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TESTIMONY BEFORE THE
SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, RESTRUCTURING AND THE DISTRICT OF COLUMBIA
OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS

by Professor Charles Tiefer

THE DOWNSIDE OF THE COMPETITIVE SOURCING INITIATIVE:

NUMERICAL OUTSOURCING TARGETS UNDER THE TILTED NEW A-76

Thank you for the opportunity to testify on the subject of the Administration's outsourcing effort. I am Professor of Government Contracts at the University of Baltimore Law School and the author of GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 2d edition forthcoming 2004)(co-authored with William A. Shook) and several law review and bar journal articles on A-76.

OUTLINE OF TESTIMONY

Overall

Topics

- Workforce Issues and the Administration's Overdependence Upon Outsourcing
- Examples and Problems With Outsourcing at Specific Agencies
- New A-76's Tilt Toward Outsourcing
- Inadequately Clear Rights to Protest Outsourcing Awards

OVERALL

In the past year, the Administration's competitive sourcing initiative has taken a turn for the worse with overdependence on outsourcing based on two main parts. First, the Office of Management and Budget (OMB) has high numerical targets (50% of all pertinent government jobs, or 850,000, put through the outsourcing process ultimately; 15% of all such jobs to go through by the end of this FY). And, the office of Federal Procurement Policy (OFPP) has promulgated its new revisions of the public/private competition process, in revised Circular A-76.

This overdependence upon outsourcing is disruptive in the short term, and impedes other ways to address workforce issues in the long term.

Important examples from specific agencies include Defense Finance and Accounting Service (DFAS)-Cleveland; Veterans Administration (VA); Forest Service.

New A-76 tilts heavily toward outsourcing. Its procedures include defaults and streamlining that lead to outsourcing without an adequate showing of merit for it.

These problems make it particularly important that legal mistakes in outsourcing be reviewed and corrected, by federal employee unions having the clear legal protest rights enjoyed by contractors.

WORKFORCE ISSUES AND ADMINISTRATION OVERDEPENDENCE UPON OUTSOURCING

Chairman Voinovich, you have appropriately focused your own legislative effort in general, and this Subcommittee's attention in particular, on the issues facing the federal workforce ahead. The public has benefited from your bringing your experience at several executive levels, particularly Governor, to these issues before Congress.

We all have a sense of the general challenges facing the federal workforce. Taking the department with the largest number of employees, the Department of Defense, as an example, a recent GAO report laid out those challenges. Actions Needed to Strengthen Civilian Human Capital Strategic Planning, GAO-03-475 (March 2003). First, the civilian workforce has been downsizing, and is now susceptible to retirements, in a rapid and potentially threatening way. From 1989 to 2002, DOD's civilian workforce shrank from 1.07 million to .67 million – about a 38 percent reduction. Of today's workforce, 58 percent will be eligible for early or regular retirement in the next three years. Second, these drops threaten shortfalls of critical skills and lack of orderly transfer of DOD's institutional knowledge. Hence, GAO designated strategic human capital as a high-risk area.

What about the developments of the past year? In brief, my own view is that for both the short-term and long-term problems of the federal workforce, the Administration's initiative goes in the opposite direction from what is needed. The Administration is pursuing its "15/50" concept – 15% of all jobs put through the process this FY, 50% ultimately. Critics called this a "quota," OMB called it a "goal." For convenience, here it will be called a "target."

In the short term, the outsourcing process itself will increase burdens, impair effectiveness, and occur in a manner that impedes the diverse ways to prepare for the long-term workforce issues. To explain why a set of fixed numerical targets, as OMB has attempted to lay down, is bad policy, there is no improving upon the excellent analyses a year ago both by Chairman Voinovich, and by then

subcommittee, and current full committee chair of the House Committee on Government Reform and Oversight, Rep. Tom Davis.

At a full Committee hearing on March 6, 2002, Senator Voinovich said:

> I agree with your Committee and feel that arbitrary goals for public/private competitions simply do not make sense. Logic tells me that this policy does not equate given the fact that the Federal Government may lose up to 70 percent of the Senior Executive Service by 2005, through retirement or early retirement, and about 55 percent of the Federal workforce by 2004.
>
> Arbitrary contracting goals send the wrong message to our Federal workforce . . . .
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> * * *
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> Furthermore, I am concerned about the negative effect that outsourcing may have on prospective government employees . . . .
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> * * *
>
> . . . . We have seen an influx of contractors in the Federal workforce. Anecdotal evidence suggests we have not witnessed a significant improvement in Federal agencies' management of service contracts.

