilities privatization contracts under which previously Government-owned utility systems are conveyed by a Military Department or Defense Agency to a contractor;” and
  - d. the authority granted the Service Secretaries to include “reversionary clauses” in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.
3. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.
  4. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. § 2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).
  5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

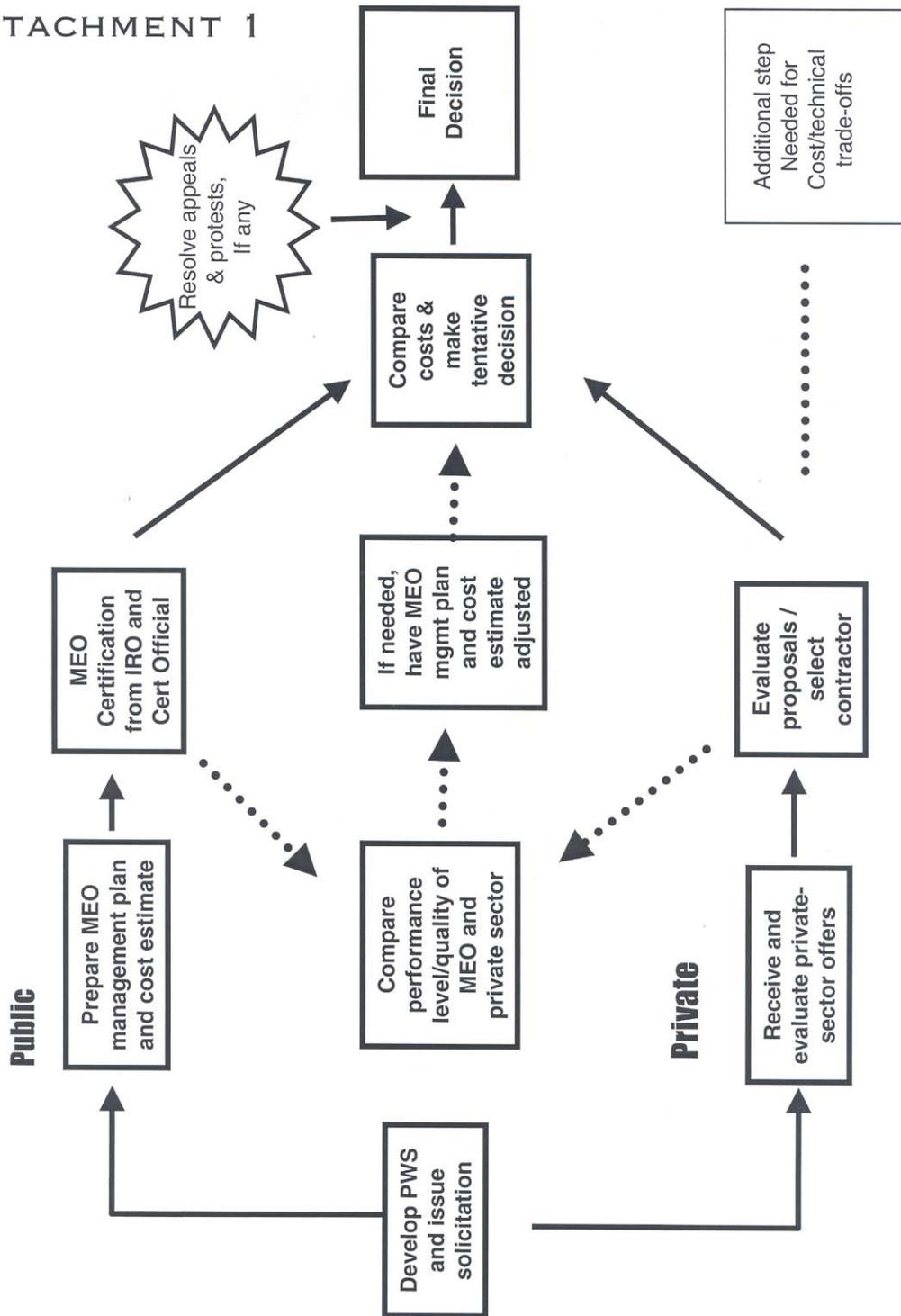
6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.
7. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DOD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns.

