Introduction

On behalf of the American Federation of Government Employees, AFL-CIO, which represents more than 600,000 federal employees, including 200,000 in the Department of Defense (DoD), who serve the American people across the nation and around the world, I thank you, Chairman Ensign, for this opportunity to testify this morning before the Senate Armed Services Subcommittee on Readiness and Management Support.

Over the last several years, AFGE has striven to reform federal privatization policy and thus promote the interests of warfighters and taxpayers as well as federal employees. In fact, last year, an amendment offered on the floor to the defense authorization by Senator Edward Kennedy (D-MA), which came within one vote of passing and was strongly supported by AFGE, would have ensured real and equitable public-private competition under an objective, cost-based process for work performed by DoD civilian employees, DoD contractors, as well as at least small fractions of work not yet performed by either workforce. The Kennedy Amendment would have also ensured greater accountability through the establishment of an inventory to track the cost and size of DoD's contractor workforce.

AFGE will continue to work with other unions and public interest organizations as well as our Republican and Democratic friends in both chambers of the Congress to enact the significant changes in law necessary to improve the delivery of services for warfighters and reduce expenses for taxpayers, including those called for in the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act, which claimed the cosponsorships of 215 House and Senate lawmakers in the 107th Congress.

Today, however, I will limit my written testimony to six main topics:

1. the Office of Management and Budget's (OMB) privatization quotas,

2. the OMB's rewrite of the OMB Circular A-76 privatization process,

3. the threat to use "best value" in DoD's public-private competitions,

4. the threat of the Army's "Third Wave" privatization initiative,

5. the threat to eliminate in-house depot maintenance and arsenals capabilities, and

6. the threatened introduction of the Service Acquisition Reform Act (SARA).

1. OMB privatization quotas

Although well over one-half of all Congressional lawmakers have emphatically repudiated the essence of the Administration's privatization policy—261 in the House of Representatives and another 48 in the Senate—the infamous OMB privatization quotas are still with us. Regardless of their needs or missions, agencies are being forced by OMB to review for privatization, either with or without public-private competition, at least 15% of the positions listed on agencies' Federal Activities Inventory Reform (FAIR) Act inventories. According to the November 14, 2002, draft proposal to rewrite the A-76 process, it is ultimately the Administration's goal to review every single position on every single agency's inventory, which works out to at least 850,000 positions.

I would like to make these points about the OMB privatization quotas:

A. The use of the term "competitive sourcing" to describe the OMB privatization quotas betrays either bias or ignorance. OMB explicitly encourages agencies, including DoD, to give work performed by federal employees to contractors without public-private competition, either through direct conversions or privatizations. According to the Administration's FY04 budget proposal, some agencies, including the General Services Administration and the National Aeronautics and Space Administration, are using direct conversions exclusively to hit their OMB privatization quotas. Other agencies are using direct conversions extensively to hit their OMB privatization quotas. There is nothing "competitive" about this corporate welfare-style privatization.

   The "competitive sourcing" (sic) initiative is not about saving money for the taxpayers; it is about replacing federal employees with contractors and shifting money to the private sector. The Administration's refusal to help already overwhelmed agencies do a better job of fairly conducting competitions and satisfactorily administering their contracts is highly illustrative of this point. The threatened shift to a loosey-goosey "best value" competition process in which contractors can submit less responsive and more expensive bids and still win contracts is also illustrative.

   Office of Federal Procurement Policy (OFPP) Administrator Angela Styles, who is responsible for the implementation and enforcement of the OMB privatization quotas, now, according to *Government Executive,* must **"caution against judging the (privatization quotas) program on savings alone."** (Emphasis added.) According to the March 2003 edition, Ms. Styles insists that threatening to privatize the jobs of 850,000 federal employees, either with competition under a privatization process that is being rewritten so that it becomes more pro-contractor, or without any competition whatsoever, "can have a positive effect on morale, and could even help attract young people to government service." Defending the indefensible can often require intelligent people to say the most preposterous things. However, as savings from the

"competitive sourcing" (sic) initiative fail to materialize, we can expect other highly subjective, to say the least, and conveniently unquantifiable rationales to be served up for our consumption in the months ahead.

Ms. Styles apparently considers public-private competitions to be intrinsically virtuous, whether or not money is actually saved—but only when the work in question is being performed by federal employees. While OMB is forcing agencies to review for privatization 850,000 federal employee positions, only a tiny handful of contractor positions will be reviewed for possible insourcing, even though contractors acquire and retain almost all of their contracts without ever having to compete against federal employees.

The Department of Housing and Urban Development (HUD) is one of only two agencies that will be reviewing work performed by contractors for possible insourcing. In fact, HUD will get credit towards its privatization quotas by reviewing work performed by contractors in the area of home loan programs. DoD, however, is not reviewing a single contractor job for insourcing, despite a much larger and more unaccountable contractor workforce. This dereliction becomes even more difficult to comprehend when we remember that 10 U.S.C. 129a requires DoD "to consider particularly the advantages of converting from one form of personnel (military, civilian, or private contract) to another for the performance of a specified job" and DoD, in the person of Undersecretary of Defense for Acquisition, Technology and Logistics E.C. "Pete" Aldrige, said as long ago as 2001, that "we (may) have already contracted out capabilities to the private sector that are essential to our mission…"

B. As implemented, the OMB privatization quotas have profoundly ugly class, race, and gender biases, and are systematically encouraging agencies to place target signs on the backs of employees who are lower-ranking, women, and members of minority groups.

For example, in the Department of Veterans Affairs (DVA), it is the employees in building maintenance, food services, and laundries who will be reviewed for privatization, rather than health care professionals. In fact, OMB has directed that all agencies aggressively review for privatization the jobs of blue-collar, clerical and maintenance workers. And managers in more than one agency have been known to compile FAIR Act inventories that classify all employees but supervisors as candidates for privatization.

DVA managers have publicly expressed concern about the impact of the OMB privatization quotas on the hard-won diversity of the agency's workforce. According to a DVA manager quoted in *Federal Times*, "(A)ny significant effort to outsource jobs (in the functions listed above) will have huge diversity implications." Moreover, the Department of Transportation, in its comments on OMB's A-76 rewrite, reported the disproportionate impact of the privatization quotas' direct conversions on women and minorities. A

consultant who has run federal public-private competitions for more than 20 years told *Government Executive* that, “(I)n looking at the affected workforce it is disproportionately minority and female."

Whether or not it is one of the intentions of those who designed the Administration’s policy, it cannot be denied that the consequences of the OMB privatization quotas will ultimately have the effect of turning back the clock to the days when federal agencies were managed and staffed primarily by white males. This is a concern that has drawn too little attention. Thanks to the hearing you are conducting here today, Chairman Ensign, perhaps we can rectify this oversight.

C. Although there was an attempt to portray the final result of the FY03 effort to free agencies from the OMB numerical privatization quotas as a compromise, such is not the case. The Administration agreed that numerical privatization quotas are bad public policy—except when they are based on the Administration’s own research and analysis. Report language requires OMB to submit a report that provides such research and analysis.