Similarly, Chairman Davis made this critical address on the House floor in support of the bipartisan anti- outsourcing "quota" appropriation limitation that, as adapted to prohibit "arbitrary" quotas, later became law. He said, at 148 Cong. Rec. 5325 (July 24, 2002):

> Mr. TOM DAVIS of Virginia. Mr. Chairman, I rise to speak in favor of the amendment. The question has always been do we take a matter in-house or outsource it. . . . .
>
> Now, the previous administration had numerous initiatives whereby they would eliminate Federal jobs, and **they defined their success by how few Federal employees they had. This was a mistake**. What we should have been asking was how much money do we save the American taxpayer, **not** how many employees we have, **how much we are outsourcing** and the like.
>
> In some cases the jobs eliminated did not save anything because these jobs were off-budget. They were fee paid for, and they were not costing the taxpayers or the general fund a nickel. In some cases **we found out we eliminated Federal jobs, but it ended up costing us more money by going outside. But it was driven by quotas, it was driven by numbers, and I submit that is the wrong approach**; and that is the problem with the current legislation, which is why I support the Moran amendment because the current legislation looks at arbitrary percentages and says when it comes to outsourcing and competing things in-house, we are going to look at certain percentages in certain agencies, and we are going to define it by this rather than where do we think we can get the best value for the American taxpayer, not how much money will it save.
>
> **There is precious little evidence that the elimination of Federal employees by itself saved money during the previous administration.** In some cases, as I noted before, these were fee-based employees, and whatever happened was not going to cost the taxpayers or fee payers a penny, but it was arbitrary.

> Competitive sourcing is a good thing; **but arbitrary quotas, numerical targets, are a bad thing**. I would say to this body that the Moran amendment eliminates the arbitrary numbers. This will still allow discretion within Federal agencies to go and compete things. We should encourage them to do that where it makes sense and where we can bring savings to the American taxpayers.
>
> Our goal should not be to preserve jobs at the Federal level, **nor should it be to get a certain percentage to get outsourced.** Our number one priority that should drive procurement policy, how do we get the best value to the American taxpayer, this amendment furthers that goal. That is why I urge my colleagues to support it.

Congress ultimately enacted a prohibition against arbitrary numerical quotas. Section 647 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, to be codified at 5 U.S.C. 8335). The conference report went further, directing OMB to provide a report, which it has apparently not yet provided, and which would have materially assisted this hearing. The Conference Report directive is as follows (in H.R. Conf. Rep. 108-10 (Feb. 13, 2003), 2003 WL 394983 (Leg.Hist.), in the discussion for the Treasury-Postal segment of the bill, corresponding to section 647):

> CONTRACTING OUT QUOTAS
>
> The conferees agree to a Senate provision prohibiting the use of funds to establish, apply, or enforce any numerical goal, target, or quota for contracting out unless the goal, target, or quota is based on considered research and sound analysis of past activities and is consistent with the stated mission of the executive agency. Although the Senate provision was somewhat different than the provision adopted by the House, the conferees want to emphasize the **strong opposition in both chambers** to the establishment of arbitrary goals, targets, and quotas. If any goals, targets, or quotas are established following "considered research and sound analysis" under the terms of this provision, **the conferees direct the Office of Management and Budget to provide a report to the Committees on Appropriations no later than 30 days following the announcement of those goals, targets, or quotas, specifically detailing the research and sound analysis that was used in reaching the decision.**

It is a special occasion when the Conference Committee on the omnibus appropriation, which is as close to the highest-level invocation by Congress of its power of the purse as one finds, directs OMB, in this way, to provide such a report "specifically detailing the research and sound analysis that was used in reaching the decision." If OMB had provided the specified report, the witnesses at today's hearing would have been able to analyze it. GAO, the academic witnesses, and the committee staff would all have studied it. A sound discussion of workforce issues would have ensued, with legitimate oversight of OMB's decision to proceed with its high numerical targets despite "strong opposition in both chambers" to arbitrary targets.

The absence of this report is doubly important because of the major questions, discussed below, about what OMB has done in promulgating the new A-76. For example, suppose OMB cannot really produce persuasive "research and sound analysis" for across-the-board numerical targets. Then,

it would become more important than ever, that the process for competing particular contracting-out decisions provides a valid basis for making each such decision. Yet, as discussed below, in many ways, new A-76 goes in the opposite direction, allowing and perhaps even forcing a contracting-out decision without such a valid basis.

Why, in the short term, does a drive toward outsourcing, posed in terms of high numerical targets, increase agency burdens? Because federal managers – both contracting personnel and mission managers - must preoccupy themselves with the outsourcing rather than their mission-supporting responsibilities. As a government contracting professor, I pay particular attention to how, in the 1990s, agencies downsized their acquisition workforce, a trend which may, unfortunately, continue. The DOD IG testified in 2001 that DOD has "reduced its acquisition workforce from 460,516 people in September 1991 to 235,560 in September 1999, a reduction of 50 percent. Further cuts are likely . . . ." And, the GAO has estimated that 27 percent of agencies current contracting officers will be eligible to retire though the year 2005. This downsizing of the acquisition workforce has been extensively critiqued for its part in diminishing of formal competition and increases in sole-source awards, and the reduced oversight of contractors. See Project on Government Oversight, *Pick Pocketing the Taxpayer: The Insidious Effects of Acquisition Reform* (2002); and, Professor Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001).

Contracting personnel now can barely cope with their regular workload, a problem that would increase greatly with an outsourcing initiative. The complexity of changing from in-house effort to outsourcing will further heavily burden already-strained acquisition personnel. The outsourcing being contemplated does not consist primarily of just ordering more tasks under existing indefinite quantity (IDIQ) contracts, or even awarding new contracts for supplies or services which have previously been acquired. Rather, new outsourcing means that the acquisition personnel must draft new requests for proposals, often for services not previously outsourced. Prior to this must come a planning process; subsequent to this must come whatever competition process is followed, including the evaluating of outside and in-house proposals; after that must come the process of overseeing awarded outsourced contracts (and, for that matter, overseeing in-sourced offers). Each part of this combination of planning, competition, evaluation, and contract oversight places heavy burdens, especially on the experienced acquisition personnel in most demand and present in diminishing numbers.

