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## CONTENTS

**FOREWORD**..... v  
*Major General (ret.) Charles J. Dunlap, Jr., USAF*

## ARTICLES

CIVIL-MILITARY COOPERATION IN CIVILIAN CASUALTY  
INVESTIGATIONS: LESSONS LEARNED FROM THE  
AZIZABAD ATTACK ..... 1  
*Second Lieutenant Brendan Groves, USAFR*

THIS LAND IS MY LAND: THE TENSION BETWEEN FEDERAL  
USE OF PUBLIC LANDS AND THE RELIGIOUS FREEDOM  
RESTORATION ACT ..... 51  
*Lieutenant Colonel James E. Key, USAF*

THE INFLUENCE OF LAW ON COMMAND OF SPACE ..... 107  
*Major John W. Bellflower, USAF*

**UNCONTRACTING: THE MOVE BACK TO PERFORMING IN-HOUSE..... 145**  
*Major Kevin P. Stiens, USAF &  
Lieutenant Colonel (ret.) Susan L. Turley, USAF*

YET ANOTHER INDUSTRY ON THE TAXPAYER-SUBSIDIZED DOLE:  
WHY SECTION 8093 OF THE CONTINUING AUTHORIZATION ACT  
OF 1988 (40 U.S.C. § 591) SHOULD BE REPEALED ..... 187  
*Major Frank D. Hollifield, USAF*

DEFINING THE CRIME OF AGGRESSION: IS THERE AN ANSWER  
TO THE INTERNATIONAL CRIMINAL COURT'S DILEMMA? ..... 229  
*Major Kari M. Fletcher, USAF*

UNCONTRACTING: THE MOVE BACK TO PERFORMING IN-  
HOUSE

*MAJOR KEVIN P. STIENS*  
*LIEUTENANT COLONEL (RET.) SUSAN L. TURLEY*

I.	INTRODUCTION .....	146
II.	BACKGROUND.....	149
	A. The Origins of Outsourcing.....	149
	B. Overview of the A-76 Process .....	153
	C. Outsourcing and the Pendulum .....	156
	D. Current Law .....	161
III.	BENEFITS OF OUTSOURCING.....	164
	A. Cost Savings.....	165
	B. A Better Product.....	167
IV.	OUTSOURCING VS. INSOURCING—WHERE SHOULD THE PENDULUM STOP?.....	168
	A. Cost Savings?.....	168
	B. Contract Administration Difficulties.....	176
	C. Retaining Experience .....	178
	D. Control of Personnel.....	180
	E. Politics and Policy.....	183
V.	CONCLUSION .....	185

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*Today, America must be spiritually, economically, and militarily strong, for her own sake and for humanity. She must guard her solvency as she does her physical frontiers. This means elimination of waste, luxury, and every needless expenditure from the national budget.*<sup>1</sup>

*[T]axpayers deserve to have their dollars spent wisely. To instill a new sense of responsibility when it comes to spending the taxpayers' dollars, [the President] has charged federal departments and agencies with . . . terminating unnecessary contracts, strengthening acquisition management, ending the overreliance on contractors, and reducing the use of high-risk contracts across government.*<sup>2</sup>

*Everything old is new again.*<sup>3</sup>

## I. INTRODUCTION

Anytime a presidential administration changes, so will presidential policies and priorities. When the party alliance of the chief executive also changes, the policy shifts are even more dramatic. However, “change” does not always mean “new,” as exemplified by the roller-coaster ride of “outsourcing” over the last four decades. Outsourcing—or contracting out, or commercial sourcing, or whatever moniker one uses—is the acquisition world’s Jekyll and Hyde, either embraced as a miraculous cost-saving tool or pilloried as the embodiment of all that is wrong with government contracting. This article examines the transformations and the validity of the associated policies and claims.

Admittedly, the Obama Administration’s desire to run government more efficiently is perfectly natural, expected and appropriate. However, even a president who runs on a platform of change cannot achieve those efficiencies alone. Any newcomer who wants to change something about his operating environment must understand the process of change and those who impact the process must assist in allowing the change.<sup>4</sup> Nowhere is this principle more

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<sup>1</sup> DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS, MANDATE FOR CHANGE: 1953–1956 33 (1963). This statement on June 4, 1952, in Abilene, Kansas, was part of Eisenhower’s first speech in which he “was universally addressed and treated by everyone as a candidate” for President. *Id.*

<sup>2</sup> OFF. OF MGMT. & BUDGET, ACQUISITION AND CONTRACTING IMPROVEMENT PLANS AND PILOTS: SAVING MONEY AND IMPROVING GOVERNMENT 1 (Dec. 2009) [hereinafter OMB, CONTRACTING IMPROVEMENT PILOTS], available at [http://www.whitehouse.gov/omb/assets/reports/2009\\_acquisition\\_contracting\\_improvement.pdf](http://www.whitehouse.gov/omb/assets/reports/2009_acquisition_contracting_improvement.pdf)

<sup>3</sup> PETER ALLEN, *Everything Old is New Again*, from ALL THAT JAZZ (Twentieth Century Fox 1979) (soundtrack).

<sup>4</sup> See ATL. SYS. GUILD INC., *On Setting the Context—Some Notes* (“Getting the right context is one of the earliest activities of the development cycle, and the one that has the

crucial than within the U.S. Government, where failure to understand the system's functional context and intertwined parts may negate the desired efficiencies.<sup>5</sup>

How the government decides whether to perform certain functions in-house or contract out for goods and services reveals how misunderstanding context—combined with a lack of cooperation among those affecting the process—limits the impact of efficiency-creating measures.<sup>6</sup> Policies and procedures also affect how the government ultimately obtains goods or services, either by providing the goods or services in-house or by purchasing them from an outside source.<sup>7</sup> Policymakers and lawmakers need to understand the proper context in setting up principles and procedures.<sup>8</sup> When the lawmakers and the policymakers do not work together or work against each other, implementation becomes problematic. This paper will analyze the presidential policy relating to outsourcing, how it has changed, and how Congress has affected this policy. Specifically, this article will analyze Section 324 of the 2008 National Defense Authorization Act and show how it has provided the impetus to reverse the policy relating to the performance of functions by military personnel versus contractors.<sup>9</sup>

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greatest potential to cause serious problems if it is done wrongly.”), <http://www.systemsguild.com/GuildSite/JSR/contextart.html> (last visited Feb. 20, 2009).

<sup>5</sup> See *Poor Performance by Federal Contractors: Hearing Before the Subcomm. on Government Management, Organization, and Procurement of the H. Comm. on H. Oversight and Government Reform*, 2007 WL 2062979 (July 18, 2007) [hereinafter *Government Management, Organization, and Procurement Hearing*] (statement of Richard Skinner, Inspector General, Department of Homeland Security discussing Department of Homeland Security's acquisition challenges in context of mission performance); Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 655–56 (2007) (discussing context).

<sup>6</sup> See generally *DHS Dependency on Contractors: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 2007 WL 3025457 (Oct. 17, 2007) [hereinafter *Homeland Security and Governmental Affairs Hearing*] (statement of Steven L. Schooner, Co-Director, Government Procurement Law Program, George Washington University); see also *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

<sup>7</sup> See generally *Homeland Security and Governmental Affairs Hearing*, *supra* note 6 (discussing the steps the Department of Homeland Security could take to improve its management and oversight of its contractors); see also *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

<sup>8</sup> See *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

<sup>9</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 324, 122 Stat 3, 60 (2008) (codified at 10 U.S.C. § 2463) [hereinafter FY08 NDAA]; see also U.S. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT, FINAL REPORT 14 (April 2002) [hereinafter GAO FINAL REPORT]. In 2004, GAO became the Government Accountability Office. U.S. Government Accountability Office, About the GAO, <http://www.gao.gov/about/namechange.html> (last visited Feb. 16, 2010).

In the 2008 National Defense Authorization Act, Congress passed legislation that almost completely reversed the presidential outsourcing efforts of the last few decades.<sup>10</sup> Specifically, 10 U.S.C. § 2463 requires government agencies to consider “using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors.”<sup>11</sup> Although Circular A-76 and the outsourcing processes still exist,<sup>12</sup> the new law calls for special consideration of functions now performed by contractors and formerly performed by DOD civilians.<sup>13</sup>

To understand how outsourcing has changed over time, this article will first provide some background information about outsourcing’s origins and then define some basic terms. Next, this article will briefly explain the A-76 process used to determine whether a function can be performed more cost effectively “in-house” versus “contracted out.” The focus will then turn to how outsourcing began, how it evolved, the perceived benefits of outsourcing, and a summary of its shortcomings. Finally, the article will explain why the move back to insourcing provides the most benefit to the federal government.

This article argues that overestimated cost savings and global changes negatively impacted the outsourcing process.<sup>14</sup> Not only did the cost savings fail to materialize, outsourcing caused other tangible losses.<sup>15</sup> The government lost personnel experience and continuity,<sup>16</sup> along with operational control,<sup>17</sup> by moving to contractors. Although insourcing<sup>18</sup> will not be a miracle cost-saving tool, performing more

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<sup>10</sup> See National Defense Authorization Act for Fiscal Year 2008, § 324; GAO Final Report, *supra* note 9, at 14. See *infra* note 144 and accompanying text regarding the 2009 Omnibus Appropriations Act, which prevents funding for new A-76 competitions at least for fiscal year 2009.

<sup>11</sup> National Defense Authorization Act for Fiscal Year 2008, § 324.

<sup>12</sup> The Office of Management and Budget uses a “system of Circulars and Bulletins . . . to communicate various instructions and information to the executive departments and establishments. The Circular series is used when the nature of the subject matter is of continuing effect.” OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-1 (Revised Aug. 7, 1952). Circular No. A-76 deals with the “Performance of Commercial Activities,” and thus “A-76” is used to informally refer to the government’s commercial sourcing activities. This article discusses the A-76 process further later in this article, starting in Section II.A. See, e.g., *infra* notes 21 and 40-44 and accompanying text. The 2009 Omnibus Appropriations Act temporarily prevents funding for new A-76 competitions. See *infra* note 144 and accompanying text.

<sup>13</sup> National Defense Authorization Act for Fiscal Year 2008, § 324.

<sup>14</sup> See discussion *infra* Section IV.

<sup>15</sup> See discussion *infra* Section IV.B.

<sup>16</sup> See discussion *infra* Section IV.D.E.

<sup>17</sup> See discussion *infra* Sections IV.E.

<sup>18</sup> “In-sourcing is the conversion of *any* currently contracted service/function to DOD civilian or military performance, or a combination thereof.” Memorandum from Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: In-sourcing Contracted Services—Implementation Guidance, Attach. 1, at 2 (May 28, 2009)

functions with federal employees instead of contractors will better equip the government to operate in current global conditions.

## II. BACKGROUND

Outsourcing has existed for several decades but evolved in terms of its name, processes, and legal authority.<sup>19</sup> This section of the article will discuss these changes, focusing on the distinctions between outsourcing<sup>20</sup> and commercial services management, the changes in the overall process, and the policy and legal reforms behind contracting out. The paper will then turn to a brief description of the A-76 process, then discuss how outsourcing has changed, and end with the current state of the law.

### A. The Origins of Outsourcing

After many years of perceived government growth, the Eisenhower administration began to examine the size of government and determine how to curb its growth.<sup>21</sup> In his inaugural address, President Eisenhower noted, “The government today has four times the number of civilian employees it had when the Republicans were last in power (2,591,000 as against 630,000) and its budget has been multiplied by about twenty.”<sup>22</sup> He planned to disband a large part of this oversized government,<sup>23</sup> viewing the competitive enterprise system as the primary source of national economic strength.<sup>24</sup> Eisenhower saw “the biggest opportunity the business community has ever had to test the application

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(internal citations omitted) (emphasis in original), *available at* [http://prhome.defense.gov/docs/DepSecDef Memo In-sourcing Contracted Services-Implementation Guidance \(28 May 2009\).pdf](http://prhome.defense.gov/docs/DepSecDef%20Memo%20In-sourcing%20Contracted%20Services-Implementation%20Guidance%20(28%20May%202009).pdf).

<sup>19</sup> See GOV'T ACCOUNTABILITY OFF., CIVILIAN AGENCIES DEVELOPMENT AND IMPLEMENTATION OF INSOURCING GUIDELINES 1 (Oct. 6, 2009).

<sup>20</sup> Outsourcing has undergone several name changes. Although in some cases “outsourcing” is a term of art, referring only to contracting out functions outside the A-76 process, this article uses it to refer to the general concept of federal employees competing against contractors to perform functions. See *infra* notes 41-45 and accompanying text.

<sup>21</sup> See DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS, WAGING PEACE: 1956-1961 239 (1965); see also JAMES JAY CARAFANO, PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ, AND FUTURE CONFLICTS 3-5 (2008); Martin J. Medhurst, *Eisenhower's Rhetorical Leadership: An Interpretation*, in MEDHURST, EISENHOWER'S WAR OF WORDS 294 (1994).

<sup>22</sup> RICHARD H. ROVERE, AFFAIRS OF STATE, THE EISENHOWER YEARS 74 (1956).

<sup>23</sup> *Id.*

<sup>24</sup> OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter 1999 OMB CIR. A-76] (note OMB CIR. A-76 was revised again in 2003; however, the 1999 version contained background information relating to purpose of the program which was not included in later revisions).

of business knowledge and business techniques to broader problems.”<sup>25</sup> In recognition of this principle, Eisenhower and subsequent presidents relied on this general policy of using commercial suppliers of products and services the government needed, thereby reducing the size of government and the costs of providing those products and services.<sup>26</sup>

What today is known as commercial services management began under the Eisenhower presidency.<sup>27</sup> Eisenhower, the first Republican president since the New Deal,

was deeply concerned about the growth of the federal government and the systematic loss of state and local autonomy. He was concerned about a . . . government that spent more than it took in, a government in which the twin threats of spiraling defense spending and an ever larger federal largess threatened to turn the country into a “garrison state” where individual liberties might be easily lost.<sup>28</sup>

Initially, outsourcing aimed to cut government spending<sup>29</sup> while also decreasing the size of the government, especially the military.<sup>30</sup> Eisenhower worried that big government “would make decisions that suited them best, undermining democracy. In short, they might use the pursuit of making Americans safer as cover for all kinds of ills.”<sup>31</sup>

Beginning in 1955, the Bureau of the Budget<sup>32</sup> issued a series of bulletins establishing federal policy for obtaining goods and services from the private sector.<sup>33</sup> Adopting the idea that “Government should not compete with its citizens,”<sup>34</sup> the Bureau stated that the federal government would “not start or carry on any commercial activity” that the private sector could do.<sup>35</sup> Individual freedom and initiative were

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<sup>25</sup> ROVERE, *supra* note 22, at 75.