The role of the General Accounting Office (GAO) in the defeat of what began as a bipartisan effort to end the use of numerical privatization quotas is disappointing. On the very day, July 24, 2002, that the House of Representatives passed an anti-numerical privatization quotas amendment, by a vote of 261-166, the Comptroller General went out of his way to criticize the effort in the media.

Later, he elaborated on his criticism in an August 9, 2002, letter to a Senate lawmaker, in which he insisted that the amendment would be a “blanket prohibition on the use of goals.” As even the most cursory reading of the language would have revealed, the amendment was in no way a “blanket prohibition.” Rather, it would have prevented only the use of numerical privatization quotas. Agencies could have used research and analysis to establish non-numerical goals if the amendment had been enacted. In fact, by preventing political appointees from plucking numbers out of thin air and then imposing them on helpless agencies, the amendment would have promoted the use of research and analysis in the establishment of goals.

Moreover, it is well understood by any observer of the federal privatization scene that the OMB privatization quotas are not based on “research and analysis.” Representatives from GAO were in attendance, and one even testified, at the March 6, 2002, hearing of the Senate Governmental Affairs Committee hearing in which Ms. Styles said that the privatization quotas had been established by the President—who is unlikely to have had the time to perform any “research and analysis.” Indeed, the Comptroller General, in his August 9 letter, correctly asserted that he had “seen no evidence to indicate that its numerical FTE goals were based on considered research and sound

analysis." Unfortunately, the inclusion of a vague "research and analysis" requirement gave the Administration an obvious out and rendered the amendment unenforceable.

Finally, the GAO's recommendation that any prohibition on the use of numerical privatization quotas include an "escape clause" for those quotas that are based on "research and analysis" was strangely incomplete. The elaboration provided in the letter was vague management-speak: "a review of historical data and sourcing activity in the public and private sector combined with an analysis of current and emerging market trends…" However, the GAO's recommendation did imply that the OMB privatization quotas should take "into account the capacity of agencies…to conduct public-private competitions."

Unfortunately, some Senators accepted the GAO's fundamentally flawed criticism as a rationale for voting against the anti-numerical privatization quotas amendment. Consequently, agencies are still being forced to review for privatization, regardless of their needs and missions, tens of thousands of federal employee jobs, either with or without public-private competition.

D. I will conclude this section of my testimony by providing you with my own thoughts on how to reform the OMB numerical privatization quotas so that agencies can, if appropriate, establish non-numerical, agency-specific, equitable sourcing goals:

1. Don't use numbers. Numbers are a lazy person's short-cut, an unworthy alternative to conducting the "research and analysis" necessary to establish goals that promote good public policy, as opposed to narrow private interests. AFGE criticized the disastrous use of numbers to manage the DoD civilian workforce during the Clinton Administration. And we'll criticize the Bush Administration when they perpetrate the same blunder in the context of DoD privatization.

   I would ask the Comptroller General to review a key passage in his own August 9 letter in which he implies that the desired "result (of a goal-setting process) would be the identification of specific functions or activities that should be subject to public-private competition." In other words, sourcing goals, he believes, should be function- or activity-based; and, of course, I would add, no numbers are needed to establish such sourcing goals.

2. Take politics out of the process. Any non-numerical sourcing goals should be designed by managers in the individual agencies, not the politicals over at OMB. Since they are closer to the action and have an institutional investment in seeing that their customers are well-served, agency managers, although far from perfect, are in a better position to establish

appropriate goals that complement agencies' actual needs and missions. OMB politicals have no business in imposing privatization quotas on agencies, let alone telling managers exactly which jobs to review, as occurs regularly today. We would do well to remember that OMB's expertise is limited to the indelicate art of telling people what to do, not in actually doing something.

3. Get rid of the corporate welfare. Direct conversions and privatizations have no place in any sourcing goals. With all respect to the Comptroller General, no amount of "research and analysis" can justify taking jobs away from federal employees and giving them to contractors without public-private competition. That does a disservice to federal employees, taxpayers, and customers.

4. Look beyond the usual suspects so that agencies can establish non-numerical, equitable sourcing goals. DoD has three different workforces: civilian, military, and contractor. However, only the civilian and military workforces have been looked to for savings. As Army Secretary Thomas E. White, of all people, has acknowledged, "In the past eleven years, the Army has significantly reduced its civilian and military workforces. These reductions were accompanied by an expanded reliance on contractor support without a comparable analysis of whether contractor support services should also be downsized." The same is true for the rest of DoD. If HUD and the Department of Energy can review contractor work for insourcing, there is no reason DoD cannot do the same.

   And just as it's important to track the work performed by federal employees, it is also important to track the work performed by contractors. This means that agencies must have contractor inventories analogous to the FAIR Act, so that managers can determine, as Army managers are currently attempting to do so, what work has been privatized already, particularly with respect to whether it is actually inherently governmental work.

5. Any non-numerical, agency-specific, equitable sourcing goals must take into account the need for a diverse federal workforce. Federal agencies should be model employers, rather than reactionary employers who use, purposefully or not, privatization quotas to roll back the civil rights revolution.

6. Non-numerical, agency-specific, equitable sourcing goals should also peacefully coexist with other, more proven techniques—from labor-management partnerships to demonstration projects to reorganizations and consolidations—to make agencies' operations more efficient. The Bush Administration has broken with bipartisan precedent and

emphasized the OMB Circular A-76 privatization process to the exclusion of all other techniques.

7. Non-numerical, agency-specific sourcing goals that are truly equitable cannot possibly be created unless both contractors and federal employees have the same rights to challenge agencies' sourcing decisions. Currently, only contractors have legal standing to take agencies to GAO and the Court of Federal Claims—and not federal employees and their union representatives. It is manifestly unfair that the Administration has unleashed a tidal wave of privatization on federal employees without making sure that federal employees as well as contractors can both have their day in court.

8. Agencies should establish non-numerical, equitable sourcing goals for one reason only: so that customers can receive better services at the lowest possible costs. Competitions are a means to an end; they are not an end in themselves. As the costs and consequences of the privatization quotas become more clear, and the resulting savings fail to materialize, OMB officials are, as noted earlier, inventing rationales for their failed policy that have nothing to do with promoting the interests of customers or taxpayers. Well, conducting competitions for the sake of conducting competitions is not acceptable public policy. As OMB officials should know, the adverse impact on workforce morale of a privatization review, as well as the commensurate adverse impact on productivity, is significant.