Moreover, scarce budget resources must also get devoted to the outsourcing process. These resources come from already-strained pools. And, one thing outsourcing efforts drain, is the alternative efforts at human capital strategic planning. As one goes through Actions Needed to Strengthen Civilian Human Capital Strategic Planning, GAO-03-475 (March 2003), one is struck by how many such actions have been foregone, and will be foregone, due to the diversion of scarce resources to the outsourcing. Within DOD, only the Air Force and the Defense Contract Management Agency (DCMA) - not the Army, the Marine Corps, and DoD (department-level) – have even developed information about their future workforce needs.

In other words, the Army can easily find itself – as it faces expanded missions, such as in Iraq – critically short of skilled personnel, without even a plan about what to do. Why is that? Because the Army has been preoccupied, in terms of its planning resources in this context, with its "Third Wave," the highly controversial plan to cut more than 214,000 Army jobs. See House Members Denounce Army

Outsourcing Plan, Federal Human Resources Week, Jan. 13, 2003.

After the short term disruption just described from the shortage of acquisition personnel and the preoccupation of managers with outsourcing, there is, of course, the effect on the morale and efficiency of mission personnel. To quote from the Report of the National Commission on the Public Service, Urgent Business for America (Jan. 2003)(the "Volcker Commission Report"), at 31: "we are also concerned that when competitive sourcing is perceived as unfair or for the purpose of reducing the government workforce, it breeds mistrust and undermines employee morale."

Let us turn to describing the long term effect of an approach to workforce issues that is too dependent upon outsourcing. There are many different strategies for addressing workforce issues: relying so much upon outsourcing precludes proper weight for the others. For one, developing creative new in-house approaches often deals best with workforce issues. For example, the Department of Veterans Affairs developed creative new pharmacy arrangements that handle enormous quantities of prescription-ordering, agency-wide, with great efficiency. The same reasons increased productivity can occur in the private sector – such as improved use of information technology – can occur with new in-house federal government approaches of that creative kind

Yet, dependence upon outsourcing stifles such creative new in-house approaches in the long term. The managerial attention and resources needed to develop them, get diverted to outsourcing. And, the pressure from above to outsource, deters managers from developing such in-house approaches. Putting the line personnel in fear of the disruption of outsourcing, or the actual process of considering or conducting outsourcing, impairs their motivation to work with such new approaches. The entire agency has its hands full handling outsourcing itself – such as handling disrupted operations, arranging the shift of work, and training contractor personnel – so that the additional effort of creating new approaches in the other areas which are not (yet) being outsourced becomes that much less feasible for the overtaxed agency. And, the difficulty of the federal government recruiting the new skilled personnel – like those with IT skills – due to its highly-publicized outsourcing, precludes launching such new approaches.

For another, outsourcing itself often replaces existing operations in a way that disperses the personnel and precludes further or later use of that existing structure and set of experienced personnel. So, the value that the outsourcing would have for new work, it lacks when it subtracts from the valuable existing in-house operations. Later it is too late to salvage what has been lost.

Also, outsourcing compounds the exposure of at-risk agencies. The GAO has pointed out that agencies with an existing high level of outsourcing, such as NASA, already go on its list of high-risk agencies. Existing capability is inadequate to supervise the already-high level of contracting-out; it will be even less able to cope with a heightened level of contracting-out. Further outsourcing just compounds this problem.

EXAMPLES AND PROBLEMS AT SPECIFIC AGENCIES

I am unimpressed that overall discussion about competitive sourcing, and specifically about outsourcing, can capture the diversity of federal agencies and their missions, particularly their service missions. This requires discussing examples and problems at specific agencies, in order to capture the magnitude of the concerns.

Arbitrary numerical targets, and a tilted A-76, are top-down approaches that follow a too-rigid ideology without sensitivity to a particular agency's mission.(Fn 1) Moreover, in terms of Congressional action, the response to numerical targets for outsourcing and to new A-76 appears likely to be, at least in part, agency-by-agency appropriation limitation provisions concerning outsourcing at specific agencies. Considering that this has already become the focus, general discussion must yield in part to the specific.

Defense Finance and Accounting Service - Cleveland

A particularly illuminating example of the problems of outsourcing has come to light by way of an inquiry by the Inspector General of the Department of Defense, Joseph E. Schmitz, as to work hitherto performed in Cleveland, Ohio. A public/private competition had been held for the Defense Finance and Accounting Service, as to its Military Retired and Annuitant Pay Functions. The work got outsourced, pursuant to A-76, to Affiliated Computer Service (ACS) by a contract with a potential 10 year value of $346 million. After award, when it was too late, the IG discovered a huge error that had inflated the in-house cost estimate by $31.8 million, producing an erroneous outsourcing award when the work should have been kept in-house. What particularly stung, was that the audit component of the IG's own office had acted as the independent review officer (IRO) of the competition, and so, should have detected, but had not detected, the huge error.