<sup>26</sup> 1999 OMB CIR. A-76, *supra* note 24, ¶ 4.a.

<sup>27</sup> *Id.*

<sup>28</sup> MEDHURST, *supra* note 21, at 294. Medhurst is a professor at Baylor University.

<sup>29</sup> EISENHOWER, *supra* note 21, at 128.

<sup>30</sup> CARAFANO, *supra* note 21, at 3-4.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> The Bureau of the Budget was the predecessor of the Office of Management and Budget (OMB). See OMB CIR. A-11, PREPARATION, SUBMISSION AND EXECUTION OF THE BUDGET ¶ 15.2 (Aug. 7, 2009), available at [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc/](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/); see also CARAFANO, *supra* note 21, at 73.

<sup>33</sup> JOHN R. LUCKEY, CONG. RES. SERV. REP., OMB CIRCULAR A-76: EXPLANATION AND DISCUSSION OF THE RECENTLY REVISED FEDERAL OUTSOURCING POLICY (2003); see also EISENHOWER, *supra* note 21, at 128; ROVERE, *supra* note 22, at 74-75.

<sup>34</sup> See 1999 OMB CIR. A-76, *supra* note 24, ¶ 4.a.

<sup>35</sup> BERNARD D. ROSTKER, A CALL TO REVITALIZE THE ENGINES OF GOVERNMENT 3 (2008).

seen as strengths of the competitive enterprise system.<sup>36</sup> The move to decrease the size of government gained renewed momentum in the 1970s, especially after the Watergate scandal.<sup>37</sup> During the Carter administration many government officials advocated for the virtues of contracting.<sup>38</sup> “[M]any saw the government bureaucracy as inflexible and unresponsive. Cost was the easiest metric by which to rationalize a move to competition and contracting, but it was by no means the only motivation.”<sup>39</sup> Additionally, the Reagan and first Bush administrations—in line with the traditional Republican touchstones of less government and enhanced private enterprise—codified a preference for contracting over in-house activities.<sup>40</sup>

Outsourcing is moving a function from performance in-house to an outside entity.<sup>41</sup> The rationale for such action is that an outside entity could perform the function cheaper, if not better.<sup>42</sup> However, as will be discussed later, the requirement to outsource does not always benefit the government, in part because of Congress’s continued attempts to regulate the process. Due to the negative connotations that eventually became associated with “outsourcing,” the concept later transformed to “competitive sourcing.”<sup>43</sup>

Competitive sourcing is a general term describing a process whereby a federal agency compares the performance by government employees against a commercial entity to determine which can provide a specified level of service at the lowest cost.<sup>44</sup> The A-76 process

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<sup>36</sup> *Id.*; see AM. B. ASS’N, GOVERNMENT CONTRACT LAW, THE DESKBOOK FOR PROCUREMENT PROFESSIONALS 275 (2007); see also CARAFANO, *supra* note 21, at 73.

<sup>37</sup> ROSTKER, *supra* note 35, at 1.

<sup>38</sup> See *id.* at 3.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> USLegal, Inc., Outsourcing Law & Legal Definition, <http://definitions.uslegal.com/o/outsourcing/> (last visited Feb. 20, 2009). Some commentators consider that outsourcing within the federal government arena “refers to a decision to contract without the A-76 process.” ROSTKER, *supra* note 35, at 3 n.5. However, this article does not use that definition, which is limited not only in scope but in acceptance among government practitioners in the area. See *infra* note 49.

<sup>42</sup> *Id.*

<sup>43</sup> USLegal, Inc., *supra* note 41; see also AM. B. ASS’N, *supra* note 36, at 275 n.1; Share A-76! and CSM, Repository of Competitive Sourcing and CSM Information, Frequently Asked Questions, <http://sharea76.fedworx.org/ShareA76/faqs/faq.aspx> (last visited Feb. 20, 2009) (This website is a place for stakeholders throughout the federal community to share knowledge and lessons learned about the A-76 process. The website is designed to capture and communicate the experiences of field operators from all federal agencies, including contractors and consultants, as well as anyone interested in the A-76 cost comparison process.).

<sup>44</sup> RAND RESEARCH BRIEF, DOES COMPETITIVE SOURCING PAY OFF? THE DOD EXPERIENCE 2 (2000), available at <http://sharea76.fedworx.org/ShareA76/docs/36%20-%20General%20DoD/RB7536.pdf>; see also AMERICAN BAR ASS’N, *supra* note 36, at 275 n.1.

frequently relies on competitive source to carry out federal policy as stated by the Office of Management and Budget (OMB). “In the process of governing, the Government should not compete with its citizens” and therefore, should let the private sector perform commercial activities.<sup>45</sup> “[C]ompetitive sourcing complies with OMB Circular A-76. Public-private competitions under the Circular can only be conducted on activities performed by government personnel.”<sup>46</sup> Although competitive sourcing allows internal suppliers (government employees) to compete, it does not provide for former government employees to later compete to get their jobs back.<sup>47</sup> Under competitive sourcing, government employees could create a Most Efficient Organization (MEO) and demonstrate that they could perform the specific function more cheaply than a contractor and thus earn the right to continue in their jobs.<sup>48</sup>

The OMB renamed competitive sourcing to “commercial services management” in early 2008 “to recognize that agencies improve the operation of their commercial functions using a variety of techniques.”<sup>49</sup> Commercial services management thus goes beyond competitive sourcing.<sup>50</sup> Under competitive sourcing, only certain governmental functions are examined for the public-private competition.<sup>51</sup> Commercial services management, however, goes beyond such public-private competitions or conversions to “track agencies’ business process reengineering (BPR) efforts that rely on disciplined management practices.”<sup>52</sup> Under competitive sourcing, the “savings” were limited to those jobs and functions the MEO and private

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<sup>45</sup> AM. B. ASS’N, *supra* note 36, at 275 (referencing Circular A-76, ¶ 4.a. (1999)).

<sup>46</sup> ROSTKER, *supra* note 35, at 3 n.5. Thus, technically, competitive sourcing could be viewed as differing from outsourcing. According to a Rand study, competitive sourcing allows internal *and* external suppliers to compete to provide services; outsourcing only looked to external suppliers for cheaper services. RAND RESEARCH BRIEF, *supra* note 44, at 2.

<sup>47</sup> OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES 5 (Mar. 1996 (updated through Transmittal Memorandum 20, June 1999)) [hereinafter OMB REVISED SUPPLEMENTAL HANDBOOK].

<sup>48</sup> RAND RESEARCH BRIEF, *supra* note 44.

<sup>49</sup> Memorandum from Clay Johnson III, Deputy Director for Management, OMB, to President’s Management Council, subject: Plans for Commercial Services Management (July 11, 2008) [hereinafter Johnson 2008 Memo], *available at* <http://share76.fedworx.org> (search for “plans for commercial services management”).

<sup>50</sup> *Id.*

<sup>51</sup> Memorandum from Executive Office of the President, OMB, to Heads of Executive Departments and Establishments, subject: Performance of Commercial Activities, Circular No. A-76, at 6 (Aug. 4, 1983) (Revised 1999), *available at* <http://www.whitehouse.gov/omb/rewrite/Circulars/a076/a076.html>.

<sup>52</sup> *Id.*

contractor competed to perform.<sup>53</sup> Conversely, commercial services management considers the “savings,” even from those functions that will always remain in-house, by implementing cost saving measures similar to those from an MEO.<sup>54</sup> Commercial services management, therefore, forces government agencies to examine whether they can more efficiently reorganize or restructure *all* government functions, whether suitable for contracting out or not. Thus, government officials expect commercial services management “to continue strengthening the acquisition workforce and improving the management and oversight of federal contractors.”<sup>55</sup>

## B. Overview of the A-76 Process

*Unlike the public sector, the private sector is bred for efficiency. Left to its own devices, it will always find the means to provide services faster, cheaper, and more effectively than will governments.*<sup>56</sup>

That theory drove the push for competitive sourcing and created the system to analyze whether the private sector can outperform the federal government.<sup>57</sup> Under the A-76 circular, OMB established the policy and procedures for determining whether certain “activities are best provided by the private sector, by government employees, [or] by another agency through a fee-for-service agreement.”<sup>58</sup> The A-76 cost comparison process has two parts.<sup>59</sup> Part one looks at the various governmental functions to determine whether the function is 1) inherently governmental and must remain in-house, or 2) a commercial activity that could be performed outside the federal government.<sup>60</sup>

OMB defines an “inherently governmental” function as follows:

a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying

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<sup>53</sup> See generally GEN. ACCT. OFF., COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE 6 (Feb. 2004) (discussing GAO’s findings regarding competitive sourcing).

<sup>54</sup> Johnson 2008 Memo, *supra* note 49, para. 2.

<sup>55</sup> *Id.* para. 5.

<sup>56</sup> CARAFANO, *supra* note 21, at 37.

<sup>57</sup> Share A-76! and CMS, *supra* note 43.

<sup>58</sup> Share A-76! and CMS, *supra* note 43.

<sup>59</sup> See generally GAO FINAL REPORT, *supra* note 9, at 16-18 (discussing the A-76 process).

<sup>60</sup> Carl Peckinpugh, *Keep Outsourcing Apolitical*, FED. COMPUTER WK. (Jan. 21, 2001), available at [http://www.fcw.com/print/7\\_2/news/72562-1.html](http://www.fcw.com/print/7_2/news/72562-1.html).

Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.<sup>61</sup>

In 1998, Congress passed the Federal Activities Inventory Reform (FAIR) Act.<sup>62</sup> The FAIR Act requires executive agencies to conduct an accounting each year for all non-inherently governmental functions performed by federal employees and submit them to OMB.<sup>63</sup> Additionally, the agencies must assess all inherently governmental activities performed by federal employees, and the resulting lists are known as “FAIR Act Inventories.”<sup>64</sup> Once OMB reviews and approves an agency’s inventory, the agency must post it on its public web site.<sup>65</sup> The lists reflect activities or functions—not specific positions or job titles, reflecting that one employee could perform both inherently governmental and commercial activities.<sup>66</sup> As part of a system to maintain government accountability, an interested party can contest a particular activity’s inclusion on or exclusion from the list.<sup>67</sup> The FAIR Act also requires the head of each executive agency to use the A-76 process when considering whether to contract with a private sector source to perform the commercial activity.<sup>68</sup>

Part two of the A-76 cost comparison process requires an agency to complete the following six steps in the cost comparison.<sup>69</sup>

1. Create a performance work statement (PWS)<sup>70</sup> that identifies the agency’s technical, functional, and performance requirements.<sup>71</sup>

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<sup>61</sup> OMB Policy Letter 92-1, To the Heads of Executive Agencies and Departments, subject: Inherently Governmental Functions, Sep. 23, 1992, Allan V. Burman, Administrator, [http://www.whitehouse.gov/omb/rewrite/procurement/policy\\_letters/92-1\\_092392.html](http://www.whitehouse.gov/omb/rewrite/procurement/policy_letters/92-1_092392.html)

<sup>62</sup> Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105–270, 112 Stat. 2382 (1998) (codified as amended at 31 U.S.C. § 501 (2006)).

<sup>63</sup> FAIR Act § 2(a).

<sup>64</sup> Share A-76! And CMS, *supra* note 43, (regarding the question, “How do government employees know whether they are performing commercial or inherently governmental activities?”).

<sup>65</sup> FAIR Act § 2(b)-(c).

<sup>66</sup> Share A-76! and CMS, *supra* note 43 (regarding the question, “How do government employees know whether they are performing commercial or inherently governmental activities?”) (last visited Feb. 20, 2009).

<sup>67</sup> FAIR Act § 3.

<sup>68</sup> *See* FAIR Act § 2(d).

<sup>69</sup> GAO FINAL REPORT, *supra* note 9, at 16.

<sup>70</sup> *Id.*

<sup>71</sup> 1999 OMB CIR. A-76, *supra* note 24, at D-7.

2. Develop a Government Management Plan to determine the government's MEO.<sup>72</sup>

3. Independently develop a cost estimate for in-house performance.<sup>73</sup>

4. Issue a solicitation, under the provisions of the Federal Acquisition Regulation (FAR), for private sector offers.<sup>74</sup> The solicitation must follow the FAR provisions governing federal procurements because if the private sector wins the competition, the company will be awarded a contract to perform the service.<sup>75</sup>

5. Conduct the cost comparison between the best private offeror and the in-house estimate and select the lower cost alternative.<sup>76</sup>

6. Process any appeals.<sup>77</sup>

Although all six steps are vital to the A-76 process, the MEO step warrants additional explanation. The MEO—the government's in-house organization set up to perform a commercial activity<sup>78</sup>—stems from the management plan and is based upon the PWS for the competed activity.<sup>79</sup> The management plan identifies the organizational structures; staffing and operating procedures; equipment; and transition and inspection plans the in-house activity will need to perform efficiently and cost effectively.<sup>80</sup> For example, the MEO may be the current organizational structure or a completely reorganized one.<sup>81</sup> The MEO may consist entirely of federal employees or a combination of federal employees and contracted support.<sup>82</sup> If the MEO wins the competition, the government must conduct a post-award review to confirm that the MEO followed the transition plan, verify the MEO's ability to perform according to the PWS and to substantiate that actual costs are within the in-house estimates.<sup>83</sup>

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<sup>72</sup> GAO FINAL REPORT, *supra* note 9, at 16.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*; see CARAFANO, *supra* note 21, at 73.