9. Agencies should also be required to conduct and make public "research and analysis" before establishing any non-numerical, agency-specific, equitable sourcing goals, including:

    a. whether the agency has the in-house capability to satisfactorily perform these inherently governmental functions: conducting the competitions,[1] crafting the most efficient organization plans, and administering any resulting contracts;

    b. what experiences the agency, other federal agencies, or state and local governments have had in the past with public sector

[1] According to the March edition of *Government Executive*, "No agency is implementing competitive sourcing without contractor support. `**There is no expertise left in government to do these competitions,'**" says one agency official. (Emphasis added.) "For niche contractors that specialize in A-76, the initiative is big business," according to one consultant. "`The demand for consultant support is so great that industry is strapped to meet it,'" according to the consultant. "`The biggest problem is finding qualified people to do the work…'" Perhaps Ms. Styles meant that her privatization quotas would encourage young people to grow up and become the A-76 consultants necessary to implement her controversial initiative, rather than the federal employees who are needlessly subjected to it.

and / or contractor performance of the work in question, particularly with respect to costs;[2]

c. to what extent the work has already been privatized;[3]

d. whether the agency can easily reconstitute an in-house capability if the work is privatized;

e. whether the private sector market can provide sufficient competition to avoid sole-source contracting if the work is privatized;

f. what impact, if any, there would be on service if the contractor were to provide its workforce with inferior compensation;[4] and

g. what alternatives to privatization exist to make the delivery of services more efficient and what are the costs of those alternatives in relation to the cost of conducting a competition and perhaps privatizing the work.[5]

Not a single agency has conducted that basic "research and analysis." Nor is there any indication that OMB or the agencies feverishly implementing the privatization quotas, will rectify that dereliction, although the Army deserves some credit for thinking about these issues, albeit in the service of the indefensible "Third Wave" initiative.

2. The OMB's rewrite of the OMB Circular A-76 privatization process

In the past, when I mentioned "OMB Circular A-76," people's eyes glazed over. Not any more, though. OMB's controversial rewrite of the A-76 process has subjected this obscure directive to a much-needed glare of publicity. In fact, 170 House and Senate lawmakers have already signed on to a joint letter of objection to OMB about its November 14, 2002, A-76 rewrite proposal; and others have

[2] Obviously, the less experience or information an agency has about the work in question, the more cautious an agency should be in shifting work from one workforce to another.

[3] As the Department of the Army has concluded, it is necessary to determine whether commercial functions, "when contracted out beyond a certain level of reliance, increase overall risk to mission capabilities and readiness."

[4] It is commonly acknowledged that the historic and systematic failure of contractors to provide screener workers with adequate compensation jeopardized passenger safety and played a significant role in the decision of the Congress to contract in the screening function.

[5] The consideration of alternatives to public-private competition is imperative when we remember that it can cost taxpayers as much as $8,000 to review just a single job for privatization.

sent their own individual letters. And I'm not surprised. The November draft is so one-sidedly pro-contractor, it defies belief.

The Army's controversial "Third Wave" privatization initiative, which was designed to review for privatization without any public-private competition at least 210,000 federal and military positions, is widely viewed as being beyond the public policy pale. In fact, at least publicly, it has even been implicitly repudiated by the Army.

In summarizing the comments I submitted to OMB last December, I will argue that the A-76 rewrite has many similarities to the "Third Wave," is in some ways even more extreme, and could be used by the Army or other services to implement the "Third Wave."

In other words, the A-76 rewrite is in many ways a stealthy continuation of the discredited "Third Wave" by other means. It might actually be called the "Fourth Wave"—and, if implemented, it would constitute the final wave for federal employees, effectively wiping out what's left of the in-house workforce. Triumphant contractors are naturally exultant about the rewrite. In fact, as a result of the changes proposed by OMB, contractors insist that they will win 90% of all A-76 competitions, instead of the 40-50% they are winning now.[6]

A. Like the "Third Wave," the A-76 rewrite would emphasize privatization to the exclusion of all other methods of making the provision of federal services more effective, more efficient, and reliable.[7] Also like the "Third Wave," the A-76 rewrite would require agencies to review 100% of their in-house inventories for privatization.

This represents a radical shift in philosophy. The current circular places the privatization process in its proper context, as just one tool in a manager's toolbox. The process of improving service delivery, according to the current Introduction, page 1, "must consider a wide range of options, including: the consolidation, restructuring or reengineering of activities, privatization options, make or buy decisions, the adoption of better business practices…" Even DoD employs a "strategic sourcing" approach that involves a range of options similar to those recommended in the Introduction to the current circular.

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[6] For example, a James C. Fontana, Senior Vice President, Geotonics Government Solutions, told contractors gathered at a Contract Services Association of America event that merely switching A-76 to a "best value" process and "forc(ing) agencies to measure the true costs of their work" (i.e., double charging in-house bids for indirect personnel costs, while not charging contractor bids for the same costs) would "dramatically decrease number of Gov't `wins' perhaps to 10%."

[7] Actual Text (Daniels Memorandum, 4., page 1): *"…(A)ll commercial activities performed by government personnel should be subject to the force of competition, as provided by this Circular."*

B. Unlike even the "Third Wave," the A-76 rewrite would include an explicit bias towards privatization.[8]

Per the A-76 rewrite, all work performed by federal employees would be considered appropriate for privatization.

C. Unlike even the "Third Wave," the A-76 rewrite would "rewrite" through a mere circular the law that defines "inherently governmental" in order to make it easier to contract out inherently governmental work.[9]

D. Unlike even the "Third Wave," the A-76 rewrite does not include an inventory to track the work performed by contractors, making it impossible for agencies to determine which inherently governmental work has been wrongly privatized, even though key figures in the Bush Administration's privatization effort concede that this has already happened.

E. Unlike even the "Third Wave," which ostensibly calls for reviewing work performed by contractors, the A-76 rewrite would subject almost exclusively only activities performed by federal employees to review.[10]

Despite the fact that contractors acquire and retain almost all of their work without public-private competition and precious little private-private competition, OMB has never applied such quotas to the federal government's massive contractor workforce. For those keeping score, between 850,000 and 1,000,000 federal employee jobs would be subjected to privatization under the rewritten A-76. At the same time, only the tiniest of fractions of the contractor workforce would be reviewed. And DoD is scheduled to review for insourcing not a single contractor job.

F. Unlike even the "Third Wave," the A-76 rewrite would not establish a reliable and comprehensive inventory to track work performed by contractors, although both processes would drastically increase the number of taxpayer dollars given to contractors.

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[8] Actual Text (Daniels Memorandum, 4.b., page 1): *"Presume all activities are commercial in nature unless an activity is justified as inherently governmental." (Emphasis added.)*

[9] Actual Text (Attachment A, E.1., page A-3): *"These activities require the exercise of substantial official discretion in the application of government authority and/or in making decisions for the government."* (Emphasis added) The addition of the word "substantial" rewrites the language in the FAIR Act that defines "inherently governmental."

[10] Actual Text (Daniels Memorandum, 4., page 1): *"…(A)ll commercial activities performed by government personnel should be subject to the forces of competition."* (Emphasis added.)

I will now discuss how the A-76 overtly encourages agencies to directly convert work performed by federal employees to contractors without any public-private competition, a la the "Third Wave."