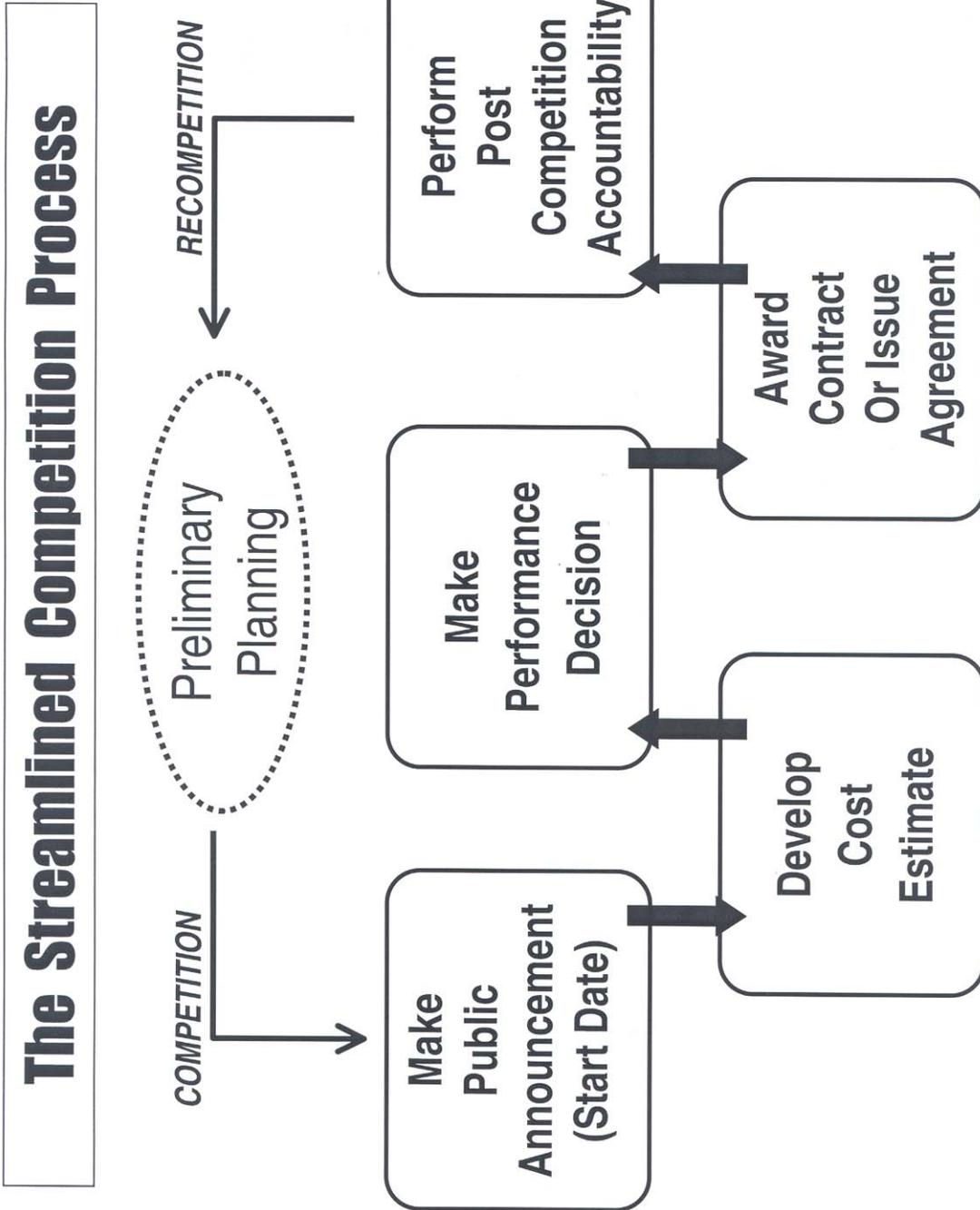
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).
2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

## **VIII. CONCLUSION.**

# ATTACHMENT 1









# The Standard Competition Process