<sup>77</sup> GAO FINAL REPORT, *supra* note 9, at 16.

<sup>78</sup> OMB REVISED SUPPLEMENTAL HANDBOOK, *supra* note 47, at 36.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *See generally id.* at 11-14 (discussing the organization of the MEO).

<sup>82</sup> *Id.* at 36.

<sup>83</sup> *Id.*

### C. Outsourcing and the Pendulum

“Deciding whether to outsource work or do it in-house [has been] one of the most contentious issues in government contracting,”<sup>84</sup> and as a result, outsourcing has repeatedly transformed both in form and substance.<sup>85</sup> Remarkably, however, the government’s policy has remained essentially unchanged since 1955,<sup>86</sup> despite the numerous changes of administration and political party.<sup>87</sup> The Congressional viewpoint has typically been non-partisan, in that everyone generally agrees that the government should spend taxpayer money wisely.<sup>88</sup>

Between 1978 and 1994, the Department of Defense (DOD) conducted more than 2100 public-private competitions using the A-76 process and procedures.<sup>89</sup> However, beginning in 1988 the number of A-76 studies began to decline substantially, as several legislative provisions limited DOD’s outsourcing efforts.<sup>90</sup> In 1988, a law known as the “Nichols Amendment,” gave installation commanders the authority to determine whether to conduct A-76 studies until 1995.<sup>91</sup> Many commanders chose not to, citing factors such as “disruptions to

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<sup>84</sup> Peckinpaugh, *supra* note 60. After all, while *someone* will perform the work under any scheme, it is not easy nor politically palatable to tell government employees that they will lose their jobs.

<sup>85</sup> After its original issue in 1955, the policy first appeared in its current A-76 form on 3 March 1966, during Lyndon Johnson’s presidency. CARAFANO *supra* note 21, at 73. It has been changed four times: in 1967, 1979, 1983, and 2003. AM. B. ASS’N, *supra* note 36, at 275. In 1979, OMB issued a “Supplemental Handbook,” which spelled out the complex details on conducting competitions. OMB also revised the handbook three times: in 1983, 1996, and again in 1999. Finally, the handbook was abandoned with the current OMB Circular A-76, published on 29 May 2003. ROSTKER, *supra* note 35, at 3, n.3.

<sup>86</sup> *Id.*

<sup>87</sup> See generally Peter Levine, Gen. Couns., S. Armed Services Comm., the 25th Annual Cuneo Lecture at The Judge Advocate General’s Legal Center and School, U.S. Army (TJAGLCS), 2008 Contracts and Fiscal Law Symposium (Dec. 5, 2008) (video recording available from TJAGLCS) (discussing how the policy remained consistent through administration changes).

<sup>88</sup> *Id.* (discussing that differences in viewpoints typically occur between different committees or between the House and Senate rather than along political party lines).

<sup>89</sup> *Defense Outsourcing, Challenges Facing DOD as It Attempts to Save Billions in Infrastructure Costs: Hearings Before the Subcomm. on Readiness of the H. Comm. on National Security*, 105th Cong. 7 (Mar. 12, 1997) [hereinafter *Hearings on Readiness*] (testimony of David R. Warren, Director, Defense Management Issues, National Security and International Affairs Division).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (“[T]he first provision, contained in the National Defense Authorization Act for fiscal years 1988-89 (P.L. 100-180), gave authority to installation commanders to determine whether to study activities for potential outsourcing. . . . [Act was later] codified at 10 U.S.C. 2468, was effective through September 30, 1995.”)

their workforce, the cost of conducting studies, and a desire for more direct control of their workforce.”<sup>92</sup>

In addition, Section 8087 of the fiscal year 1991 DOD Appropriations Act prohibited funding for A-76 studies exceeding 24 months.<sup>93</sup> This was followed by provisions in the DOD Authorization Acts for fiscal years 1993 and 1994, sections 312 and 313 respectively, prohibiting the DOD “from entering into contracts resulting from cost studies done under OMB Circular A-76.”<sup>94</sup> As a result, DOD imposed a moratorium on A-76 studies, canceling roughly 75 percent of ongoing studies.<sup>95</sup> In April 1994 the prohibition expired, and the department later lifted the moratorium.<sup>96</sup>

In 1996, the OMB revised its supplemental handbook to streamline the outsourcing process.<sup>97</sup> The revised process attempted to “capture the benefits of the tradeoff process, while maintaining the perceived objectivity of a cost-only selection.”<sup>98</sup> The agency now had to “measure the selected private-sector proposal against the MEO and . . . if the two do not offer the same level of performance and quality,” the agency had to adjust the MEO’s proposal.<sup>99</sup> Only after that adjustment was made could the agency complete the cost-only comparison to select the winner.<sup>100</sup>

Throughout the 1990s, numerous other legislative provisions impacted outsourcing, including 10 U.S.C. § 2464, which required the DOD to maintain the logistical resources and technical competence to effectively and timely respond to any contingency or national defense emergency.<sup>101</sup> Only the Secretary of Defense could grant a waiver to allow contracting that function out.<sup>102</sup> Additionally, 10 U.S.C. § 2461 required A-76 cost comparisons in order to outsource, Congressional

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<sup>92</sup> *Id.*

<sup>93</sup> Department of Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511 § 8087, 104 Stat. 1896 (1990); *see also Hearings on Readiness, supra* note 89, at 7.

<sup>94</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484 § 312, 106 Stat. 2315, 2365 (1992) (prohibiting service contracts for commercial activities resulting from A-76 studies); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 § 313, 107 Stat. 1547, 1619 (1993) (prohibiting certain cost comparison studies); *see also Hearings on Readiness, supra* note 89, at 7.

<sup>95</sup> *Hearings on Readiness, supra* note 89, at 7.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 8.

<sup>98</sup> GAO FINAL REPORT *supra* note 9, at 42.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* A leveling process is, for the most part, antithetical to FAR procurements, and agencies sometimes failed to implement it, leading to sustained GAO protests. *See id.*

<sup>101</sup> *Hearings on Readiness, supra* note 89, at 23; *see* DEPOT MAINTENANCE: OPPORTUNITIES TO PRIVATIZE REPAIR OF MILITARY ENGINES 6, 9, 18, and 21 (Mar. 5, 1996) (GAO/NSIAD-96-33); *see also* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 105-85 § 356, 111 Stat. 1629, 1694 (1997) (codified at 10 U.S.C. § 2464 (2006)).

<sup>102</sup> *Id.*

notification of most studies, and annual reports to the Congress on outsourcing.<sup>103</sup> Moreover, 10 U.S.C. § 2465 prohibited the DOD from outsourcing civilian firefighter or security guard positions after September 1983.<sup>104</sup> As discussed earlier, the FAIR Act of 1998<sup>105</sup> forbade the government from outsourcing any inherently governmental function.<sup>106</sup>

As the new millennium began, Congress continued to influence the process but now shifted the balance in favor of outsourcing. Section 832 of the National Defense Authorization Act for Fiscal Year 2001<sup>107</sup> required the Comptroller General to convene a panel to study transferring commercial activities from performance by federal employees to performance by contractors.<sup>108</sup> “[T]he Panel was to consider procedures for determining whether functions should continue to be performed by government personnel, and for comparing the cost of performance of functions by government personnel with the cost of the functions by contractors.”<sup>109</sup> Part of the panel’s purpose was to create a process that reflected “a balance among taxpayer interests, government needs, employee rights, and contractor concerns.”<sup>110</sup> Congress also

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<sup>103</sup> See 10 U.S.C. § 2461 (2006) (mandating Congressional notification if the competition involves ten or more civilian employees). The numerous legislative changes in this area attest to outsourcing’s status as a hot political issue. See *Hearings on Readiness*, *supra* note 89, at 24; see Department of Defense Authorization Act, 1983, Pub. L. No. 97-252 § 112, 96 Stat. 718, 747 (1982); see also Department of Defense Authorization Act, 1981, Pub. L. No. 96-342 § 502, 94 Stat. 1077, 1086 (1980) (requiring studies involving competitions of fifty or more civilian employees); Department of Defense Authorization Act, 1983, Pub. L. No. 97-252 § 112, 96 Stat. 718, 747 (1982) (requiring studies involving competitions of ten or more civilian employees); Department of Defense Authorization Act, 1986, Pub. L. No. 99-145 § 1234, 99 Stat. 583, 734 (1985) (requiring studies involving competitions of forty or more civilian employees); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661 § 1221, 100 Stat. 3816, 3976 (1986) (requiring studies involving competitions of forty-five or more civilian employees). The language of 10 U.S.C. § 2461 currently requires Congressional notification if the competition involves ten or more civilian employees.

<sup>104</sup> See 10 U.S.C. § 2465 (2006); see also *Hearings on Readiness*, *supra* note 89, at 24 (“DOD’s fiscal year 1996 inventory of civilian and military personnel performing commercial activities show[ed] that about 9,600 firefighters and 16,000 security guards [were] exempt from outsourcing because of this law and other considerations, such as mobility requirements.”).

<sup>105</sup> See discussion *supra* Section II.B. FAIR Act 1998, Pub. L. No. 105-270, 112 Stat. 2381 (1998) (codified as amended at 31 U.S.C. § 501 (2006)); see also CARAFANO, *supra* note 21, at 75.

<sup>106</sup> VALERIE BAILEY GRASSO, CONG. RES. SERV. REP., DEFENSE OUTSOURCING: THE OMB CIRCULAR A-76 POLICY 3 (2003).

<sup>107</sup> National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398 § 832, 114 Stat. 1654, 1654A-221 (2000).

<sup>108</sup> GAO FINAL REPORT, *supra* note 9, at 32.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

directed the panel to study the DOD's implementation of the FAIR Act and A-76 cost comparison procedures.<sup>111</sup>

In 2002, then-President Bush's Management Agenda identified competitive sourcing as one of its five government-wide initiatives,<sup>112</sup> placing "a new emphasis on selection of the best service provider, public or private."<sup>113</sup> President Bush stated that it was the administration's policy to "achieve efficient and effective competition between public and private sources . . . to better publicize the activities subject to competition and to ensure senior level agency attention to the promotion of competition."<sup>114</sup> To accomplish this policy objective, the Bush Administration set a goal of completing public-private or direct conversion competitions for at least five percent of the executive branch's full-time equivalent positions.<sup>115</sup>

However, Congress once again stepped in and began to swing the pendulum back away from the perceived presidential move to outsourcing. In the 2003 National Defense Authorization Act (NDAA) Congress again imposed notice requirements for A-76 conversion studies and prevented DOD from converting to contractors until after reporting the findings to Congress.<sup>116</sup> Then the 2004 NDAA prevented

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<sup>111</sup> *Id.* The panel concluded that the system offered advantages yet suffered from some valid criticisms. Advantages included the following: (1) establishing procedural rules intended to "ensure that sourcing decisions are based on uniform, transparent, and consistently applied criteria"; (2) enabling "federal managers to make cost comparisons between sectors that have vastly different approaches to cost accounting"; and (3) achieving "significant savings and efficiencies for the government," with savings of 20 percent or more regardless of outcome. *Id.* at 9-10. On the other hand, the panel "heard criticism of the A-76 process as being slow, too complicated, unfair to either or both sectors, and causing needless distress to federal workers." *Id.* at 10.

In the Panel's view, however, the most serious shortcoming of the A-76 process is that it has been stretched beyond its original purpose, which was to determine the low-cost provider of a defined set of services. Circular A-76 has not worked well as the basis for competitions that seek to identify the best provider in terms of quality, innovation, flexibility, and reliability.

*Id.*

<sup>112</sup> ROSTKER *supra* note 35, at 3; see OFF. OF MGMT. & BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, 17 [hereinafter FY02 PRESIDENT'S MANAGEMENT AGENDA], available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>. The other four were strategic management of human capital, improved financial performance, expanded electronic government, and budget and performance integration. FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 4.

<sup>113</sup> ROSTKER, *supra* note 35, at 3.

<sup>114</sup> *Id.*; see also FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 17.

<sup>115</sup> ROSTKER *supra* note 35, at 3; see FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 18.

<sup>116</sup> National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314 § 331, 116 Stat. 2458, 2512 (2002).

any further A-76 studies until 45 days after the Secretary of Defense submitted a report to Congress on the effects of the 2003 OMB revision to the A-76 process.<sup>117</sup> Additionally in 2004, Congress directed a pilot program for high-performing organizations,<sup>118</sup> organizations that “focus on achieving results and outcomes, and [where] a results-oriented organizational culture is fostered to reinforce this focus.”<sup>119</sup> While these high-performing organizations were exempt from the A-76 competition, the savings that occurred from the related business reorganizations were credited to the public-private competition goals.<sup>120</sup>

In the 2005 NDAA, Congress partially lifted the A-76 moratorium. The law still prevented DOD from contracting out a function unless contractor performance would save the lesser of \$10 million or “10 percent of the most efficient organization’s personnel related costs for performance of the activity or function by civilian employees.”<sup>121</sup> If this standard was not met, an agency could not convert work to private-sector performance “even if the agency can demonstrate that private sector performance would provide a superior solution, when both cost and quality considerations are taken into account.”<sup>122</sup> A year later, Congress permanently codified the above limitation for the DOD.<sup>123</sup> Additionally, the 2006 NDAA required the Secretary of Defense to establish “guidelines and procedures for

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<sup>117</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136 § 335, 117 Stat. 1392, 1443 (2003).

<sup>118</sup> *Id.* § 337.

<sup>119</sup> GEN. ACC’T OFF., HIGH-PERFORMING ORGANIZATIONS: METRICS, MEANS, AND MECHANISMS FOR ACHIEVING HIGH PERFORMANCE IN THE 21ST CENTURY PUBLIC MANAGEMENT ENVIRONMENT (Feb. 2004), *available at* <http://www.gao.gov/new.items/d04343sp.pdf>.

[The report] identified key characteristics and capabilities of high-performing organizations that support this results-oriented focus, which include having a clear, well-articulated, and compelling mission, strategically using partnerships, focusing on the needs of clients and customers, and strategically managing people. High-performing organizations have a coherent mission, the strategic goals for achieving it, and a performance management system that aligns with these goals to show employees how their performance can contribute to overall organizational results.