G. The rewritten circular retains various direct conversion methods of giving work to contractors without public-private competition that are included in the current circular, including special authorities for smaller functions, whenever it can be claimed not to adversely impact federal employees, waivers, and business case analyses.[11] Because of the OMB privatization quotas, agencies would be encouraged to make use of all of these explicit direct conversion methods.

With respect to the authority for direct conversion of smaller functions, OMB has failed to require agencies to employ the Department of the Interior model that first performs a bare-bones cost comparison between the existing in-house workforce and private sector firms performing similar work before shifting any work to contractors.[12]

The direct conversion authority where there is ostensibly no impact on federal employees has been significantly expanded so that it applies without numerical limitation on the number of federal employees involved and could now also be used when "all directly affected Federal civilian employees within the agency…voluntarily retire." This is surely smart politics, encouraging agencies to give work to contractors when there might be no opposition from an in-house workforce, but is it good for government? Of course not. Divesting an agency of a function through privatization without making a formal make-or-buy decision simply because of its political expediency is clearly bad for government.[13]

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[11] For the Actual Text, please see Attachment C, A.1., 2., 8., and 9, pages C-1, C-2.

[12] According to an April 8, 2002, GovExec.com article, "The Interior plan gives agencies a new option for holding public-private competitions on functions involving 10 or fewer employees. Currently, agencies may directly convert such small functions to the private sector without giving civil servants a chance to compete for their jobs. Interior's plan, by contrast, would allow federal employees to keep their jobs if they could perform the work at a lower cost than private firms." While less than the ideal of allowing federal employees to put their best bid forward as a real Most Efficient Organization (MEO), it's surely better than the wholly noncompetitive process mandated by the rewritten circular.

[13] This is the sort of loophole that caused the "human capital crisis," and the rewritten circular's expansion of that loophole would only exacerbate that crisis. For a precedent, we need look no further than the ruinous downsizing that has taken place in the Defense Department's acquisition workforce; as the Inspector General reported in 2000, DoD hired contractors to replace the civilian employees in the acquisition workforce who "voluntarily retired"—at higher costs. Among the adverse consequences reported by multiple acquisition organizations from the downsizing: insufficient staff to manage requirements efficiently, reduced scrutiny and timeliness in reviewing acquisition actions, increased backlog in closing out completed contracts, and lost opportunities to develop cost savings initiatives. The IG also reported that seven different acquisition organizations experienced "increased program costs resulting from contracting for technical support versus using in-house technical support." All such privatization occurred through direct conversions, the rationale being that the federal workforce had (been) retired. The results: inherently governmental work was privatized and taxpayers paid more than before.

I will now discuss how the A-76 covertly encourages agencies to directly convert work performed by federal employees to contractors without any public-private competition, a la the "Third Wave."

H. If managers responsible for conducting competitions for work performed by federal employees are unable to complete those competitions within 12 months, the work can simply be given to contractors.

"If you can't complete the (competition within 12 months) then you are not prepared to do the work, so we will outsource it," thundered OMB's David Childs, according to the November 18, 2002, edition of *Federal Times*.

In response to intense criticism, Ms. Styles, in a January 28, 2003, article in *The Washington Post*, spun OMB's position, "saying it was `absolutely not' true that agencies who exceed the 12-month time frame would automatically lose the competitions to a private-sector bidder. `Could one of the alternatives be that this work goes to the private sector? Yes, it is,' she said. `But that's not the favored alternative. It's not the presumed alternative.'"

The ability of rank-and-file federal employees to perform a service and the ability of management elsewhere in the agency to conduct a competition for that service are obviously apples and oranges. To say that federal employees should be converted without competition because the agency didn't finish its competition on time is like saying that all OMB staff should be fired because the Director didn't submit his testimony on entitlement spending to the Senate Budget Committee on time. No arbitrary deadline for the completion of a competition, particularly one that involves a direct conversion of jobs to contractors as a penalty, is ever appropriate, period.

I. Agencies should be able to convert work performed by federal employees to contractor performance without competition when management does not punctually submit in-house tenders;[14] however, instead of canceling solicitations when contractors submit bad proposals or don't submit their proposals on time, agencies are expected to rewrite their solicitations to address the complaints of contractors.[15]

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[14] Actual Text [Attachment B, C.3.(9), page B-9]: *"When the in-house bid is not submitted, the agency's privatization czar "may: (1) instruct the Contracting Officer to return received offers and tenders and amend the solicitation allowing additional time for resubmission of all offers and tenders, or (2) instruct the Contracting Officer to proceed with source selection without the Agency Tender."*

[15] Actual Text: [Attachment B, C.3.(9)d, on page B-10]: *"When a Standard Competition is attempted but private sector offers or public reimbursable tenders are either not received, or those received are found to be non-responsive or not responsible…the contracting officer shall document, in writing, the following: (1) restrictive, vague, confusing, or misleading portions of the solicitation; (b) possible revisions to the solicitation to encourage participation; (2) the reasons provided by sources for not submitting responses;*

If the Agency Tender Official, a management official, fails to submit the in-house tender by the deadline, the jobs of innocent rank-and-file federal employees, who are in no way responsible for the mechanics of the privatization process, could be given to contractors without any public-private competition. This is obvious unfair to the affected workforce.

Because the OMB privatization quotas give agencies full credit for completing direct conversions pursuant to OMB Circular A-76, the same as if the jobs had been subjected to real public-private competitions, agencies will have little incentive to submit thoughtful in-house tenders in timely fashion. Why bother taking the time to craft the best possible in-house tender when the agency can do no work at all and get the same amount of credit, because OMB doesn't care whether the work is competed or converted, as long as any work performed by federal employees is ultimately privatized?

I will now discuss how the A-76 rewrite requires federal employees—but not contractors—to undergo public-private competition in order to perform or retain new work, segregable work, and existing work.

J. Federal employees—but not contractors—must compete to perform new work.[16]

K. Federal employees—but not contractors—must compete when they are doing exactly the same work as before, but the value of that work increases by as little as 30%.[17]

L. Federal employees—but not contractors—must compete to continue to perform work when their contracts expire; or agencies may simply give such work away to contractors through direct conversions.[18]

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and (3) the reasons offers or tenders were either not responsive or not responsible. The contracting officer and the source selection authority shall evaluate the results of these discussions and propose a course of action in a written document to the (agency's privatization czar). The contracting officer shall provide a copy of this written document to the Performance Work Statement Team, Agency Tender Official, and to the public, upon request…(The agency's privatization czar) shall evaluate the contracting officer's written recommendation and make a written determination to either (a) revise solicitation or (2) implement the (in-house bid)."