I gave some personal study to this particular example myself several months ago, and became familiar with how it combines relatively common features of outsourcing with the disastrous error that was made. First of all, it has a geographic aspect likely to recur. ACS is a Dallas-headquartered firm that planned to move the jobs around from one location to another, including moving some of the jobs from Cleveland to Kentucky. This is fairly familiar. Hitherto, many sensible considerations tended to stabilize the geographic distribution of the federal service workforce and its work. Notice that the Senate and House Appropriation Committees devote an entire, important Subcommittee to Military Construction, and you have a vivid reflection of how important – and, hitherto, relatively stable – the siting of federal facilities and the location of their workforce has been.

Once an agency, sometimes in consultation with Congress, authorized and funded a federal facility at a particular location to perform work, that work and that workforce tended for efficiency

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1 For example, it is all very well to note that private companies accomplish, by private contracting, the "protective function" for their facilities and personnel, and then to size up the number of federal employees performing protective functions who might potentially be replaced by outsourcing. But, does that capture what the reaction would be, if someone proposed replacing the President's Secret Service detail with contractor personnel? Does it take into account the reasons, after September 11, the public insisted on federal screeners in the new TSA, not private companies like Argenbright? Different missions cannot be reduced to uniform functions found in the private sector and calculable by one-dimensional numerical data. Debt collection by agencies for, say, student loans, cannot be equated to IRS collection activity. Federal prisons cannot be equated to local jails. And, health care for veterans cannot be equated to Medicaid. The public desires, and deserves, that federal missions of such kinds be performed by a highly motivated federal civil service – not a contracted-out minimum wage, high-turnover workforce.

reasons to stay there, all other things being equal. At least, there had to be some showing of a reason, before undertaking the disruption and expense of moving the work around. Since experienced personnel may not follow the work when it moves, even if offered a chance – for example, they may not want to uproot their families and move – moving the work often means sacrificing the use of experienced federal personnel. Through outsourcing and A-76, however – especially through new A-76 – there is now a procedure, favored by OMB and agency higher-ups eager to meet outsourcing targets, for undertaking precisely that disruption and expense of moving the work.

Not coincidentally, the work may well follow a particular migratory pattern. It is not surprising that ACS, a firm headquartered in Dallas, having work performed in the state of Kentucky, would tend to be a winner, and Cleveland would be a relative loser. Once work is put into "play" geographically, so to speak, it does not move around randomly. Even at best, it moves toward the lower-wage regions of the country. (It is important to remember that there are so many loopholes in the Service Contracting Act, that it does not effectively preclude contracting out to result in lowest-wage work.) At worst, the contracted-out work moves toward where newly-interested contractors take an interest in developing sufficient political influence to make federal policy go in their preferred direction.

Also, the particular DFAS problem reflects how new A-76 will make matters worse, especially unless protest rights are now established. The huge error in computing the cost estimate for the in-house bid went unnoticed by the IRO even though, in that instance, that review function was being performed by the relatively experienced and qualified DOD IG's office.(Fn 2) Currently, some experienced personnel may work on designing and costing the in-house bid – the Most Efficient Organization, or MEO - and errors may get caught by an independent review officer, even if they did not in the DFAS instance. Under new A-76, one-sided rules against conflicts of interest will keep most experienced personnel from work on the MEO, and the phase of independent review has been cut out. The quality of MEO design and costing will suffer, and with it, the employees' fair chance to keep the work.

And, new A-76 continues to have, as its Achilles' heel, that the contractors talk a great game about savings without diminished services, but in reality, they lose experienced personnel, and they do not have the idealistic motivation of the federal civil service. ACS has been fined nearly $500,000 for not meeting performance standards. Concretely, that means military widows not being able to get answers to their questions about complex but important pension formulae, or even having their checks sent to the wrong banks. As a former DFAS employee who went to work for ACS but quit after two months told the Cleveland Plain Dealer: "They were trying to do it with fewer people to save money." Sabrina Eaton, Firm That Replaced Cleveland Workers Fined, Cleveland Plain Dealer, July 19, 2003.

VA Services

Traditionally, the Department of Veterans Affairs (VA) had a statutory safeguard against privatization. 38 U.S.C. sec. 8110(a)(5). Now, however, the Administration is pressing to fund VA privatization studies. The Veterans Health Administration (VHA) represents a major quarry for the

2 That is entirely possible because many aspects of public/private competitions are atypical in general procurement, and may trip up even experienced acquisition personnel. Among the atypical aspects are, for example, the special aspects of cost estimation involving the costs of conversion of facilities from public to private, the costs of supervising a newly awarded outsourced contract, the computations for overhead as to in-house bids, the comparison between public and private descriptions of how work will be performed, and so on.

outsourcing hunt. Currently, the VHA has more than 206,000 employees, with over 50,000 considered candidates for privatization. So, since OMB wants to meet high government-wide numerical targets for outsourcing, the VA offers a tempting opportunity. And, new A-76 offers an easy way to take that opportunity. The VA's single largest function consists of its hospital system, something outsourcing enthusiasts would want to view as particularly commercial.