*Id.*

<sup>120</sup> *Id.*

<sup>121</sup> National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 327, 118 Stat. 1811, 1849 (2004).

<sup>122</sup> Memorandum from Clay Johnson III, Acting Director for Management, OMB, to Heads of Executive Departments and Agencies, subject: Competitive Sourcing under Section 842(a) of Public Law 109-115 para. 2 (Apr. 24, 2006) [hereinafter Johnson 2006 Memo], *available at* <http://www.whitehouse.gov/omb/memoranda/fy2006/m06-13.pdf>.

<sup>123</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (2006).

ensuring that consideration is given to using Federal Government employees for work that is currently performed or would otherwise be performed under Department of Defense contracts.”<sup>124</sup> The section did not mandate insourcing but did require DOD to consider returning to performance by government employees when a contract has been “poorly performed due to excessive costs or inferior quality.”<sup>125</sup> While the 2006 NDAA simply directed DOD to ensure federal employees receive consideration for work currently or potentially performed by contractors, more recent legislation continued the swing away from hiring contractors to perform government functions.<sup>126</sup>

#### D. Current Law

Current legislation has nearly completed the pendulum swing and is set to undo the past five decades of government outsourcing. The 2008 National Defense Authorization Act returned government policy to its pre-Eisenhower state.<sup>127</sup> Specifically, Section 324 of the 2008 NDAA provided revised guidelines on “Insourcing New and Contracted Out Functions.” It required the DOD to regularly consider using civilian employees to perform functions and functions currently performed by contractors—without “limitation or restriction on the number of functions or activities” that could be brought back in-house.<sup>128</sup> Section 324 also challenged the 2003 rewrite of A-76 by significantly limiting the categories of functions considered appropriate candidates for outsourcing.<sup>129</sup> The 2003 rewrite opened the door to contracting out additional functions as long as the activities were not “substantially inherently governmental.”<sup>130</sup> However, Section 324 carved out “special consideration” for insourcing any function even

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<sup>124</sup> National Defense Authorization Act for Fiscal Year 2006, § 343. In this same section, Congress pointed to the flexible hiring authority of the National Security Personnel System (NSPS) as a tool to bolster performance of work by federal employees instead of contractors. *Id.* § 343(b).

<sup>125</sup> *Id.* § 343(a)(2)(D).

<sup>126</sup> Compare National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181 § 324, 122 Stat. 3, 60 (2008) with National Defense Authorization Act for Fiscal Year 2006, § 343.

<sup>127</sup> See National Defense Authorization Act for Fiscal Year 2008, § 324. In a report on competitive sourcing for calendar year 2007, OMB noted the number of positions competed had declined and asserted that “this decrease is due, in large part, to legislative actions that block or otherwise defund competitions.” The OMB noted the Consolidated Appropriations Act, FY 2008, P.L. 110-161, contained at least eight provisions addressing competitive sourcing. OFFICE OF MGMT. & BUDGET, COMPETITIVE SOURCING, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2007, at 7 (May 2008) [hereinafter OMB 2007 REPORT].

<sup>128</sup> *Id.* (codified at 10 U.S.C.S. § 2463 (2009)).

<sup>129</sup> ROSTKER *supra* note 35, at 13.

<sup>130</sup> *Id.*

“closely associated with the performance of an inherently governmental function.”<sup>131</sup> Cost issues aside, this “special consideration” grew out of concerns that contractors were taking on functions that, while not themselves inherently governmental, provided the type of support that could impact government decision making, policy development and program management—without adequate government supervision or oversight.<sup>132</sup>

Additionally, Section 322 was modified to change the competition requirements<sup>133</sup> and reduce any advantage a contractor might gain by offering reduced employee benefits. Specifically, Section 322 excluded health care and retirement costs from the commercial sourcing cost comparison “if the contractor’s contribution towards its employees’ benefits is less than what the Congress requires . . . [DOD] to contribute for the benefits of federal civilian employees.”<sup>134</sup> Section 322 did not “require contractors to provide the same level of health and retirement benefits” as DOD but did offer them “full credit” for using benefit plans such as health-savings accounts, 401(k) plans and profit-sharing arrangements.<sup>135</sup>

The 2008 NDAA contained three other provisions that pulled back the outsourcing pendulum. Section 326 gave federal employees an additional appeal right to have the Government Accountability Office (GAO) review any decisions to contract out, providing another avenue to stop outsourcing.<sup>136</sup> Section 323 removed the requirement to

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<sup>131</sup> National Defense Authorization Act for Fiscal Year 2008, § 324.

<sup>132</sup> See ROSTKER *supra* note 35, at 4 (describing the results of a GAO audit into outsourcing professional and management support services).

<sup>133</sup> H.R. REP. NO. 110–146, at 308 (2007) (discussing H.R. 1585 relating to the FY 08 NDAA).

<sup>134</sup> *Id.* at 307. The 2008 National Defense Authorization Act repealed 10 U.S.C. § 2467, which provided for the inclusion of retirement costs. See National Defense Authorization Act for Fiscal Year 2008, § 322.

<sup>135</sup> H.R. REP. NO. 110–146, at 307–8 (discussing the relation of H.R. 1585 to the FY08 NDAA § 322).

<sup>136</sup> National Defense Authorization Act for Fiscal Year 2006, § 326 (codified at 10 U.S.C. § 2465 (2006)).

Section 326 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108–375) allow[ed] an appeal to be filed on behalf of federal employees by an Agency Tender Official (ATO), a senior procurement official acting on behalf of the employees, only in A-76 competitions [involving more than 65 full time equivalents]. However, the committee [was] concerned that federal employees may not be adequately represented and question[ed] whether an agency tender official would have sufficient resources to employ qualified counsel. Furthermore, the committee notes that there are many instances in which there is no ATO at all, such as in a streamlined OMB Circular A-76 competition, which can include up to 65 employees.

recompete work where the public-private competition favored federal employees, removing federal employees from a cycle of continuous competition.<sup>137</sup> Finally, Section 327 applied the DOD requirement to conduct public-private competitions before contracting out functions performed by ten or more civilians to the entire government.<sup>138</sup>

One piece of proposed legislation absent from the final 2008 NDAA further demonstrates Congress's intent to reel in outsourcing. Section 328 of the House version of the bill prohibited OMB from assigning any mandatory quotas to DOD for A-76 competitions.<sup>139</sup> The committee report revealed concern that OMB continued to impose competition quotas throughout the federal government but also pointed out that this section would not prohibit DOD from conducting A-76 reviews. "However, such decisions must be made independently of any direction or requirement from OMB."<sup>140</sup> Ultimately, this language was removed, leaving only a requirement that the Secretary of Defense ensure any competitions follow the regulations.<sup>141</sup>

Addressing the current state of the law requires a look at the Obama administration's position and how the law may be changed. Just before the 2008 election, one commentator predicted a shift from the Bush administration's emphasis on privatization.<sup>142</sup> Obama's campaign platform included a vow to save billions of dollars each year by cutting government contracts.<sup>143</sup>

The past two administrations have faced the dilemma of providing more federal services efficiently without expanding government. They tackled these issues differently—Bush through a greater dependence on the private sector and Clinton through streamlining the size

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H.R. REP. NO. 110-146, at 308 (2007). The 2008 NDAA gave federal employees the right to file a protest through any appointed representative, not just the ATO, and the appeal was not limited to functions involving 65 or more full time equivalents. National Defense Authorization Act for Fiscal Year 2008, § 326.

<sup>137</sup> H.R. REP. NO. 110-146, at 308 (2007); *see also* National Defense Authorization Act for Fiscal Year 2008, § 323 (codified at 10 U.S.C. § 2462).

<sup>138</sup> H. ARMED SERVICES COMM. REP. NO. 110-146 § 330 (2007); *see* National Defense Authorization Act for Fiscal Year 2008, § 327 (codified at 10 U.S.C. § 2466 (2006)); *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (codified at 10 U.S.C.S. 2461 (2006)).

<sup>139</sup> *Id.* at 308.

<sup>140</sup> *Id.*

<sup>141</sup> H.R. REP. NO. 110-477, 878 (2007) (regarding § 325); *see* National Defense Authorization Act for Fiscal Year 2008, § 325 (stating generally that OMB cannot require A-76 studies).

<sup>142</sup> Robert Brodsky, *Great Expectations*, GOV'T EXECUTIVE.COM, (Oct. 1, 2008), <http://www.govexec.com/features/1008-01/1008-01s1.htm> (last visited Dec. 3, 2009).

<sup>143</sup> *Id.*

of the federal workforce—but the results were the same:  
more contractors . . . .<sup>144</sup>

Obama campaign officials said he supports scaling back some privatization initiatives and restoring balance between in-house efforts and outsourcing. While he had not then determined whether to continue the Bush administration's competitive sourcing agenda, he pledged to "end the abuse in contracting."<sup>145</sup>

While the pendulum swing favoring insourcing will likely survive through the new administration, after a year in office, President Obama has not signaled that he is ready to give up on outsourcing. Although he signed the 2009 Omnibus Appropriations Act, which prevents funds from being used to begin or announce A-76 studies or competitions,<sup>146</sup> he has not taken any executive actions to terminate the A-76 process.<sup>147</sup> However, he has required each of the government's largest contracting agencies to identify "at least one pilot initiative where potential overreliance on contractors may be affecting performance and [to] take steps, as part of these pilots, to determine the best mix of in-house and contractor skills and workforce size to help the organization operate at its best."<sup>148</sup> The DOD and six other agencies are studying outsourcing of acquisition functions, while another nine agencies are studying information management support.<sup>149</sup>

### III. BENEFITS OF OUTSOURCING?

Allowing the private sector to assume functions performed by government personnel began as a means to reduce the size of the government.<sup>150</sup> However, the overriding reason to conduct outsourcing, competitive sourcing or commercial services management is simple—to save the government money. The competition requires the government to first examine what functions it is performing and focus on what its

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> David Alexander, *Obama Signs Big Spending Bill Despite Earmarks*, WASH. POST, Mar. 11, 2009, available at <http://www.reuters.com/article/idUSTRE52A4H020090312>; see H.R. 1105, 111th Cong. Div. D, Title VII, § 737 (2009) (the Omnibus Appropriations Act, 2009 bill was approved by the Senate).

<sup>147</sup> See Presidential Executive Orders, available at <http://www.whitehouse.gov/briefing-room/presidential-actions/> (last visited Nov. 17, 2009).

<sup>148</sup> OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 2; see also Memorandum from President Barack Obama, to the Heads of Executive Departments and Agencies, subject: Government Contracting, 74 Fed. Reg. 9,755 (Mar. 4, 2009) [hereinafter Obama Memo] ("Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.").

<sup>149</sup> OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 9.

<sup>150</sup> ROVERE, *supra* note 22, at 74-75; CARAFANO, *supra* note 21, at 5 (citing MARTIN J. MEDHURST, EISENHOWER'S WAR OF WORDS: RHETORIC AND LEADERSHIP 294 (1994)).

mission really is, as well as forcing the government to determine how to most efficiently use its resources and the best way to organize to perform necessary functions.<sup>151</sup>

#### A. Cost Savings

Financial savings are crucial as the federal government, especially the DOD, fights for scarce spending dollars.<sup>152</sup> Two advisory boards—the Commission on Roles and Missions (CORM) and the Defense Science Board (DSB)—“have made outsourcing and privatization the centerpiece of their reforms to reduce infrastructure and support costs.”<sup>153</sup>

In 1995 the CORM report “recommended that [DOD] outsource or privatize all current and newly established commercial-type support services,” a move that could save an estimated \$3 billion a year.<sup>154</sup> Similarly, in 1996, the DSB recommended DOD restructure its support framework “by maximizing the use of the private sector for almost all support functions.”<sup>155</sup> According to the DSB, doing so could reduce defense infrastructure costs by more than \$30 billion annually by the year 2002.<sup>156</sup>

The GAO also agreed that outsourcing could achieve substantial savings, concluding that “outsourcing is cost-effective because the competitions generate savings—usually through a reduction in personnel—whether the competition is won by the government or the private sector.”<sup>157</sup> Based on these reports and studies, the DOD moved forward with private-public competitions.

The Department of Defense had a “goal to save billions of dollars by outsourcing work to the private sector and through other initiatives.”<sup>158</sup> In fiscal year 1997, the Department of Defense estimated it would spend almost two thirds of its budget, nearly \$146 billion, on

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<sup>151</sup> See Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. OF CONT. MGMT. 13 (Summer 2008); see also ROVERE, *supra* note 22, at 74-75.

<sup>152</sup> See GRASSO, *supra* note 106, at 2.

<sup>153</sup> *Hearings on Readiness*, *supra* note 89, at 1. The CORM provided a report on the roles and missions of the Department of Defense focusing on the needs of the commanders in chief and recommended a more vigorous reliance on the private sector for services in order to restructure the DOD Support organizations and not perform services unless they needed to be performed by the government. The DSB advises the Pentagon on scientific, technical, manufacturing, and acquisition processes of special interest to the Department of Defense.

<sup>154</sup> *Hearings on Readiness*, *supra* note 89, at 16.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* The dramatic difference between the two cost-savings estimates illustrates the often tenuous nature of such predictions, as this article discusses later.

<sup>157</sup> *Hearings on Readiness*, *supra* note 89, at 16-17.