[16] Actual Text [Attachment A, A.2.b.(3), page B-2]: *"Agencies shall use Standard Competitions to justify…(a)gency…performance of a new requirement. A Standard Competition is not required for private sector performance of a new requirement competed (sic) in accordance with the Federal Acquisition Regulation."*

[17] Actual Text: [Attachment A, A.2.b.(4), page B-2]: *"Agencies shall use Standard Competitions to justify…(a)gency…performance of an expansion of existing commercial activities. An expansion is the modernization, replacement, upgrade, or increased workload of an existing agency performed commercial activity that increases the operating cost of the activity by 30 percent or more…A Standard Competition is not required for private sector expansion competed (sic) in accordance with the FAR."*

At the outset of this discussion, one point needs to be fully understood. The rewrite of the circular applies only to the circular, not the FAR. However, the rewrite of the circular inserts the FAR into the circular. Consequently, to the extent the FAR has problems with private-private competition—and it does—those problems will now be spread to public-private competition.

As Ms. Styles remarked at a House Armed Services Readiness Subcommittee hearing last year,

> *"There needs to be some recognition that there are problems in the private-private system for competition and FAR based competitions. It's not a perfect system and we may be exacerbating some of the problems when we try to apply the FAR based system private-private competitions to public-private competition."*

Although "full and open competition" is technically still the law of the land, recent "acquisition reform" (sic) law (e.g., the Federal Acquisition Streamlining Act and the Clinger-Cohen Act) has virtually made "full and open competition" the exception rather than the rule in awarding contracts, particularly with respect to service contracts.

There are so many exceptions to the rule that are technically deemed to involve competitive procedures [e.g., use of Government-Wide Acquisition Contracts (GWACs), multiple and single agency indefinite delivery / indefinite quantity (ID/IQ) contracts, General Service Administration (GSA) schedules, the higher dollar threshold and other requirements for "commercial requirements," etc.] that the "full and open competition" standard is essentially dead. (And, of course, it's getting worse. The streamlined acquisition authority under Section 833 of the new Homeland Security Act allows any service to be deemed a commercial item for purposes of federal procurement laws.) Moreover, many of these "competitive alternatives" are protest proof, meaning that they are not even subject to administrative or judicial review.

Agency Inspectors General, the GAO, respected procurement judges, and even OMB officials have bemoaned the largely non-competitive state of government contract awards.[19] Here are some examples:

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[18] Actual Text [Attachment B, C.5.b.(2), page B-16]: *"By the end of the last performance period stated on the Standard Competition Form, another public-private competition or Direct Conversion shall be completed in accordance with this Circular."*

[19] Contractors still try to insist that there is competition between contractors, albeit unpersuasively. At a March 6, 2002, hearing of the Senate Governmental Affairs Committee, a contractor representative insisted that "Contractors, for instance, are subject to a range of checks and balances, including continual competitive pressures. In fact, some 75 percent of all services contracting actions, and more than 90 percent of all information technology services contracting actions, are competitively awarded…" As AFGE

According to a 2000 report of the DoD Inspector General, "(I)nadequate competition occurred for 63 of the 105 contract actions" surveyed.

Later that year, the GAO reported that most information technology orders were sole-sourced. In fact, "only one proposal was received in 16 of the 22 cases" (or about $444 million of the total $553 million).

The Associated Press reported last year that the federal government,

> *"bought more than half its products and services (in 2001) without bidding or through practices that auditors say do not fully take advantage of the marketplace…Concerns about the government's new (i.e., post-acquisition reform) style of shopping are simply put: Buying without competition often means the public treasury gets overcharged."*

Judge Stephen M. Daniels, Chairman of the General Services Board of Contract Appeals, has declared that,

> *"Although some parts of the (1984 Competition in Contracting Act) remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of the taxpayers were once supreme, now the convenience of agency program managers is most important. Full and open competition has become a slogan, not a standard; agencies have to implement it only `in a manner that is consistent with the need to efficiently fulfill the Government's requirements.' It is now much easier to acquire goods and services without competition. Notice requirements have been reduced, particularly as the Government increasingly fulfills its needs without conducting formal procurements. The drive to have the Government present a single face to industry has been sent into retreat: agencies have been given greater discretion to procure in their own idiosyncratic ways, Government-wide regulations have been discarded or diminished in importance, and programs and whole agencies (the Federal Aviation Administration being just the first) are being*

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pointed out subsequently, this is a very misleading use of statistics from the Federal Procurement Data System. Although the contract vehicle (a.k.a., "hunting license") in a multiple award scenario may be considered to be competitively awarded, funding is provided through task orders. Such task orders through September 30, 2001, were automatically classified as competitively awarded, regardless of the circumstances. Although it is not possible to recreate the records to determine whether task orders to multiple award service contracts were competitively awarded, a DoD IG review indicated that an astounding 72% of 423 multiple-award task orders awarded in fiscal years 2000 and 2001 were awarded on a sole-source or directed-source basis.

allowed to procure under unique and sometimes vague rules and procedures."

Ms. Styles herself has also said that,

"Since the beginning of the (acquisition) reform movement, over a decade ago, I have not seen a serious examination of the effects of reform on competition, fairness, integrity, or transparency. As a result, I think we are seeing some serious competitive problems surface with the proliferation of government-wide contracting vehicles and service contracting."

Clearly, contractors are not always required under the FAR to compete against one another to win or retain service contracts. Consequently, while the rewritten circular will require federal employees to compete to perform new work and segregable work as well as retain existing work, contractors will be able to acquire and keep such work without ever having to compete against federal employees or even one another.

Let's look in particular at segregable work. Under the rewritten circular, an automatic competition requirement kicks in for federal employees when the value of work that they are already performing merely increases in value by 30 percent. What happens to contractors in such circumstances? The FAR does not use the concept of percentage increases in scope of work in order to determine whether a new competition is required. Rather, the FAR and government contract case law use the concept of "scope."

For example, if operating a telephone servicing center is expected to cost $10,000,000 but ultimately costs $15,000,000, this does not necessarily mean that new work has been added. It could just be that the original cost estimates were low, that the winning offeror low-balled his bid, or that more effort was required than originally anticipated. The general test of whether new work has been added is whether the added work is within the original "scope" of anticipated effort that the contractor was supposed to provide. Mere dollar value increases in the work under contract does not constitute expanded scope requiring a new competition. In practice, however, even if new scope is added to a contract, this is almost always performed by the original contractor. That's just a way of life in government procurement. If the contract is a high visibility contract, typically a sole source justification will be written, with the justification stating that "given the experience of the contractor in the work already performed, it is the only source that can continue to `practicably' complete the work in process."

I will now discuss how the A-76 rewrite would hold federal employees far more accountable for failure than contractors.

M. When federal employees are found in default, the work must automatically be converted or competed; for contractors, however, it could be business as usual.[20]

What happens to federal employees under the rewrite is clear. However, the consequences for defaulting contractors aren't quite so dire. Per FAR Part 49, "The following courses of action, among others, are available to the contracting officer in lieu of termination (of a contract) for default when in the Government's interest: (a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule. (b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved…"

Moreover, contractors can and do vigorously litigate to avoid default.[21] Federal employees and their union representatives, on the other hand, have no such recourse.

I will now discuss six different ways the A-76 rewrite favors contractors over federal employees.