Yet, outsourcing at the VA has its own special downsides. The VA's budget has not risen at the rate either of general medical costs or the dramatically increasing population of veterans needing care. The report of the President's Task Force to Improve Health Care Delivery for our Nation's Veterans (May 28, 2003), urged measures from better DoD-VA collaboration to full funding of VA's obligations. Conspicuously absent was any proposal to outsource the running of the VA health care system. (There was a proposal that when the existing VA facilities cannot meet the demand for services, opportunities should occur for VA patients to receive those services outside of VA facilities, but that is very different from outsourcing the existing work in the existing VA facilities.) Quite the opposite, the Administration proposes to spend $50 million on VA competition studies – funds that could instead be used for veteran's health care itself.

To take another specific point which Congress would note in studying the VA example, currently, 52% of all VA blue collar workers in food service, housekeeping, and grounds maintenance are veterans. (These are particularly targeted for privatization, although many white collar jobs, from nurses to radiologists, are also targeted.) Asked about whether outsourcing would mean fewer jobs for veterans, contractor organizations mumble about possible clauses in subcontracts. As a government contracts professor, to me that sounds like rank double-talk. The short answer is apparently that VA outsourcing will be a backdoor way to repeal partially the veterans employment preference – something which, if attempted on the floor of Congress, would surely fail. Critics could consider it hypocritical for an Administration which purports not just in general to administer effectively, but in particular to be more pro-veteran than its predecessor, to engage in such a backdoor repeal of the veteran's preference. Throwing blue-collar veterans out of work – when they are performing VA work without criticism - at a time of high unemployment, hardly seems pro-veteran.

Forest Service

At the beginning of July 2003, it came out that the Forest Service is initiating studies for contracting out its entire law enforcement, budgetary and human resources staff. It is also doing so for significant portions of its environmental, fire control and timber sale workforce. The proposals mean outsourcing more than a quarter of the Forest Service's 34,700 jobs by the end of FY 2005. The more than $10 million for planning and studies this year would come out of the budgets of these areas. Moreover, thousands of Forest Service managers and workers have been drawn away from their regular duties, like forest firefighting planning and efforts, to work on outsourcing. See Christopher Lee, Forest Service Works to Meet Bush Policy on Outsourcing, Washington Post, July 1, 2003 at A11.

This has been sufficiently controversial that the recently House-passed version of the Interior Appropriation Bill carries a broad ban on outsourcing studies, and the Senate version may have a similar provision. The issue has aroused the environmental community, which sees a danger that the responsibility for protecting the nation's forests will get turned over by this process to the very firms being criticized for over-exploiting the forests. For example, the timber sale workforce is at the center

of a highly intense policy controversy over whether expanded timber sales represent an anti-forest fire measure, as the Administration maintains, or will lead to clearcutting in old growth areas, the most lucrative activity for contractors. Turning the timber sale activity itself over to private contractors seems a formula for imposing an environment-threatening agenda on the national forests.

Quite concretely, the Forest Service matter illustrates the themes discussed throughout this testimony. Outsourcing is only one approach to workforce issues, yet this Administration overdepends upon it, implementing it in a heavy-handed way, by agency-wide numerical targets. The impact upon the Forest Service, as upon the IRS and the VA, shows no sensitivity to agencies that have done traditional governmental work, treating them as no different than private sector firms without the same longstanding idealistic missions, specialized functions, and public interest responsibilities. In the near term, the proposals for the Forest Service, like those for other agencies, produce disruption, plummeting morale, and fear in the community most concerned about the agency's mission.

Even the cost and effort of outsourcing draws heavily on agency resources. There is a subtle message in the fact that the Forest Service would spend $10 million on such studies. I believe that when the Administrator of OFPP was asked what would drive an agency to meet its targets, her answer was to innocently suggest that nothing drove them – that no one does anything to an agency to make it meet its OMB-set outsourcing targets. However, the drive to meet outsourcing targets does not come from just some merely cheerleading federal official with a nice symbolic title but no particular authority. It comes from OMB. OMB has its hands on the money. *See generally* Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 Yale J. on Reg. 501, 519-24 (1996)(describing OMB's authority). So OMB has the power, which no one else does, to make an agency like the Forest Service take $10 million its employees would much rather devote to its environmental mission, and spend that instead on outsourcing studies. And, in the long term, a range of major deleterious effects, such as, for the Forest Service, delivering its environmental mission into the hands of profit-oriented firms that may well be perceived publicly as anti-environmental, will ensue.

NEW A-76'S TILT TOWARD OUTSOURCING

I recently published an article in a federal bar newsletter critiquing the new A-76 – which was the first (and may still be the only) academic analysis of the new circular. Charles Tiefer, OMB's New A-76: Tilting the Contracting-out Process, Federal Bar Association Government Contracts Section Newsletter, Spring 2003, at 6. New A-76's tilting comes under several separate headings.

Defining What Is "Governmental".

First, new A-76 radically expands the effective definition of what is to get contracted-out. Congress itself previously drew the lines about what is "inherently governmental" in the Federal Activities Inventory Reform (?FAIR?) Act, with its annual inventory of federal services to list which ones could have public-private competitions. While the FAIR Act, written by Congress in 1998, only drove contracting-out a limited distance in recent years, many features in the new A-76 are ready to push the process much further. New A-76 arranges to inventory all ?inherently governmental? activities, with a novel suggestion that ?all? activities performed by the federal government shall now be

deemed commercial, unless justified in writing as inherently governmental.(Fn 3)

The directive newly redefines as commercial even governmental activities that involve an exercise of federal discretionary authority affecting individual liberty, so long as higher agency officials set procedures enabling what is called "regular oversight." (Fn 4) OFPP has tried to argue that it has just recycled a definition in use in a 1992 policy letter. However, the 1992 policy letter predated the FAIR Act by six years, and was not part of an action mechanism. It did not drive the annual creation of inventories used to get agencies to meet numerical targets for outsourcing. For purposes of action, Congress took a more cautious approach in the FAIR Act. OFPP has overthrown that cautious approach.