<sup>158</sup> *Id.* at 1.

operations and support activities, which generally included installation and infrastructure maintenance, generalized training, health care, equipment repair and spare-part inventories.<sup>159</sup> The DOD viewed these support activities as offering the greatest potential for savings.<sup>160</sup> By reducing the size of the steady force needed, DOD would then decrease the cost of feeding, lodging, and caring for the force. Contracting out for support services only as needed would slash not just the force size but the cost to maintain that force and its necessary equipment.<sup>161</sup>

A few years later, a RAND study of competitive sourcing further supported the government's cost savings argument.<sup>162</sup> The study examined personnel costs for several DOD public-private competitions between 1989 and 1996, comparing bidders' proposed costs with actual expenses and assessing contractors' planned cost-cutting methods.<sup>163</sup>

According to the study, most bidders accurately projected personnel cost savings, which tended to run about 30 to 60 percent. Winning bidders obtained most of these savings by using fewer people, and they maintained those lower personnel costs over time.<sup>164</sup> Cost savings also occurred from eliminating unnecessary duplication of effort so common in government. "New programs are frequently created with little review or assessment of the already-existing programs to address the same perceived problem. Over time, numerous programs with overlapping missions and competing agendas grow up alongside one another—wasting money and baffling citizens."<sup>165</sup>

More recent reports bolster the financial argument. The OMB released a Report on Competitive Sourcing Results in 2008 estimating that, over the life of the contracts, taxpayers would save more than \$7.2 billion from A-76 efforts during the 2003 to 2007 fiscal years.<sup>166</sup> A 2007 study on the need for reform in Army contracting lauded competitive sourcing. "As a result of this progress in Defense personnel policies, each of the Services has outsourced tasks previously performed by personnel in uniform . . . and done so at significant savings to the

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See U.S. Defense Science Board, *Report of the Defense Science Board Task Force on Outsourcing and Privatization* 1A, 6A, 17-17A, 28A (August 1996); see CARAFANO, *supra* note 21, at 43.

<sup>162</sup> RAND RESEARCH BRIEF, *supra* note 42, at 1.

<sup>163</sup> *Id.* (discussing Susan M. Gates & Albert A. Robbert, *Personnel Savings in Competitively Sourced DoD Activities: Are They Real? Will They Last?* (2000)).

<sup>164</sup> *Id.* Despite the savings, the study expressed doubt that "without significant managerial and organizational changes, the Pentagon [could apply] lessons it has learned in these initial competitive sourcing experiences to large segments of its uniformed and civilian workforce." *Id.*

<sup>165</sup> FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 3.

<sup>166</sup> OMB 2007 REPORT, *supra* note 127, at 4.

taxpayer.”<sup>167</sup> These savings came from competitive sourcing actions where the federal government team won more than half of the public-private competitions. “[J]ust because the government team won, does not mean there is not cost savings. Even if the in-house federal government team wins, there can be cost savings to the government because the competition improved how the government performed the function.”<sup>168</sup>

## B. A Better Product

Competition can do more than save money. The private sector may be able to perform the function better than the federal government.<sup>169</sup> “Outsourcing permits organizations to focus on what they do best . . . while relying upon other more efficient entities to provide the goods, services, and support necessary to do so.”<sup>170</sup> Militaries have relied on contractors to assist in conflict for nearly as long as there have been wars.<sup>171</sup> Now, more than ever, the military depends on contractors to perform food services, lodging management, and supply management.<sup>172</sup> “Experience suggests that privatization offers many potential benefits, including surge capacity, flexibility, innovation, and quite often, the ability to meet agency missions using limited government personnel, abilities, and resources.”<sup>173</sup>

The military has caps on the number of personnel, military and civilian, that it can maintain.<sup>174</sup> Contracting out some functions allows the limited number of government employees to focus on their primary mission, while the contractors can concentrate on and specialize in the contracted functions, learning to perform more efficiently with better end products. “In successful outsourcing arrangements, the vendor utilizes new technologies and business practices to improve service

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<sup>167</sup> REPORT OF THE COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING, 13-14 (Oct. 31, 2007) [hereinafter GANSLER REPORT].

<sup>168</sup> *Id.*

<sup>169</sup> See Schooner & Greenspahn, *supra* note 151, at 13.

<sup>170</sup> *Id.*

<sup>171</sup> See CARAFANO, *supra* note 21, at 14-28; see also GEN. ACC’T OFF., CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM 1-2 (Feb. 1997) [hereinafter LOGCAP Report] (noting that the Army used contractors extensively in Korean and Vietnam to boost logistical support).

<sup>172</sup> See Obama Memo, *supra* note 148 (memo discussing government contracting).

<sup>173</sup> Schooner & Greenspahn, *supra* note 151, at 13.

<sup>174</sup> CARAFANO, *supra* note 21, at 52-54. While the requirement to manage civilian personnel by end strengths was repealed with the Department of Defense Appropriations Act, 1991, P.L. 101-511 § 8016A, 104 Stat. 1856, 1878 (Nov. 1990), end strengths are still limited based on the funding of personnel accounts. *Id.* at 54-56.

delivery or reduce support costs.”<sup>175</sup> Competitive sourcing thus can do more with less—enhancing the military’s warfighting capabilities while saving the taxpayer money.<sup>176</sup>

#### IV. OUTSOURCING VS. INSOURCING—WHERE SHOULD THE PENDULUM STOP?

Despite increased effectiveness, improved capabilities and taxpayer savings, competitive sourcing ultimately fails for a number of reasons. The biggest drawbacks roughly correspond to benefits offered by insourcing. The anticipated cost savings turned out to be inflated at best and non-existent at worst. In some cases, outsourcing has actually cost the government more, in part because of an inability to properly manage the contracts and contractor personnel, and the recurring recompetition requirement. Insourcing, on the other hand, would not only reverse the financial roller-coaster but would allow the government to better control personnel while retaining in-house expertise.

##### A. Cost Savings?

With estimates ranging from \$3 billion to \$30 billion in savings, outsourcing sounded like a good deal during the past decades. Ironically, the same basic justification used to support outsourcing—lower cost—was recently touted as the reason for returning to in-house performance.<sup>177</sup> After passage of the 2008 NDAA, defense officials stated, “This new legislation should improve our ability to reduce costs and manage the Defense workforce.”<sup>178</sup> They issued implementing guidance to “help ensure that when DOD Components make decisions to use DOD civilian employees, the decisions are fiscally informed and

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<sup>175</sup> GRASSO, *supra* note 106, at 2 (quoting DEPT. OF DEF, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY, REPORT OF THE DEFENSE SCIENCE BOARD, TASK FORCE ON OUTSOURCING AND PRIVATIZATION 7a (Aug. 1996)).

<sup>176</sup> GANSLER REPORT, *supra* note 167, at 13-14.

<sup>177</sup> Compare 1999 OMB CIR. A-76, *supra* note 24, with Memorandum from Gordon England, the Deputy Undersecretary of Defense, to Secretaries of the Military Departments, et al., subject: Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA)—Guidelines and Procedures on In-sourcing New and Contracted Out Functions (4 Apr. 2008) (both outsourcing and insourcing use the claim of lower costs for support) [hereinafter England Memo], available at <http://prhome.defense.gov/docs/OSDIn-sourcingGuidance04184-08.pdf>. Admittedly, government contracts are a necessity. The government cannot produce everything it needs, and in certain instances commercial companies can provide the product or service more efficiently than the government itself. The problem arises when a government agency is forced to perform either insourcing or outsourcing

<sup>178</sup> England Memo, *supra* note 177, at 2.

analytically based.”<sup>179</sup> Similarly, when advocating insourcing, OMB echoed the rationale originally supporting outsourcing: “to ensure that commercial activities are performed by the best source at the lowest possible cost.”<sup>180</sup>

Public-private competitions have at times saved money—but outsourcing, in all its forms, never produced the cost savings and better products promised.<sup>181</sup> Reasons range from inherent difficulties in calculating the costs and resulting savings, to a failure to track the actual expenses, to short-term savings that led to long-term increases in cost. For example, the government is expected to become sufficiently “fiscally informed” to make “analytically based” decisions.<sup>182</sup> Utilizing the A-76 process, the government first determines what activity or function to potentially compete and what work it involves.<sup>183</sup> The next step is to determine the government in-house estimate: what it costs for government employees to do the work?<sup>184</sup>

The primary problem with the competitive process has been calculating the true cost of a DOD employee.<sup>185</sup> A computer program, COMPARE, considers everything from current pay and medical benefits to retirement and likely temporary duty costs when determining the government in-house estimate.<sup>186</sup> The calculation formulas can take into account a number of factors,<sup>187</sup> but including or removing certain factors can manipulate the ultimate results.<sup>188</sup>

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<sup>179</sup> *Id.* at 1-2.

<sup>180</sup> 1999 OMB CIR. A-76, *supra* note 24.

<sup>181</sup> See John C. Anderson, Force Management, Manpower and Resources, Office of the Assistant Secretary of the Army, Manpower and Reserve Affairs, Lecture at TJAGLCS 2008 Contracts and Fiscal Law Symposium: Insourcing (Dec. 4, 2008) (video recording available from TJAGLCS).

<sup>182</sup> England Memo, *supra* note 177, Attach. 2.

<sup>183</sup> GAO FINAL REPORT *supra* note 9, at 16.

<sup>184</sup> *Id.*

<sup>185</sup> See *id.*

<sup>186</sup> See OFFICE OF DEP’Y UNDER SEC’Y OF DEF. FOR INSTALLATIONS & ENVIRONMENT, HOUSING & COMPETITIVE SOURCING OFFICE, COMPARE USER MANUAL ¶ 2.5 (Mar. 31, 2009) [hereinafter COMPARE USER MANUAL], available at <http://www.compare76.com/>.

<sup>187</sup> The government cost estimate considers, among other expenses, personnel costs, material and supply costs, overhead costs, total cost of agency performance, private sector price or public reimbursable costs, contract administration costs, one-time conversion costs, gain from disposal or transfer of assets, federal income tax adjustment, total adjusted cost of private sector or public reimbursable performance, adjusted total cost of agency performance, adjusted total cost of private sector or public reimbursable performance, cost difference, and low-cost provider. *Id.* (demonstrating the extent to which all possible costs are attempted to be taken into account).

<sup>188</sup> See H.R. REP. NO. 110-146, 307 (2007) (discussing the repeal of 10 U.S.C. § 2467, which provided for the inclusion of retirement costs, the consultation of DOD employees in cost comparisons, and Congressional notification of cost comparison waivers, by Pub. L. No. 110-181 § 322 (FY08 NDAA)).

The ability to modify the calculations allows critics on both sides to complain about the system. “To compare the cost of in-house performance to private sector performance, detailed estimates of the full cost of government performance to the taxpayer have to be calculated. The development of these estimates has devolved into a contentious and rigid exercise in precision.”<sup>189</sup>

Labor unions, such as the American Federation of Government Employees (AFGE), have been among outsourcing’s most vocal foes.<sup>190</sup> The union’s argument against contracting out federal positions is that the federal government saves money by contracting work to employers who pay less than a living wage.<sup>191</sup> At the lower ranges of the pay scale, federal jobs have historically paid better and had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers.<sup>192</sup>

In response to criticisms such as these, Section 322 of the 2008 NDAA excluded health care and retirement costs from the cost comparison process.<sup>193</sup> This exclusion applied if the contractor’s contribution towards employee benefit plans was less than what the DOD contributed for the benefits of federal civilian employees, thus removing any competitive edge a contractor might have in this area.<sup>194</sup>

However, other actions short of legislation can impact computations. For example, in a 2006 cost-cutting effort, “Air Force officials extended the average assignment length for most Airmen from three years to four years, which has reduced the number of yearly PCS moves.”<sup>195</sup> Because the COMPARE software considers a number of

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<sup>189</sup> FY02 PRESIDENT’S MANAGEMENT AGENDA, *supra* note 112, at 17.

<sup>190</sup> American Federation of Government Employees, *2008 Conference Issue Papers, Department of Defense: Keeping Our Nation Safe and Secure* (Feb. 5, 2008), <http://www.afge.org/index.cfm?page=2008ConferenceIssuePapers&Fuse=Content&ContentID=1417> (last visited Nov. 16, 2009).

<sup>191</sup> See, *Competitive Sourcing: Hearing Before The H. Comm. on Government Reform*, 2003 WL 21481705 (F.D.C.H.) (June 26, 2003) (statement by Bobby L. Harnage, Sr., National President, AFGE, AFL-CIO, claiming that contractors could gain a “competitive advantage from providing inferior benefits or no benefits at all”).

<sup>192</sup> CHAUNA BROCHT, ECON. POL’Y INST., *THE FORGOTTEN WORKFORCE, MORE THAN ONE IN 10 FEDERAL CONTRACT WORKERS EARN LESS THAN A LIVING WAGE* (Nov. 1, 2000), available at [http://www.epi.org/content.cfm/briefingpapers\\_livwage](http://www.epi.org/content.cfm/briefingpapers_livwage); see also Robert Jensen, *Bush Puts a Contract Out on Federal Jobs*, COUNTERPUNCH (Nov. 25, 2002), (arguing that any savings come “at the cost of lower wages and reduced benefits for workers”), available at <http://www.counterpunch.org/jensen1125.html>.

<sup>193</sup> See H.R. REP. NO. 110-146 (2007), at 307.

<sup>194</sup> *Id.* at 307-308 (discussing H.R. 1585 relating to the FY08 NDAA).

<sup>195</sup> A.F. News Service, *PCS Policy Changes Promote Stability, Quality of Life*, Jun. 17, 2009, at <http://www.af.mil/news/story.asp?id=123154669>.

factors, including personnel costs, even seemingly small changes can impact overall competition calculations.<sup>196</sup>

Additionally, the fact that the government uses a detailed process to determine costs does not guarantee that the private competitor will conduct such an exacting pricing evaluation. Contractors' bids should reflect their overhead costs, such as training personnel and providing medical and retirement benefits; their more direct costs, such as wages; and what they plan to charge the government to achieve a reasonable profit.<sup>197</sup> However, contractors have an economic incentive to overestimate their savings and efficiencies: award of the contract.<sup>198</sup> In a fixed-price contract, the contractor bears the risk of underbidding, but if the government commits to reimbursing the contractor's costs, the government may realize no savings.<sup>199</sup> No matter how the results are calculated, they are simply estimates, which may or may not play out as expected.<sup>200</sup>

Most outsourcing savings estimates failed to account for typical growth in contract costs.<sup>201</sup> Admittedly, the government can obtain some simple goods and services more cheaply through contracting out.<sup>202</sup> However, frequently "the short-term savings that [outsourcing] promises evaporate quickly once competitors drop out; contractors who underbid to win a contract are free to raise rates later or in follow on contracts, often leaving government representatives with little choice but to accept."<sup>203</sup> While the GAO recognized that outsourcing can be cost-effective, in a report to Congress it questioned some of the savings projections.<sup>204</sup> The GAO reported doubts that the services would ever achieve the projected 20 to 30 percent savings.<sup>205</sup> In fact, the "GAO found that contracting outside of A-76 can actually cost the government more than doing the work in-house."<sup>206</sup> According to GAO, both DOD and OMB lacked "reliable data" at every stage of the outsourcing effort. Neither agency had the right information at the start "to assess the soundness of savings estimates,"<sup>207</sup> and DOD then failed to consistently

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<sup>196</sup> COMPARE USER MANUAL, *supra* note 186, ¶ 2.5.