N. Agencies should provide much more justification under the A-76 rewrite before canceling an award to a contractor than when the work has been won by federal employees.[22]

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[20] Actual Text [Attachment B, C.5.c.(2), page B-16]: *"If an agency, private sector or public reimbursable provider fails to perform to the extent a termination for default is justified, agencies shall comply with the following: (a) for a private sector provider, the Contracting Officer complies with the FAR Part 49; (b) for an agency or public reimbursable provider, the head of the requiring organization shall issue a notice to terminate and shall recommend, in writing, that the (agency's privatization czar) approve either (1) a Direct Conversion based upon a Standard Competition Waiver or (2) a Standard Competition."*

[21] "How To Avoid & Overturn Terminations for Default," a veritable Bible for contractors who have strayed from the path of compliance, lists a variety of aggressive defenses that have been used successfully by contractors to avoid default determinations, including excusable delay, defective specification and impossibility, waiver of contract due date, contracting officer's failure to follow procedural requirements, contracting officer's failure to exercise discretion, and contracting officer's abuse of discretion; and there are many more defenses for specific types of contracts.

[22] When federal employees win the work but the agency wants to cancel the solicitation, the contracting officer is merely required to cancel in accordance with the FAR. However, when a contractor wins, the agency's privatization czar must personally certify the cancellation. But wait—there's more. The agency's most senior official must then submit a detailed report to the OMB Deputy Director for Management, the agency's third most senior official, that states the contracting officer's cancellation decision was in accordance with the FAR. But wait—there's still more. The agency's most senior official must also justify to one of the most important officials in the federal government's most powerful agency that the cancellation "was clearly in the public interest," "provide the agency's rationale for canceling the solicitation," and then state the "approximate date for reissuance of the solicitation…" For the actual text, please see Attachment B, C.2.a.(14), page B-7.

O. Under the A-76 rewrite, contractors—but not rank-and-file federal employees directly affected by privatization or their union representatives—can participate in all appellate processes, to the Administrative Appeal Authority, the GAO, or the Court of Federal Claims.[23]

P. Under the A-76 rewrite, only the confidential nature of proprietary information of the contractors' bids is protected.[24]

Q. The only conflicts of interest addressed by the A-76 rewrite are those that might conceivably benefit federal employees in the privatization process; the longstanding conflicts of interest which demonstrably benefit contractors will continue to undermine the integrity of the privatization process.[25]

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[23] Actual Text [Attachment B, C.6.a.(1), page B-17]: *"The Administrative Appeal Process provides directly interested parties an opportunity to have an independent agency official review the Performance Decision."*

"Directly interested parties" is not defined in the Definition of Terms. With respect to the in-house workforce, only the Agency Tender Official is identified in the rewritten circular as a "directly interested party." Actual Text [Attachment B, B.1., page B-3]: *"The ATO shall be considered a directly interested party."*

Directly affected federal employees and their union representatives would not be allowed to participate in this process. Moreover, as the Agency Tender Official is a management official, it is manifestly unreasonable to expect that he could act independently on behalf of directly affected federal employees in appealing to another management official who would serve as the Administrative Appeal Authority. Finally, it should be noted that the internal appellate process applies only after the Performance Decision. There is no provision for appeal of such important pre-performance questions as the decision whether to use sealed bidding or negotiation, the choice of evaluation factors and their weights, or an allegedly defective performance work statement. How can an internal appellate process be fair if it is forbidden to challenge the very "ground rules" of the competition?

While directly affected federal employees will be allowed only representation by a management official who will determine entirely on his own whether to appeal to another management official who is forbidden to review most questions raised by the privatization process, contractors, on the other hand, will still be allowed to appeal all pre-Performance Decision and post-Performance Decision questions to the GAO and the Court of Federal Claims. Moreover, per Attachment B, C.6.a.(1), page B-17, contractors will still be able to participate in the internal appellate process with respect to "questions regarding a private sector offeror's compliance with the scope and technical performance requirements of the solicitation."

The rewritten circular is needlessly punitive with respect to the involvement of federal employees in the appellate process. The current circular allows employees 20 calendar days during which to file an appeal. Per Attachment B C.6.a.(2), page B-17, the submission period is reduced to 10 working days. Given that federal employees, whether or not represented by unions, are less likely to have legal representation, this change will have a disproportionately adverse effect on the in-house workforce.

[24] Actual Text [Attachment B, C.6.a.(2), page B-17]: *"Where private sector proprietary information is involved a redacted copy of the appeal and decision documentation will be made available."*

[25] Excerpted Actual Text [Attachment B, D.2.a.(1), D.2.b.(1), D.2.c.1., pages B-19-20]: *"To avoid any appearance of a conflict of interest, members of the Performance Work Statement Team shall not be*

R. Under existing law and regulation, federal employees—but not contractors—would continue to be subject to a myriad of requirements and obligations under the A-76 rewrite.[26]

S. Under the A-76 rewrite, tenders submitted by federal employees must include "all" costs, even when they are irrelevant or have already been counted, while contractors should be allowed to exclude significant costs from their own proposals.

The calculation of costs has been an extraordinary obsession for contractors through the years. They know that if they could ever artificially inflate the cost of in-house tenders, they would win the vast majority of competitions. And, in OMB, contractors have allies who are eager to help contractors finally fulfill this long-sought dream.

OMB has made much ado about ensuring that in-house tenders account for all of their "indirect costs." The existing circular already requires in-house tenders to

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members of the (In-House Bid) Team. Members of the (In-House Bid) Team shall not be members of the Source Selection Executive Board."

As OMB officials know very well, the reason managers experienced with privatization often had to play multiple roles in the process is precisely because agencies employ so few of them. Because the rewritten circular means more competitions and conversions but no more staff or training, agencies will be forced to rely even more on contractors to conduct the competitions, particularly with respect to writing performance work statements and in-house bids.

Again, because the radical overhaul of the privatization process is being accomplished only through a rewrite of the circular, contractors emerge completely unscathed. As anybody with even a modicum of experience with procurement understands, the privatization process is rife with conflicts of interest that benefit contractors. FAR Subpart 9.5 purports to be designed to minimize contractor conflicts of interest. However, it is largely full of empty exhortations. Conflicts of interest arise when contractors recommend or otherwise advise buying agencies to make additional purchases from the contractors with whom the recommending contractors have business interests. While the FAR tries to address blatant conflicts (e.g., contractors recommending themselves for jobs), the nature of modern day government contracting is replete with contractor "partnerships," "strategic relationships," and other arrangements in which various contractors agree to help one another out—usually through various subcontracting relationships. The rewrite of the circular raises the very real prospect that contractors will be increasingly responsible for evaluating the work of other contractors—contractors with whom they have business interests at many levels. The inevitable conflicts of interest and the resulting corruption have the potential to make recent accounting and auditing scandals pale in comparison.