These changes in the annual inventory process intimate what agencies might do to meet OMB contracting-out quotas. They might declare that their agents exercising discretion over the most sensitive matters - say, choices among which of the powerful IRS collection techniques ought to apply to particular taxpayers, or choices among which levels of isolation punishment ought to apply to particular federal prisoners(Fn 5) - might now, under agency oversight procedures, be privatized as "commercial." The rule of federal law is becoming rule by contractors. The American Federation of Government Employees, and the National Treasury Employees Union, have filed lawsuits challenging new A-76, including the new expanded definition of what can be contracted-out. I urge Congress not to abdicate its oversight role.(Fn 6)

Outsourcing "Wins" By Default or By Skewed Calculations

New A-76 says that a standard competition must occur on a timetable forcing decision within a

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3 The Draft A-76 (Nov. 14, 2002) expressly stated the presumption as that agencies shall "Presume all activities are commercial in nature unless an activity is justified as inherently governmental." (Page 1, point 4.1.; see also App. A-1.) The Final A-76 (May 29, 2003), requires that "The CSO shall justify, in writing, any designation of government personnel performing inherently governmental activities." Activities not so justified, and hence, not inherently governmental, must be commercial.

4 Section B.1.a.3, at page A-2, lets something be considered an inherently governmental activity if it involves "Significantly affecting the life, liberty, or property of private persons." By the canon of *expression unius*, if something affects individual liberty but not "significantly" affects it, then it is commercial rather than inherently governmental. For example, even if the Administration would concede that IRS collections activity can affect the liberty and property of taxpayers, presumably its position may be that such activity does not "significantly" affect liberty and property.

5 The policies about not deeming commercial those government activities that significantly and directly affect life and liberty, "do not prohibit contracting for . . . the operation of prison or detention facilities." Att. A, App. A-3, point B.1.c.4.

6 The Executive Branch will set up several doctrines in the way of a fair judicial ruling against it. It can urge that the issue, in whole or in part, is not yet "ripe" until federal employees suffer the actual hardship of RIFs. It will argue that its interpretation of the relevant legal principles, right or wrong, ought to receive various kinds of "deference." Congress has no reason to heed these kind of excuses for avoiding scrutiny of the A-76 changes. And, Congress can consider policy arguments on all sides. For example, a study by a former IRS commissioner concluded that a dollar invested in additional IRS in-house personnel would return $31 in additional collections, while, at a 25 percent commission, contractors will return only $3 for every dollar spent – putting aside all the other issues about contracting IRS collections out. Albert B. Crenshaw, Tax-Collection Proposal Draws Criticism on Hill; Private Firms would Pursue Debtors, Wash. Post, May 14, 2003, at E2. Congress can consider such policy studies, of course, while the Justice Department will likely urge the courts not to. So, Congressional attention and oversight on this issue are necessary and proper.

set period, and it is not easy to waive the deadline. A-76, point D.1 If agency managers, even just from the uncertainties of designing an MEO for types of services never before competed this way, submit a materially deficient tender, the public service proposal might not be considered - and the private contractor, regardless of relative lack of merit, wins by default.(Fn 7) The extraordinary concept is that service by public employees must cease if the process of deciding about this runs into problems, whatever the reason.

Also, new A-76 puts great emphasis upon something newly injected with significance, the "streamlined competition" for outsourcing that OFPP will now use to handles activities involving 65 or fewer FTEs. This eliminates so much of the process that it is in some ways more like a direct conversion than a genuine competition, but, hitherto, direct conversions were only for activities involving 10 or fewer FTEs. For example, OFPP has told agencies they need not even bother to develop an MEO for the public offer in a streamlined competition, but rather, "An agency may base the agency cost estimate on the incumbent activity." Att. B., point C.1.a.(Fn 8) This is an extraordinary truncation of the process, considering that in past A-76 competitions, the in-house MEO won sixty percent of the time. Now, in other words, even if agency employees could win the competition and do better and cheaper work than the private contractors if given half a chance by proposing how to improve their operation, the agency, to save time, can skip giving them that opportunity and just zoom ahead by a "streamlined" route to outsourcing.

OFPP has tried to contend that the new aspects of revised A-76 were at least vetted by the Commercial Activities Panel (CAP). Not even the thinnest claim of prior vetting can be made for what new A-76 does with this "streamlined" procedure for relatively substantial operations (65 FTEs). This was not only not proposed or considered by the CAP, it was not even in the original late 2002 proposal for new A-76 that received public comment. It sprang forth, without opportunity for formal public discussion or explanation, in the May 2003 final version. OMB has given no reason to doubt that it developed this powerful "streamlined" procedure to implement the Administration's element of hard-line enthusiasm for outsourcing that lies behind the high numerical goals.