<sup>197</sup> See GAO FINAL REPORT, *supra* note 9, at 16.

<sup>198</sup> See Levine, *supra* note 87; see also GRASSO, *supra* note 106, at 6.

<sup>199</sup> See Obama Memo, *supra* note 148 (discussing government contracting).

<sup>200</sup> See OMB 2007 REPORT, *supra* note 127, at 6, 11, 35-36 (discussing that while efforts are in place to capture actual cost savings, the savings numbers are based on estimates).

<sup>201</sup> *Hearings on Readiness*, *supra* note 89, at 19.

<sup>202</sup> Jensen, *supra* note 199.

<sup>203</sup> *Id.*

<sup>204</sup> *Hearings on Readiness*, *supra* note 89, at 18 (reporting that GAO audits found "the estimated savings did not achieve the projections, even though the costs of the competitions were not taken into consideration")

<sup>205</sup> *Id.*

<sup>206</sup> ROSTKER, *supra* note 35, at 6.

<sup>207</sup> *Hearings on Readiness*, *supra* note 89, at 18; see also LOGCAP Report, *supra* note 171, at 5 (noting that the Army's original contractor-developed estimate for logistical

track and analyze cost data to determine whether the contract achieved the savings.<sup>208</sup> The process takes into account anticipated costs; it does not look at what a contract costs the government in the end.<sup>209</sup>

GAO pointed to the DOD-wide initiative to “standardize and consolidate automatic data processing systems” that was projected to save \$2.18 billion during 1991 through 1995.<sup>210</sup> Not only was this program abandoned without realizing any savings, GAO found that most “consolidation initiatives” never achieved the anticipated billions of dollars of savings.<sup>211</sup> In those cases where savings did materialize, GAO identified the competition itself as the primary cause, rather than the function’s actual outsourcing.<sup>212</sup>

Overall, GAO summarized the problem with anticipated savings as follows: (1) savings estimates represent projected, rather than realized savings; (2) the costs of the competitions were not included; (3) baseline cost estimates are lost over time; (4) actual savings have not been tracked; (5) where audited, projected savings have not been achieved; and (6) in some cases, work contracted out was more expensive than estimated before privatization.<sup>213</sup>

As early as 1991, various studies showed that contracts are more expensive than government employees. For example, the GAO concluded that 11 out of 12 contractors in their study were about 25 percent more costly.<sup>214</sup> Studies after years of outsourcing confirmed this early data. In 2007, a Congressional study found that contracts for intelligence support cost, on average, almost twice as much as in-house performance.<sup>215</sup> In 2008, the Office of the Director of National Intelligence reported that the cost of a federal employee—including not just salary but all benefits such as retirement and healthcare—was

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support in Bosnia was \$350.2 million, yet three months later, the DOD reduced the estimate to \$191.6 million—without supporting documentation for doing so).

<sup>208</sup> *Id.* at 8; see GEN. ACCT. OFF., OMB CIRCULAR A-76: DOD’S REPORTED SAVINGS FIGURES ARE INCOMPLETE AND INACCURATE (Mar. 15, 1990) (report GAO/GGD-90-58 to the Chairman, Subcomm. on Federal Services, Post Office, and Civil Service, S. Comm. on Governmental Affairs).

<sup>209</sup> ROSTKER, *supra* note 35, at 6.

<sup>210</sup> *Hearings on Readiness, supra* note 89, at 2.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 19; see also Levine, *supra* note 87.

<sup>213</sup> *Hearings on Readiness, supra* note 89, at 8; see GEN. ACCT. OFF., DEFENSE DEPOT MAINTENANCE: COMMISSION ON ROLES AND MISSION’S PRIVATIZATION ASSUMPTIONS ARE QUESTIONABLE (July 15, 1996) (letter report GAO/NSIAD-96-161).

<sup>214</sup> ROSTKER, *supra* note 35, at 6 (citing J. DEXTER PEACH, ENERGY MANAGEMENT: USING DOE EMPLOYEES CAN REDUCE COSTS FOR SOME SUPPORT SERVICES 2 (1991) (GAO/RCED-91-186)).

<sup>215</sup> *Id.* (citing House Select Committee on Intelligence, Intelligence Authorization Act for Fiscal Year 2008, 28 (2007)).

\$125,000, while the direct cost (excluding overhead) for each contractor employee was \$207,000.<sup>216</sup>

As can be seen from post-competition review, this competition process, at least from a government perspective, fails to address the cost of changes to the contract, changes in requirements or future price hikes. One of the expected tradeoffs during the military drawdown was the fact that contracting for contingencies would be more expensive for the short term, with overall long term savings. In other words, after the post-Cold War reduction in the size of the military, some concluded it would be cheaper to contract out for support services only when needed.<sup>217</sup> However, at some point what was originally viewed as a wartime flux became normal operations and the long term savings now point back to performing in-house.

Prolonged military operations requiring services in more isolated and less technically developed locations such as Iraq and Afghanistan have overcome any potential savings achieved by paying a higher cost for short durations.<sup>218</sup> A prime example is the Army's Logistics Civil Augmentation Program, or LOGCAP, the subject of a 1997 GAO report.<sup>219</sup> While the Army centrally managed the single, worldwide LOGCAP contract, each operational commander defined his organization's requirements, paid for the services, and integrated contract employees into mission performance.<sup>220</sup>

Responding to Congressional concerns about LOGCAP usage in Bosnia, GAO found that in just a year contract costs jumped 32 percent, from \$350.2 million to \$461.5 million.<sup>221</sup> GAO attributed the increased costs mainly to changes in requirements, stemming from factors such as unfamiliarity with the operating environment. However, other causes included lack of guidance on using the contract and insufficient monitoring and tracking systems.<sup>222</sup>

Because operational commanders at all levels lacked guidance and experience in using the LOGCAP contract, they failed to understand

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<sup>216</sup> ROSTKER, *supra* note 35, at 6 (citing RONALD SANDERS, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE TRANSCRIPT: CONFERENCE CALL ON THE RESULTS OF THE FISCAL YEAR 2007 U.S. INTELLIGENCE COMMUNITY INVENTORY OF CORE CONTRACTOR PERSONNEL 8 (2008)). The apparent contradiction between these findings and labor union arguments that contractor employees would earn less only emphasizes the questionable nature of much of the purported "data" on both sides of the outsourcing argument.

<sup>217</sup> See CARAFANO, *supra* note 21, at 51-56.

<sup>218</sup> See *id.* at 44-45; see also Schooner & Greenspahn, *supra* note 151, at 12-13.

<sup>219</sup> LOGCAP Report, *supra* note 171, at 1. The Army established LOGCAP in 1985 to "(1) preplan for the use of contractor support in contingencies or crises and (2) take advantage of existing civilian resources in the United States and overseas to augment active and reserve forces." *Id.* at 2.

<sup>220</sup> *Id.* at 4.

<sup>221</sup> *Id.* at 1, 4.

<sup>222</sup> *Id.* at 4-5.

how their contracting decisions impacted the ultimate cost.<sup>223</sup> GAO provided this example:

[T]he decision to accelerate the camp construction schedule required the contractor to fly plywood from the United States into the area of operations because sufficient stores were not available in Europe, which increased costs. For example, the contractor reported that the cost of a 3/4-inch sheet of plywood, 4' x 8', purchased in the United States was \$14.06. Flying that sheet of plywood to the area of operations from the United States increased the cost to \$85.98 per sheet, and shipping by boat increases the cost to \$27.31 per sheet. According to a U.S. Army, Europe official, his commander "was shocked" to find the contractor was flying plywood from the United States.<sup>224</sup>

Thus, one of the primary benefits of insourcing is to undo outsourcing efforts that brought neither cost savings nor improved mission performance.<sup>225</sup> In 1995, "the goal of downsizing the Federal workforce [was] widely perceived as placing [DOD] in a position of having to contract for services regardless of what is more desirable and cost effective,"<sup>226</sup> and little has changed since then. The DOD has a history of cutting both personnel and funding without properly restructuring to obtain the hoped-for efficiencies.<sup>227</sup> These forced reductions came about because of ever increasing goals to complete public-private or direct conversion competitions of the full-time equivalent employees listed on the FAIR Act inventories.<sup>228</sup> Military

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<sup>223</sup> LOGCAP Report, *supra* note 171, at 17-18. "One official likened the employment of LOGCAP without doctrine and guidance to giving the Army a new weapon system without instructions on how to use it." *Id.* at 17.

<sup>224</sup> *Id.* at 18.

<sup>225</sup> This process will require work by both the Personnel and Comptroller communities, for example, reprogramming contract funding to pay for personnel costs and re-creating the federal employing positions. However, information exists regarding guidelines and procedures to insource positions. See Anderson, *supra* note 181; England Memo, *supra* note 182, at para. 3; see also Memorandum from Ronald J. James, Assistant Secretary of the Army, Manpower and Reserve Affairs, to HQDA Principals et al., subject: Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 119-181 (FY 2008 NDAA))—Guidelines and Procedures on Insourcing New and Contracted Out Functions (8 May 2008); U.S. Army Management Directorate G-8, Service Contracts and Insourcing Policy VTC, (Jul. 30, 2008) (unpublished PowerPoint Presentation, on file with author).

<sup>226</sup> *Hearings on Readiness*, *supra* note 89, at 10 (reporting the findings of a DOD IG study on cost growth).

<sup>227</sup> *Id.*

<sup>228</sup> FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 18.

commanders saw outsourcing as a direct way to achieve the mandated across-the-board reductions—the need to reduce civilian positions became greater than the need to save money.<sup>229</sup> Under pressure to conduct these conversions, the government seldom secured the best bargain.

Additionally, insourcing removes the government from the revolving door of re-competition, which impacts both costs and less-tangible results. The government expends both significant time and effort to determine the most efficient organizational structure,<sup>230</sup> resources that are taken away from performing the “real” mission.<sup>231</sup> Seldom do the cost-savings projections adequately account for this resource drain, especially because competitions tend to take longer than anticipated.<sup>232</sup> All these factors reduce the realized savings, both in the short term and the long run.<sup>233</sup>

Although the 2008 NDAA limited the re-competition requirement, outsourcing calculations must still consider the re-competition costs.<sup>234</sup> Section 323 removed the requirement to re-compete “work being performed by federal employees that was won by the employees under a public-private competition process.”<sup>235</sup> Thus, the law did not entirely eliminate re-competition but instead made it a discretionary management option.<sup>236</sup>

Interestingly, the A-76 Handbook states, “If the Government believes that quality is unacceptable or prices appear unreasonable, a cost comparison is conducted to justify conversion [back] to in-house”<sup>237</sup>—yet procedures were never laid out for conducting a re-competition to bring an outsourced function back in-house.<sup>238</sup> It was not

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<sup>229</sup> See *Hearings on Readiness*, *supra* note 89, at 10 (discussing results from GAO’s review of outsourcing base support operations).

<sup>230</sup> See generally GRASSO, *supra* note 106, at 5. Insourcing also reduces the harm to morale from outsourcing, in which individuals may be less motivated to work or even quit. *Id.* at 12.

<sup>231</sup> The authors concede that outsourcing can bring about cost savings. However, these savings generally flow from creating the MEO, and at some point during the continued re-competition, the MEO has become as “efficient” as it will ever be. Any additional “savings” occur from evolving organizations or technological improvements that occur outside the competition process. See U.S. GEN. ACCT. OFF., DOD COMPETITIVE SOURCING, LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS 11 (July 1999) (GAO/NSIAD-99-152).

<sup>232</sup> See *id.* at 25.

<sup>233</sup> *Id.*

<sup>234</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No 110-181 § 323, 122 Stat. 3, 60 (2008) (codified at 10 U.S.C. § 2462) (addressing re-competition requirements).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*; see also H.R. CONF. REP. NO. 110-477, 877 (regarding section 323).

<sup>237</sup> OMB REVISED SUPPLEMENTAL HANDBOOK, *supra* note 47, at 4.

<sup>238</sup> *Id.* at 10-14.

until the 2006 NDAA that insourcing was put forth as a realistic option—and then only one that the DOD had to “consider.”<sup>239</sup>

## B. Contract Administration Difficulties

The government’s inability to properly administer contracts has contributed to the lack of cost savings. It has also revealed several major flaws with outsourcing, including the fundamental question of whether outsourcing is appropriate for an organization where the primary mission is to fight the country’s wars.<sup>240</sup>

Beginning in the mid-1990s, the DOD drastically increased spending on government contracts.<sup>241</sup> The DOD now spends more for service contracts than any other activity, including major weapons systems.<sup>242</sup> Additionally, in an eight-year period, the number of service contracts more than doubled,<sup>243</sup> while contract growth as a whole increased 178 percent from 1999 to 2008.<sup>244</sup> From fiscal year 2000 to fiscal year 2007, contractor totals jumped from 730,000 to 1.5 million,<sup>245</sup> as DOD has used contractors to compensate for organic personnel shortages.<sup>246</sup>

With contract growth comes a corresponding increase in both complexity and volume of the workload of contracting personnel at all stages—from drafting and negotiating the contract to monitoring and enforcing performance.<sup>247</sup> Yet simultaneously, the contracting career field has shrunk, exacerbating the strain and ultimately degrading mission performance.<sup>248</sup> “If the military commander has gained

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<sup>239</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (2006), § 343. As stated earlier, this section directed the DOD to ensure “that consideration is given to using Federal Government employees” for work currently or potentially performed by a contractor. Similarly, the section required DOD to consider insourcing when a contract resulted in excessive costs or poor performance. *Id.*

<sup>240</sup> “Of course, nobody seriously recommends that the military be privatized . . . . If death and disaster on a considerable scale are inevitable products, the rule seems to be that this responsibility is the business of government.” P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 3 (2003) (quoting DAVID SICHOR, PUNISHMENT FOR PROFIT).