[26] As the independent scholar Dan Guttman has written, federal employees, but not contractors, are subject to a variety of rules "that address conflict of interest (e.g., 18 U.S.C. 208), assure that government activities are (with limits) `open' to the public (e.g., Freedom of Information Act), limit the pay for official service, and limit the participation of officials in political activities."

Despite this extraordinary effort to massively increase the number of politically well-connected contractors on the federal payroll and so completely blur the appropriate and vital distinction between public and private, OMB will make no effort to ensure that contractors are as accountable to the American people as federal employees already are.

include such overhead costs. The rewritten circular would appear to require that in-house tenders be charged twice for the same overhead[27] costs.

The 12 percent "standardized cost factor" for indirect costs in the existing circular would be retained in the rewritten A-76.[28] However, the rewritten circular would allow agencies to charge in-house tenders for indirect costs a second time, under "personnel costs."[29]

Not only would the rewritten circular charge the in-house tender twice for the same costs, but the definition of in-house indirect labor costs is so broad as to ensure that any time an agency wanted to ensure the privatization of a function under competition management could easily manufacture the additional superfluous overhead costs.[30]

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[27] Actual Text [Definition of Terms, page F-7]: "*Overhead is a cost that is included in all cost proposals. The overhead used in cost estimates submitted by agency or reimbursable sources is the OMB required standard cost factor identified in Attachment E. This standardized cost factor accounts for indirect costs that are comparable to those included in private sector offers, represent costs to the taxpayer that are not necessarily visible at the installation, headquarters level or Department level, but are provided by the Government's budget at an expense to the taxpayer…"*

[28] Actual Text [Attachment E, B.4.b., page E-11]: *"The 12 percent overhead factor is a rate established by OMB to represent an overhead cost factor for all Federal agencies when performing Standard Competitions…This overhead factor represents costs that are not visible, allocable, or quantifiable to the agency, activity, or the Most Efficient Organization (MEO, or in-house bid). Use of the rate accounts for all management and support costs internal and external to the agency not required on Line 1."*

A 1998 GAO report (NSIAD-98-62) provides information on the origins of the 12 percent overhead that is charged to all in-house tenders: "Absent (actual cost data about in-house overhead), OMB selected a single overhead rate of 12 percent, a rate that was near the midpoint of overhead rates suggested by government agencies and private sector groups. Most government and private sector groups (GAO) contacted agreed that reasonable levels of overhead should be included in A-76 cost estimates and, absent anything better, the 12 percent rate is acceptable at this time." The report noted that 12 percent rate for "(o)verhead was supposed to include two types of costs on a marginal or proportional basis: (1) operations overhead, which includes the costs of managing an organization that are not 100 percent attributable to the activity under study, and (2) general and administrative costs, which include the salaries and equipment, and work space related to headquarters management, accounting and finance support, personnel support, legal support, data processing support, and other common support activities such as facilities maintenance."

[29] Actual Text [Attachment E, B.1.b.(2), page E-4]: "Personnel costs for labor that is not dedicated to the MEO but clearly have responsibilities to the MEO are considered `indirect labor.' Indirect labor includes, but is not limited to, personnel costs for MEO management and oversight activities, such as managers and supervisors above the first line of MEO supervision who are essential to the performance of the MEO. Indirect labor also includes the labor of individuals who are responsible for oversight and compliance actions implicitly required by the MEO in order to comply with the solicitation (e.g., supervision, human resources, comptroller, general counsel, environmental, OSHA Act compliance management)."

[30] Actual Text [Attachment E, B.1.b.(2), page E-4]: *"The agency shall include in the Agency Cost Estimate the cost of indirect labor to reflect personnel who are responsible to manage, control, regulate, preside over, oversee, or supervise MEO related activities but are not dedicated to the MEO as a direct labor cost."* With such a broad definition, the in-house tender could be charged for the cost of maintaining Air Force One because, of course, the President is ultimately charged with the responsibility for "managing, controlling, presiding over, overseeing, and supervising" the MEO. And, to belabor the obvious, the

But it gets worse. Not only would the rewritten circular charge the in-house tender twice for indirect labor costs, some of them wholly irrelevant to the MEO, contractors would not even be charged for their indirect labor costs.[31]

While the rewritten circular would charge in-house tenders with costs not once but twice and even when such costs are irrelevant, OMB is increasingly unwilling to charge contractors for their most basic costs. This raises serious equity and efficiency issues in the context of the circular and privatization generally.[32]

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functions in the agency that are being charged twice against the MEO would in almost all cases need to exist, and thus require the same resources, regardless of the MEO. Moreover, it must be noted that the rewritten circular actually exacerbates the perverse incentive to privatize work in order to reduce the pay and benefits of those who perform work for the federal government by imposing redundant and irrelevant indirect personnel costs on in-house tenders.

[31] While contractors are charged with the cost of contract administration, they are not charged with the indirect labor costs of contract administration. For example, the costs associated with the personnel responsible for paying the contract administrators, or the cost of the human resources staff who hire the payroll staff, or the security guards who keep safe the building in which the contract administrators work, or the cost of the maintenance staff who keep clean the facility in which contract administrators work, or the managers of the contract administrators, or, in the words of the rewritten circular with respect to in-house bids, all of the other "personnel who are responsible to manage, control, regulate, preside over, oversee, or supervise (contract administration-) related activities but are not dedicated to the (contract administration workforce) as a direct labor cost."

[32] One major factor in properly administering service contracts is cost control. Without adequate cost control mechanisms in place, ultimate contract costs, and consequently prices paid by the taxpayers, can rapidly spiral upward. And, although, much has been said about performance-based service contracting, the facts reveal that contractors continue to press government agencies to award contract types that minimize contractor risk and cost control.

With the exception of common commercially available off the shelf services, cost evaluations and / or determinations play a significant role in government contract pricing and / or reimbursement decisions. The simplest scenario is for cost-reimbursement contracts. For that contract type, actual reimbursement of the contractor is made on the basis of costs that have been determined to be allowable, allocable, and reasonable in accordance with specific accounting conventions, policy, and procurement regulations.

However, even for so-called fixed-price contracts, many times initial cost evaluations and / or determinations are required when estimating what a fair and reasonable price should be. In other cases, cost evaluations and / or determinations are required to estimate the pricing of "changed" or added work that occurs during contract performance. In still other cases, cost evaluations and / or determinations are required under fixed-price contracts in order to effect profit and/or fee adjustments, make progress (i.e., financing) payments, etc.

Traditionally, when cost evaluations were made, contractors were required to submit cost or pricing data (i.e., certified pricing data). Under the various acquisition reform (sic) laws, the need for formal cost evaluations has not been reduced, but the form in which submission are made has been. Frequently, contractors are now permitted to submit "information other than cost or pricing data" which is the same thing as cost or pricing data; it's just that the cost data is no longer certified, which legally relieves contractors from all manner of oversight. A contractor's certification must be that the cost data submitted are current, accurate, and complete. If it is later determined to be untrue, the government can make a claim against the contractor for defective pricing under the Truth in Negotiations Act (TINA).