Unfortunately, there is every reason to expect that OMB will treat the "streamlined" process as a way to outsource without putting in the resources in planning, attention, and consideration, to fairly weigh public vs. private alternatives. This is particularly likely when an agency considers itself under heavy pressure from OMB or higher-ups to meet arbitrary targets. It is significant that the "streamlined" process can even use multiple-award contracts for the private offer, so that an agency can, in effect, push through outsourcing on an automatic, cookie-cutter basis, outsourcing one in-house operation after another without even a minimal new or tailored effort or expense by the private contractors to beat, in competition, a specific MEO in the specific existing in-house operation. This

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7 "If the CSO determines that the ATO cannot correct the material deficiency with a reasonable commitment of additional resources, the CSO may advise the SSA to exclude the agency tender form the standard competition . . . . and the SSA shall make the performance decision . . . ." Att. B, point C.5.c.(3).

8 To hammer the point home, Att. B, point A.5.b.(2), says to look for a threshold determination at the "agency tender (for a standard competition)" but at "the agency cost estimate (for a streamlined competition)." In other words, there may well not be any agency tender in a streamlined competition – just an agency cost estimate derived from the current agency activity (not an MEO).

metes out the economic equivalent of capital punishment to federal employees without even adapting the indictment or evidence to the specific facts.

The most dicey part of the new directive consists of letting go of what hitherto gave the public-private competition a semblance of objectivity - the standard of making public and private offerors compete as to the lowest calculated cost to the taxpayer. Inherently, calculations of the lowest cost, albeit manipulable to make private providers look better than they actually prove, put some kind of limits on outsized profits blatantly built into private proposals. Congress has particularly wanted the Defense Department only to contract out upon a persuasive demonstration it saves the taxpayer money. *See* 10 U.S.C sec. 2462; 10 U.S.C. sec. 129a. Without adhering to that, there is too large a danger of contractor giveaways to meet numerical outsourcing quotas. See Charles Tiefer, Giving Away the Store: How Much More Can the New Administration Surrender to Contractors?, Legal Times, March 5, 2001, at 36 ("the policy case for enfeebling the competitive procedures of A-76 is weak").

Yet, new A-76 includes the option of the private provider winning without competing on cost. It explicitly allows standard competitions to come to a performance decision other than on low cost. The private contractor merely needs to make a proposal that the agency decides has some obscure or irrelevant kind of technical superiority, providing in new A-76's terms, a "rationale for the decision to award other than the low-cost provider." An agency can, with ease, skew a set of arbitrarily-picked non-cost technical factors to assure meeting its contracting-out quota. It can exclude factors the public appreciates in civil servants - experienced service, public spirit, incorruptibility, respectable levels of women or minority employment. And, it can overvalue technical factors found predominantly in the private offers - say, frilly features of the latest information technology that contractors can buy but that OMB would not let public employees have. See Charles Tiefer & William A. Shook, Government Contract Law 108-121 (1999 ed.)(agency discretion on evaluation factors).

Indeed, the final version of A-76 made it even easier to outsource than that. The draft version had required a "quantifiable rationale" for not taking a lower-cost in-house offer. But, the final version dropped the requirement that the rationale be "quantifiable." It is no wonder that critics of new A-76 warn that it will provide a field day for purely subjective decisions to outsource: now the rationale can even be non-quantifiable. In other words, the in-house offer can not only be lowest-cost, it can even be numerically superior by every quantifiable measure – and an agency under the gun to meet its numerical target can still go ahead with outsourcing.

A subtle point in new A-76 consists of what might be called the contractor "write your own dream ticket" provision. The technical term is the "phased evaluation" process. Att. B, point D.5.b.(2), at B-13. If a contractor does not like the agency's statement of the work to be done, the contractor can submit its own alternative. For example, suppose the current worksite is Cleveland – or Chicago – and the agency's statement of work requires continuing to do the work on site there. But, a would-be contractor may be in Dallas. The contractor can submit the alternative of moving the work to Dallas, which, presumably, would give it an incredible advantage over the in-house bid.

It need hardly be said, that any would-be contractor's lawyer given this opportunity, could easily figure out a way to stack such an alternative to give his contractor-client a tremendous advantage in the ensuing competition. This procedure is a godsend for the contractor who could not otherwise win a public-private competition, or at any rate could not do so without less profit than he wishes. Even GAO, which tried its very hardest to keep mute about the problems in new A-76, found this part

"burdensome in implementation" and one which "may affect the timeliness of the process." (GAO Testimony before the House Comm. on Government Reform, June 26, 2003, GAO-03-943T.) Translation: GAO cannot avoid mentioning that this stacked pro-contractor process by which the contractor gets to say what work the government should pay for, has the potential to drag on indefinitely, impose large burdens, and make a mockery of the competition.