<sup>241</sup> CARAFANO, *supra* note 21, at 75. *See generally* Schooner & Greenspahn, *supra* note 148, at 12.

<sup>242</sup> Levine, *supra* note 87. *See generally* Schooner & Greenspahn, *supra* note 151, at 12.

<sup>243</sup> Levine, *supra* note 87.

<sup>244</sup> Anderson, *supra* note 181 (lecture on insourcing). *See generally* Schooner & Greenspahn, *supra* note 151, at 12.

<sup>245</sup> Levine, *supra* note 87.

<sup>246</sup> *See generally id.* (discussing use of contractors).

<sup>247</sup> GANSLER REPORT, *supra* note 167, at 14.

<sup>248</sup> *Id.*

riflemen, but not added contract professionals who can acquire the support services his unit needs, then he has lost capability.”<sup>249</sup>

In March 2000, the increased number of service contracts and the decreased number of personnel in the acquisition workforce prompted the DOD’s Inspector General to audit all service contracts for professional, administrative, and management support activities.<sup>250</sup> The report found that *every one* of the 105 audited contracts had at least one of the following issues:

- Failure to use prior history to define requirements (69%)
- Inadequate Government cost estimates (77%)
- Cursory technical reviews (57%)
- Inadequate competition (60%)
- Awarding a single contract where multiple awards would have worked better (18%)
- Insufficient documentation of how the price was negotiated (68%)
- Inadequate contract surveillance (67%)
- Lack of cost control (25%)<sup>251</sup>

These deficiencies, the IG said, “occurred because acquisition officials lacked training, familiarity and time to fulfill their duties,” leaving the DOD procurement system with “material weaknesses” in control measures.<sup>252</sup>

In hearings before Congress, GAO officials echoed these same concerns over potential for cost growth, especially in weapons system procurements.<sup>253</sup> First, cost growth arises because the weapons system arena tends to lack a pre-existing competitive commercial market.<sup>254</sup> Second, the depot work, such as major overhauls, is generally sole-sourced to the original equipment manufacturer, with the cost increase typical of lack of competition.<sup>255</sup> Finally, the GAO pointed to the

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<sup>249</sup> *Id.* at 13-14.

<sup>250</sup> GRASSO, *supra* note 106, at 25.

<sup>251</sup> U.S. DEP’T OF DEF., OFF. OF THE INSPECTOR GEN., CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE AND MANAGEMENT SUPPORT SERVICES 4 (Mar. 10, 2000) [hereinafter DOD IG Report].

<sup>252</sup> *Id.* at 4, i; *see also* SINGER, *supra* note 240, at 153 (asserting that “full-time contract monitoring not only raises costs” but is “particularly difficult”). A follow-up audit three years later looked at 113 contracts valued at about \$17.8 billion found that 98 suffered from similar shortcomings. U.S. DEP’T OF DEF., OFF. OF THE INSPECTOR GEN., CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE AND MANAGEMENT SUPPORT SERVICES 5-6 (Oct. 30, 2003) (Audit Report No. D-2004-015).

<sup>253</sup> *Hearings on Readiness*, *supra* note 89, at 22.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* For example, the DOD IG pointed to the Army’s contract for engineering services on the HAWK missile system. Despite 39 years of contract history that could

resulting reduction in core capability proficiency and the organic repair capability to question whether outsourcing is the appropriate model for most weapon systems.<sup>256</sup> Similarly, during the Navy's efforts to privatize weapons handling, some critics charged that our "national security interests are being compromised."<sup>257</sup>

From an institutional level, the military continues to rely heavily upon contractors, but without the manpower to oversee contractor performance. The lack of control over contractors—both while performing the contract and ensuring the continued availability of their needed expertise—puts the DOD at risk. Simply increasing the acquisition workforce will not in and of itself guarantee proper oversight of the numerous DOD contracts. Without proper oversight, contracting out does not always provide a better product or service for the government nor address the government's long-term needs. Insourcing can resolve these concerns.

### C. Retaining Experience

The DOD has long touted the value of "partnering" with contractors.<sup>258</sup> But "[w]hile some exalt the benefits of the blended workforce,<sup>259</sup> others are concerned about the loss of in-house expertise,<sup>260</sup> lack of ethical standards for contractors, and the 'pirating' of government employees by contractors."<sup>261</sup> Particularly frustrating for organizations that require specialized expertise and experience, such as intelligence agencies, are organic personnel who leave for better pay with contractors after the government has trained them, obtained their security clearances, and given them experience.<sup>262</sup> The government pays to get the worker qualified, then ends up "leasing back . . . former

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have been used to determine an appropriate fixed price for the work, the Army gave Raytheon Corp. a \$36.2 million cost-reimbursement contract. DOD IG Report, *supra* note 251, at 8.

<sup>256</sup> *Hearings on Readiness, supra* note 89, at 22

<sup>257</sup> GRASSO, *supra* note 106, at 26-27.

<sup>258</sup> See, e.g., ARMY MATERIEL COMMAND, HANDBOOK OF ARMY PUBLIC-PRIVATE PARTNERING (undated); JOHN R. WILLIAMS, DEFENSE CONTRACTORS SBIR/STTR PARTNERING MANUAL (Aug. 1, 2008). "SBIR" stands for Small Business Innovation Research, "STTR" for Small Business Technology Transfer. *Id.* Interestingly, Williams, the U.S. Navy's director of SBIR/STTR Programs, wrote the manual "with assistance from" two contractors. *Id.*

<sup>259</sup> ROSTKER, *supra* note 35, at 7 (citing James R. Thompson & Sharon H. Mastracci, *The Blended Workforce: Maximizing Agility Through Nonstandard Work Arrangements*, HUMAN CAP. MGMT (2005)).

<sup>260</sup> *Id.* (citing S. Appropriations Comm., Department of Homeland Security Appropriations Bill 2009, 14 (2008)).

<sup>261</sup> *Id.* (citing JOHN D. NEGROPONTE, DIRECTOR OF NATIONAL INTELLIGENCE, FIVE YEAR STRATEGIC HUMAN CAPITAL PLAN (2006)).

<sup>262</sup> Walter Pincus, *Increase in Contracting Intelligence Jobs Raises Concerns*, WASH. POST, Mar. 20, 2006, at A3.

employees.”<sup>263</sup> Some individuals complain this “phenomenon is partly the result of Congress’s approving large funding increases . . . but not increasing the limit on the number of full-time persons that agencies can hire.”<sup>264</sup> With the limit on positions, government agencies turn to contractors to make up for the lack of federal positions.<sup>265</sup>

It is one thing to contract out to provide surge capability, especially in austere environments. However, it is another to rely completely on contractors for such functions. “Since these services are needed, and now are being provided by commercial vendors instead of organically, they can now *only be fulfilled* through the acquisition process . . . .”<sup>266</sup> In contrast to outsourcing, insourcing can build and exploit “a reach-back capability to not only capture and institutionalize best practices but to draw in and leverage other U.S. Government-wide experts. Reliance on outsourcing continues and even promotes the ad hoc responses, inhibiting or preventing required institutional learning and connections.”<sup>267</sup>

Retaining experience in the federal workplace, mainly through federal civilian employees, frequently provides the only continuity in DOD organizations. Not only can military personnel be tasked at any moment to perform a necessary mission elsewhere,<sup>268</sup> they traditionally transfer to a new assignment every two to four years.<sup>269</sup> The resulting turnover, while beneficial in many ways, creates a continuing learning curve for those who fill military billets—and a continuous training workload for the more permanent workers who remain. Long-term civilian personnel are DOD’s only “corporate memory,” providing better continuity of operations and understanding of previous issues.<sup>270</sup>

Finally, without an in-house cadre of knowledgeable professionals, the government will never be able to properly monitor and administer contracts.<sup>271</sup> To properly write requirements, evaluate proposals and oversee and assess contractor performance, the

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See Pincus, *supra* note 262, at A03.

<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> Matt Armstrong, *In-sourcing the Tools of National Power for Success and Security*, SMALL WARS J. (Jan. 3, 2008), available at <http://smallwarsjournal.com/blog/2008/01/insourcing-the-tools-of-nation/>.

<sup>268</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 206-22, LEADERSHIP ROLES, LEADERSHIP LEVELS AND LEADERSHIP TEAMS 11-56 (12 Oct. 2006) [hereinafter FM 206-22].

<sup>269</sup> WILLIAM M. HIX ET AL., PERSONNEL TURBULENCE: THE POLICY DETERMINANTS OF PERMANENT CHANGE OF STATION MOVES (1998), [http://www.rand.org/pubs/monograph\\_reports/MR938/MR.938.ch2.pdf](http://www.rand.org/pubs/monograph_reports/MR938/MR.938.ch2.pdf); see also GEN. ACCT. OFFICE, MILITARY PERSONNEL: LONGER TIME BETWEEN MOVES RELATED TO HIGHER SATISFACTION AND RETENTION 3 (Aug. 2001) (Briefing Report GAO-01-841 to the S. Subcomm. on Defense C. on Appropriations).

<sup>270</sup> FM 206-22, *supra* note 268, at 3-26 and 11-61.

<sup>271</sup> See CARAFANO, *supra* note 21, at 44.

government needs someone with sufficient experience in the field. The more functions the government outsources, the less experience it retains internally to ensure it is receiving the best goods and services.

#### D. Control of Personnel

*[T]he privatized military industry introduces very real contractual dilemmas into the realm of international security. The overall issues of these contractual dilemmas come down to divided loyalties and goals . . . . For governments, the public good and the good of the private companies are not identical . . . [and] these two parties' interests will never exactly coincide.*<sup>272</sup>

Perhaps the most crucial benefit of insourcing is the control it gives the government over both the work results themselves and those doing the work.<sup>273</sup> One concern relating to a blended workforce is danger of confusion regarding appropriate lines of authority.<sup>274</sup> “The desire to treat the contractor as part of the team is understandable”—but frequently misguided.<sup>275</sup> Government employees and contractor employees work for different organizations and are bound by different standards and rules. While government employees can be prosecuted for conflict-of-interest violations, such rules often do not apply to contractor employees.<sup>276</sup> Government employees are expected to always keep the public good in mind; contractors are usually motivated by profits.<sup>277</sup>

The bottom line is this: “[w]hen we contract, we give up an element of control and flexibility.”<sup>278</sup> Nothing can surpass the amount of control the government has over military personnel, who may be tasked to do just about any job. Some would also say that civilian personnel do not have to perform anything that is not in their position descriptions and it is difficult to change position descriptions.<sup>279</sup> However, in most cases, a civilian employee can eventually be tasked to

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<sup>272</sup> SINGER, *supra* note 240, at 151.

<sup>273</sup> AIR FORCE MATERIEL COMMAND, GUIDE FOR THE GOVERNMENT-CONTRACTOR RELATIONSHIP 6 (May 2005) (emphasis in original) (on file with the authors) [hereinafter AFMC GUIDE] (“The fundamental difference between government employees and contractor personnel is *control*.”).

<sup>274</sup> ROSTKER, *supra* note 35, at 7; *see also* SINGER, *supra* note 240, at 153 (asserting that contractual relationships can “blur the chain of command and diffuse responsibility”).

<sup>275</sup> AFMC GUIDE, *supra* note 273, at 5.

<sup>276</sup> *See* CARAFANO, *supra* note 21, at 48-50.

<sup>277</sup> SINGER, *supra* note 240, at 151 (asserting that “private companies as a rule are more interested in doing well than good”).

<sup>278</sup> AFMC GUIDE, *supra* note 273, at 9.

<sup>279</sup> *See* U.S. DEP’T OF DEFENSE, CIVILIAN PERSONNEL MANAGEMENT GUIDE FOR MANAGEMENT OFFICIALS DURING CONTINGENCIES AND EMERGENCIES 1-5 (Mar. 2003), available at [http://www.cpms.osd.mil/civ\\_prep/ManagementGuide.pdf](http://www.cpms.osd.mil/civ_prep/ManagementGuide.pdf).

work on new projects, but with contractors “there are no ‘other duties as assigned.’”<sup>280</sup> Any work that is not within the scope of a contract will either not get done or will come at increased cost to the government.<sup>281</sup> Thus, government employees may not supervise contractor personnel, or vice versa, and no employer-employee relationship exists between the two groups.<sup>282</sup>

The need to avoid such “personal services” contractual relationships is a particularly thorny one—especially in “revolving door” circumstances where DOD personnel leave government service on Friday and show up on Monday working for a contractor in their old office.<sup>283</sup> As a result, the military branches have issued guidance on everything from how contractor employees must identify themselves in e-mails to when government and contractor employees may ride together in rental cars.<sup>284</sup> While some of these rules may seem rather pedantic, at their root, they all aim to ensure contractor personnel do not perform inherently governmental functions—those functions that go to the very heart of what it means to govern, those acts that are “so intimately related to the public interest as to mandate performance by Government employees.”<sup>285</sup>

Contractor personnel and government employees may work side-by-side and may perform essentially the same job—but they are not interchangeable.<sup>286</sup> “Private employees have distinctly different motivations, responsibilities and loyalties than those in the public military. . . . [T]hey are hired, fired, promoted, demoted, rewarded and disciplined by the management of their private company, not by government officials or the public.”<sup>287</sup> Critics predicted privatization would bring risks such as safety compromises; operational damage from

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<sup>280</sup> AFMC GUIDE, *supra* note 273, at 9.

<sup>281</sup> See CARAFANO, *supra* note 21, at 76-77, 84.

<sup>282</sup> AFMC GUIDE, *supra* note 273, at 6.

<sup>283</sup> *Id.* at 10 (“Many of the contractor personnel working side by side with government employees were once government employees themselves (e.g., retired military or former civil servants). It is important that government employees recognize that these individuals’ employment status has changed and, therefore, so have the rules applied to that employee.”); see also SINGER, *supra* note 240, at 154 (noting that this scenario “risks strict, unbiased supervision” and creates an inherent potential for conflicts of interest”).