INADEQUATELY CLEAR RIGHTS TO PROTEST OUTSOURCING AWARDS

Considering the heightened risks under the new A-76 of the tilt toward outsourcing, it matters more than ever what rights exist to protest an improper contract award. An important legal issue has long concerned the denial of rights either to someone articulating the government's in-house position or the employees and their unions, to protest improper awards. This is a subject I addressed in some detail in a law review article published not long ago. Charles Tiefer & Jennifer Ferragut, Letting Federal Unions Protest Improper Contracting-Out, 10 Cornell Journal of Law & Public Policy 581 (2001). As I discussed at length, the barriers to employee union protests in this context are the hoary leftovers of long-obsolete circumstances. The better decisions (or dissenting opinions) in support of union protests make a persuasive case, and show that the supposed barriers or problems are just not serious. *See National Air Traffic Controllers Association v. Pena*, 78 F.3d 585, 1996 WL 102421 (6th Cir. 1996); *Diebold v. United States* , 947 F.2d 787 (6th Cir. 1991); *National Federation of Federal Employees v. Cheney* , 883 F.2d 1038, 1054(D.C. Cir. 1989) (Mikva, C.J., dissenting); *International Assn. of Firefighters, Local 5-0100 v. United States Department of the Navy*, 536 F. Supp. 1254 (D.R.I. 1982).

Of course, this issue has received special consideration due to recent developments: new A-76 itself calls the Agency Tender Official or ATO, in devising, defending, and filing internal appeals for the MEO, a ?directly interested party,? and takes other formal steps to put the MEO on a formal basis. In light of new A-76, the GAO has published an invitation to comment on whether to allow standing for a public-side protest right. There is a substantial chance the GAO will allow the ATO, one way or another, to pursue protests to obtain independent judgments of legal flaws in public-private competitions. After all, new A-76 makes the MEO, far more than ever, an entity with distinct formal rights and interests, bound by a stiff contractual instrument (a ?letter of obligation?), subject to termination for default, and lasting just for a specific term.

Contractor associations will urge that no such protest rights should be extended even to the ATO, let alone to employees and their unions. And, presumably, they will urge a hands-off stance by Congress. However, I would suggest a number of reasons, in this new situation, for Congress to study and to encourage the recognition both of full ATO protest rights – the easy step – and the more worthwhile, but more strongly contractor-resisted, step of recognition of rights to protest contracting-out by employees and their unions.(Fn 9)

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9 Part of what holds back GAO and the Court of Federal Claims consists of formal or precedential considerations that cannot be argued the same way to Congress. Both GAO and the Court of Federal Claims have past precedents against union standing to protest. It will be argued to them by contractors that these are *stare decisis* – settled precedents not to be overruled – because in some respects the precedents are interpretations of the Competition in Contracting Act, or other statutes, and these forums will be told not to change previous statutory

Contractors will argue to these other forums that any protest rights for the ATO – the agency official who formulates the MEO – is more than sufficient, and, hence, that no recognition at all should be given to employees and their unions. Although I have hoped, and continue to hope, that this argument will not overly sway these other forums, Congress in particular is immune to some of the subtext underlying this argument. Contractors like to argue that there is no symmetry between them and unions: that contractors must have the right to protest flawed agency decisions about contracting-out, while unions should not have such a right. Congress, in particular, can recognize contractor arguments for such asymmetry as self-serving: that it is utterly unfair and illogical that the only errors in the outsourcing process that get corrected should be the ones contractors want to see getting corrected, not the rest. The protest forums would become like one-way pro-contractor auditors, who could only take notice of situations where the public should pay the contractors more, but who are forbidden to take notice of those in which the public should pay the contractor less. Both basic fairness, and the public interest, call for legally mistaken awards of contracts in the outsourcing process to be at least as subject to protest as decisions the other way.

And, rights for ATOs to protest, although better than nothing, also fall short of the more worthwhile situation from recognizing rights in employees and their unions. ATOs are, after all, agency officials. They know the desire of OMB and their superiors for outsourcing, and even if this does not totally sap their willingness to propose in-house alternatives, it may somewhat put a ceiling on how far they will fight in calling attention to the errors committed in the error-prone A-76 process in rejecting those alternatives. ATOs may not have as much independence of outlook, experience with the downsides of outsourcing throughout the government, and vigor of presentation, as the employees and their unions.

This is particularly necessary in light of what the new A-76 does. For, by its new provisions such as denying consideration of in-house alternatives deemed materially deficient on technical factors, it creates new ways a contractor could receive a legally unmerited award in effect by default. More than ever, employees and their unions must have a forum to go to, when they lose an A-76 competition, not on the merits, but by these forms of default.

And, if ATOs receive the right to protest, there may be new ways for employees and their unions to participate, which GAO and the courts will adequately consider only if encouraged by Congress. In outsourcing cases, the GAO and the courts should be encouraged, with ATOs now playing a role as a protester, to readily grant unions that apply for it, intervenor status.(10)

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interpretations. Although new A-76 makes changes in the public-private competition process, so that the *stare decisis* argument is largely without merit in this situation, still, it is an argument which contractors can use to distract these other forums in a way that would be completely ineffective in Congress.

10 This is another way to make up for the fact that agencies or ATOs may not have as much independence of outlook, experience with the downsides of outsourcing throughout the government, and vigor of presentation, as the employees and their unions. (For example, during protests of awards during all-private competitions, the petitioner is the rejected contractor and the respondent is the agency, but the contractor receiving the award often participates as an intervenor. It is similarly common in general labor relations cases (e.g., appeals from NLRB decisions on unfair labor practices in organizing), when a corporation appeals and the agency is the respondent, for the union to become an intervenor.)

I thank the Subcommittee for the opportunity to testify.