<sup>284</sup> AFMC GUIDE, *supra* note 273, at 10, 25-26.

<sup>285</sup> See OMB Policy Letter 92-1, *supra* note 61 (defining inherently governmental functions). Such functions usually “require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government.” *Id.*

<sup>286</sup> AFMC GUIDE, *supra* note 273, at 8.

<sup>287</sup> SINGER, *supra* note 240, at 154.

strikes, prohibited for most federal workers; and an emphasis on profits above all else.<sup>288</sup>

This prediction has proven prescient, as a lack of control has created situations that range from offensive to expensive, from dangerous to deadly. The primary contractor in the Army's LOGCAP contract in the Balkans faced allegations of discrimination, sexual harassment and maltreatment. Among other complaints, the company was accused of "posting security guards to keep foreign employees out of American-only restrooms."<sup>289</sup> In June 2009, a strike by 800 contractor and subcontractor employees grounded flying operations at Vance Air Force Base (AFB), Oklahoma, for two weeks.<sup>290</sup> The 71<sup>st</sup> Flying Training Wing, which normally generates 1,250 training sorties a week, sent twenty-seven students and their instructors to Randolph AFB and Dyess AFB in Texas to continue training.<sup>291</sup> Additionally, base leaders brought in augmentees from three other bases to provide fire-fighting services.<sup>292</sup> Maintenance operations in overseas combat zones were equally at risk, according to one expert in outsourcing who cited allegations that contractor DynCorp used "waitresses, security guards, cooks and cashiers" with no mechanical or aviation experience to maintain U.S. aircraft.<sup>293</sup>

Perhaps the most egregious case is the alleged "unprovoked and illegal attack" by Blackwater Worldwide security guards that killed at least fourteen and wounded twenty.<sup>294</sup> Federal prosecutors brought a 35-count indictment that included manslaughter charges. Those charges were possible only because Congress had changed the law to give federal authorities jurisdiction for contractor criminal misconduct committed outside the United States.<sup>295</sup> In late December 2009, a

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<sup>288</sup> GRASSO, *supra* note 106, at 26-27 (discussing the Navy's efforts to privatize weapons handling); see also Janet Wilson, *Navy to Seek Private Bids for Weapons Handling*, L.A. TIMES, Mar. 13, 1999, at A14; SINGER, *supra* note 240, at 151-68 (discussing the "contractual dilemmas" that arise in outsourcing battlefield work).

<sup>289</sup> *Id.* at 140.

<sup>290</sup> *Contract Employees Strike at Vance*, A.F. NEWS SERV., Jun. 8, 2009, available at <http://www.af.mil/news/story.asp?id=123153117>; *Labor Dispute Ends at Vance*, A.F. NEWS SERV., Jun. 23, 2009, available at <http://www.af.mil/news/story.asp?id=123155577>.

<sup>291</sup> *Labor Dispute Ends at Vance*, *supra* note 290.

<sup>292</sup> *Contract Employees Strike at Vance*, *supra* note 290.

<sup>293</sup> SINGER, *supra* note 240, at 156. Singer quotes a DynCorp mechanic: "The management here is looking at the bottom line, and they surely do not seem to care what kind of person works on the helicopters. I guess that makes good business sense, but to me not at the cost of our servicemen and women." *Id.* DynCorp settled a related lawsuit but denied any wrongdoing. *Id.* at 281, n.28.

<sup>294</sup> Del Quentin Wilber, *Contractors Charged in '07 Iraq Deaths*, WASH. POST, Dec. 9, 2008, at A02.

<sup>295</sup> *Id.*; see also Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 212, Pub. L. No. 106-523, 114 Stat 2488 (2000) (addressing contractor accountability and ability to prosecute); FM 206-22, *supra* note 268, at 3-28.

federal judge dismissed the manslaughter and weapons charges based on prosecutor's use of statements given under promises of immunity.<sup>296</sup>

"When we contract, we give up an element of control and flexibility."<sup>297</sup> These government tradeoffs include not just cost oversight, but management practices, accountability and organic expertise.<sup>298</sup> Recognizing "the need to promote [insourcing] and gain tighter control over the contractor workforce," the Army instituted new policies that insourced 585 positions at an average savings of \$48,000 per year per position.<sup>299</sup>

Similarly, the OMB states that the current pilot programs examining outsourcing will "give each agency the opportunity to reshape its workforce and strike the right balance between staffing positions with permanent federal employees—to build and sustain its in-house capabilities—and, where appropriate, utilizing the expertise and capacities of contractors available in the marketplace."<sup>300</sup> OMB points with pride to a DOD use of "in-house" expertise to improve the Javelin, a contractor-produced, shoulder-fired missile. After early versions suffered cracks in the launch tubes, a team of Defense engineers designed a protective coating that will save an estimated \$10 million over the five-year contract.<sup>301</sup>

#### E. Politics and Policy

One final point deserves discussion regarding the pendulum swing between insourcing and outsourcing—the impact of political forces and policy decisions. The background section of this article analyzed some of the historical political underpinnings of pushes to outsource.<sup>302</sup> However, the move to insource also certainly has a strong tie to political pressure.

When Congress passes laws, it is supposed to be acting on behalf of the entire population. However, individuals and groups, including labor unions, successfully lobby Congress in many cases. The unions testify before Congress on a number of labor issues.<sup>303</sup> With

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<sup>296</sup> Timothy Williams, *Iraqis Angered as Blackwater Charges Are Dropped*, N.Y. TIMES, Jan. 1, 2010, at A4; see also Del Quentin Wilber, *Missteps, Errors and Miscommunication Doomed Blackwater Case*, WASH. POST, Feb. 11, 2010, at 4.

<sup>297</sup> AFMC GUIDE, *supra* note 273, at 9.

<sup>298</sup> 2008 Army Posture Statement, Information Paper on Army In-sourcing, [http://www.army.mil/aps/08/information\\_papers/sustain/Army\\_Insourcing.html](http://www.army.mil/aps/08/information_papers/sustain/Army_Insourcing.html) (last visited Jan. 13, 2009).

<sup>299</sup> *Id.*

<sup>300</sup> OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 9.

<sup>301</sup> *Id.* at 5

<sup>302</sup> See *supra* Section II.A.

<sup>303</sup> See, e.g., *Competitive Sourcing: Hearing Before The H. Comm. on Government Reform*, 2003 WL 21481705 (F.D.C.H.) (June 26, 2003) (statement by Bobby L.

regard to the outsourcing debate the union particularly pushed hard, with the obvious motivation of preserving their constituent's jobs. An example of how the unions attempted to drive the insourcing debate can be seen in the American Federation of Government Employees's (AFGE) Defense Conference (DEFCON) which is held in conjunction with the union's Legislative Conference.<sup>304</sup> AFGE's DEFCON "allows for the voluntary participation of [DOD local unions] in serving as an activist group committed to using their collective strength in representing federal employees."<sup>305</sup> Activists in the AFGE's DEFCON held demonstrations at different DOD procurement hubs to protest what it referred to as the "controversial outsourcing of defense functions [and] waste of taxpayer money."<sup>306</sup> In a 2009 press release AFGE also touted its support from members of Congress for legislatively reversing the privatization trend.<sup>307</sup>

In 2008 the AFGE union criticized the Bush administration for cuts to the federal workforce, labeling it the "primary threat to the DOD workforce." The union also accused the administration of "feverishly attempting to privatize the jobs of hundreds of thousands of DOD employees."<sup>308</sup> At the union's 2008 conference it claimed victory in that the FY06 Defense Authorization Bill forbade "the Defense Department from giving work performed by civilian employees to contractors through direct conversions."<sup>309</sup>

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Harnage, Sr., National President, American Federation of Government Employees (AFGE), AFL-CIO, regarding the "new" 2003 OMB Circular A-76 and discussing that the agency is getting around Congressional limits on privatization, there are no real savings only estimated savings, AFGE seeks legislation to extend federal employees the same appeal rights that contractors have to the GAO, OMB forced conferees to drop provisions in Defense Authorization Bills, and AFGE is working to make sure contractors do not gain a "competitive advantage from providing inferior benefits or no benefits at all"; *Improving Federal Employee Performance: Hearing Before the Subcomm. on Oversight of Government Management, The Federal Workforce, And The District Of Columbia, of the S. Comm. on Homeland Security and Governmental Affairs*, 2008 WL 2817177 (July 22, 2008) (statement of John Gage, National President, AFGE supporting House Resolution 5550); *Recruiting and Retaining Federal Employees Through Better Benefits: Hearing Before the Subcomm. on Federal Workforce, Postal Service and The District Of Columbia, of the H. Comm. on Oversight and Government Reform*, 2008 WL 1891774 (Apr. 29, 2008) (statement of John Gage).

<sup>304</sup> American Federation of Government Employees, AFGE's Defense Conference 2009, <http://www.afge.org/Index.cfm?page=DEFCON> (last visited Mar. 1, 2010).

<sup>305</sup> *Id.*

<sup>306</sup> American Federation of Government Employees, Press Release, *Civilian Defense Employees' Union Launches Campaign to Clean up Contract Mess*, May 26, 2009, available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=996>.

<sup>307</sup> *Id.*

<sup>308</sup> American Federation of Government Employees, *2008 Conference Issue Papers, Department of Defense: Keeping Our Nation Safe and Secure* (Feb. 5, 2008), <http://www.afge.org/index.cfm?page=2008ConferenceIssuePapers&Fuse=Content&ContentID=1417> (last visited Nov. 16, 2009).

<sup>309</sup> *Id.*

A political consideration on the opposite side of the debate is the capability of driving social policy through contracting. Small businesses have been provided preferences for government contracts.<sup>310</sup> In particular, the government acquisition structure aims to send a significant amount of federal contracting dollars to small businesses owned by historically disadvantaged segments of society.<sup>311</sup> The government is willing to pay a slightly higher cost for such policy reasons.<sup>312</sup> Reducing the amount of contracting dollars spent on outsourcing efforts will subsequently reduce the amount of federal dollars that can be steered toward minority-owned businesses. Ultimately, one must keep in mind that cost comparisons alone do not dictate the outcome of this debate. Outside influences with agendas to press can also impact the governmental decision of outsourcing versus insourcing.

## V. CONCLUSION

*"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."<sup>313</sup>*

Context means everything when determining whether the government should provide goods or services in-house or purchase them from an outside source.<sup>314</sup> Depending on the context, outsourcing may or may not benefit the DOD.<sup>315</sup> However, outsourcing and its implementation often did not ultimately produce the touted cost savings, and the reasons why are many, varied and frequently ill-defined.<sup>316</sup> Still, the outsourcing efforts of the past few decades do offer a few clear-cut lessons.

First, the DOD has failed to adapt outsourcing to the current military environment and operational tempo, where the military no longer responds just to short-lived, intermittent contingency operations.

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<sup>310</sup> See GEN. SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. pt. 19 (Small Business Programs) (July 2009) [hereinafter FAR]. Specifically, see 15 U.S.C. §§ 631-650; FAR 19.201.

<sup>311</sup> See, e.g., FAR 19.8 (procedures for the 8(a) program which permits sole-sourcing to small "disadvantaged" businesses).

<sup>312</sup> See AM. B. ASS'N, *supra* note 36, at 123-26.

<sup>313</sup> LEWIS CARROLL, THROUGH THE LOOKING GLASS: AND WHAT ALICE FOUND THERE 123 (1897).

<sup>314</sup> Weidemaier, *supra* note 5, at 655-56.

<sup>315</sup> *Hearings on Readiness*, *supra* note 89, at 1, 16; see also FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 3.

<sup>316</sup> ROSTKER, *supra* note 35, at 6; see *Hearings on Readiness*, *supra* note 89, at 8; see also L. NYE STEVENS, OMB CIRCULAR A-76: DOD'S REPORTED SAVINGS FIGURES ARE INCOMPLETE AND INACCURATE 2-6 (Mar. 15, 1990) (report GAO/GGD-90-58 to the Chairman, Subcomm. on Federal Services, Post Office, and Civil Service, S. Com. on Governmental Affairs).

Secondly, the outsourcing explosion coincided with long-term reductions to the acquisition workforce<sup>317</sup>—which ultimately led to outsourcing under the wrong conditions or for the wrong work, poor government oversight of contractors, and a loss of control over governmental functions necessary to conduct military contingency operations.<sup>318</sup> Thus, the pendulum has—and will continue for the foreseeable future—to swing back to favoring in-house performance.

However, no matter what arc the pendulum follows, it will never come to rest entirely at one extreme or the other. The reality is that in some cases turning commercial activities over to the public sector can be beneficial. “Agencies use both federal employees and private-sector contractors to deliver important services to citizens.”<sup>319</sup> As DOD and other federal agencies do so, their leaders “must recognize the proper role of each sector’s labor force and draw on their respective skills so the government operates at its best.”<sup>320</sup> In today’s fluid environment, the decision to outsource must consider a number of factors rather than cost alone. Although insourcing has its own difficulties, using government employees, whether military or civilian, involves fairly well understood and expected costs, as well as the resources and control necessary to accomplish the mission. Insourcing, under the current military operational tempo, will provide cost savings and the retention of experience to control functions necessary to carry out contingency operations. Determining the best mix of resources in the “total force” workforce will not be easy, but it will ensure the DOD can utilize the power of the pendulum’s swing, rather than just trying to hold on.

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<sup>317</sup> CARAFANO, *supra* note 21, at 48-50; *see* National Defense Authorization Act for Fiscal Year 2008, 10 U.S.C. § 101(a)(13); *see also* Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 212, Pub. L. No. 106-523, 114 Stat 2488 (2000); FM 206-22, *supra* note 268, at 3-28.

<sup>318</sup> *Hearings on Readiness*, *supra* note 89, at 5; ROSTKER, *supra* note 35, at 7 (citing S. Appropriations Comm., Department of Homeland Security Appropriations Bill, 2009, 14 (2008)).

<sup>319</sup> OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 8.

<sup>320</sup> *Id.*