The A-76 rewrite changes how costs are calculated to benefit contractors in other ways as well:

> Exclusion of the cost of a performance bond, which is executed in connection with a contract in order to ensure performance so as to protect taxpayers and agencies' customers from the consequences of default.[33]
>
> Security clearances are another example.[34] With respect to security clearances for the federal employee workforce, that is a sunk cost, one that has already been amortized, which is not the case with contractors.

The latest incarnation of the phenomenon of contractors running away from their costs is the rapidly increasing use of time and material (T&M) and labor hour (LH) contracts. These contracts place nearly all risk of cost control on the taxpayers, and substantially reduce cost visibility. T&M/LH contracts are frequently touted by contractors as an alternative to cost-reimbursement contracts. Unfortunately, T&M/LH contracts are prone to even less cost control than cost-type vehicles.

T&M/LH contracts are contracts in which hourly rates are paid by the government as services are rendered (e.g., $75 hour for IT services). Added to these rates are any additional costs of material. Contractors claim that T&M/LH contracts are frequently used in the "commercial sector," thus, they should be used by the agencies. However, the increasing use of T&M/LH contracts has nothing to do with "commercial practice," rather it has to do with shifting performance risk to the government, and increasing profits for contractors. Under a T&M/LH contract, a contractor only promises to use its "best efforts" to accomplish the work. Performance is not guaranteed. For example, if a computer programming job is budgeted at 500 hours x $75/hour, and the contractor does not complete the job within the hours specified, the government's only real recourse is to pay for more hours. Worse yet, because contractors are asking that T&M/LH contracts be recognized as "commercial"—a euphemism for no price protections, oversight or auditing—the government has tremendously reduced its ability to ensure that taxpayers are getting a good deal. As FAR 16.601 has long stated "A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency."

Recently, as a part of a rule ostensibly designed to increase competition and accountability in DoD service contracting, OMB initially tried to specifically require that use of T&M/LH contracts be accompanied by audit and pricing protection clauses in order to ensure that the government was getting a good deal. In doing so, OMB was only trying enforce an existing FAR provision (FAR 12.207) that restricted use of T&M/LH contracts to circumstances in which audit and TINA clauses are included in the contract award vehicle. Ultimately, in the face of ferocious opposition, from information technology contractors and their Congressional supporters, particularly Representative Tom Davis (R-VA), Chair of the House Government Reform Subcommittee on Technology and Procurement Policy, OMB backed off its stance. It now appears reasonably likely that OMB will support allowing use of T&M/LH contracts without the safeguards provided by audit, TINA and Cost Accounting Standards contract clauses—while at the same time insisting the in-house tenders be charged twice for indirect labor costs, no matter how irrelevant.

[33] Actual Text [Attachment E, C.1.d., page E-12] *"When a solicitation requires the private sector offer to provide a performance bond, the cost of the performance bond is excluded from the private sector offer when entered on Line 7."*

[34] Actual Text: [Attachement B, C.2.a.(12), page B-7]: *"The costs associated with security clearance requirements shall not be included on the Standard Competition Form for an agency tender, private sector offer, or public reimbursable tender."*

Phase-out costs are yet another example.[35] The term "phase-out plans" does not appear in the rewritten circular's "Definition of Terms." However, phase-out costs are considered to include such significant one-time costs resulting from the transfer or disposal of employees, equipment, and facilities.[36]

3. The threat to use "best value" in DoD's public-private competitions

Section 824 of the legislative recommendations submitted by DoD for the FY04 defense authorization bill calls for the end of an objective, cost-based competition process. It would be replaced by the controversial "best value" competition process, which allows contractors to submit more expensive and less responsive bids and still win contracts.

Contractors are not happy about losing almost three-fifths of the public-private competitions conducted under OMB Circular A-76. Rather than cut their costs and provide taxpayers with a better deal, contractors want to junk the existing ultimately cost-based process and replace it with a pro-contractor "best value." Process.

Instead of making the best decision for taxpayers, i.e., what costs less, acquisition officers would be encouraged to use all manner of subjective criteria to determine the winner of a public-private competition process, including such whimsical notions as a contractor's ability to respond "flexibly" to changing circumstances or the contractor's use of "innovative" approaches.

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[35] [Actual Text, Attachment B, C.2.a.(6), page B-6]: *"For a Standard Competition, the Contracting Officer shall include in the solicitation a requirement for private sector offers, public reimbursable tenders and the agency tender to propose a phase-in plan to replace the existing incumbent service provider. Phase-in plans shall include details to minimize disruption, adverse personnel impacts, and startup requirements. The length and requirements of the phase-in must consider hiring, training, recruiting, security limitations, and any other special considerations to reflect a realistic phase-in plan. The costs associated with phase-out plans shall not be required by the solicitation or calculated on the Standard Competition Form."* (Emphasis added)

[36] For example, equipment that might have been used by the MEO could become surplus and then be made available for transfer to another in-house activity or to the contractor. In the event of transferring material to a contractor, it may be appropriate to do a special joint physical inventory, which would be a phase-out cost. Personnel, or labor-related costs, would include certain one-time labor-related expenses such as health benefit costs, severance pay, homeowner assistance, and relocation and training expenses.

A conversion to contract may also require an agency to take certain actions that would not be necessary if the activity had continued to be performed by federal employees. For example, it may not be possible to terminate a rent or lease agreement without a penalty fee, or it may be necessary to move materials that are not associated with the activity under study to another location in order to complete the transition. Moreover, there are costs of labor associated with the transfer or disposal of equipment, property or facilities. The rewritten circular should clearly define the many costs associated with phase-out and then count those costs against the proposals of the challenging offerors.

“Best value” would tilt the field of play even farther in contractors’ direction by allowing acquisition officials to ignore the standards established in the solicitation in favor of the “bells and whistles” included in the contractor’s offer.

“Best value” would also deny federal employees the opportunity to reformulate their offer in response to a contractor offer that exceeds the standards in the solicitation. If a contractor includes a feature in its bid that DoD thinks should be included in the solicitation, DoD should be allowed to go back and revise that solicitation—and allow federal employees to reformulate their bid so that it includes that feature.

Contractors know that, historically, “best value” competitions between contractors have cost taxpayers more and taken longer to complete. However, they try to justify the use of “best value” by falsely asserting that A-76 currently doesn’t allow for qualitative improvements in service. Wrong. As currently written, A-76 allows agencies, under a highly objective process, to establish the standards they want met by federal employees or a contractor, whether they are the same as before or more exacting, and then choose the provider with the lower cost. That’s what’s best for warfighters and taxpayers.

Contractors note that “best value” has been used in private-private competition. However, its use has been accompanied by extraordinary controversy and litigation because of its intrinsic subjectivity. Some of its most fervent critics are small business contractors. And it is precisely that subjectivity that makes a “best value” process so dangerous in the context of public-private competition. While it is not possible to systematically discriminate against one group of contractors in favor of another group of contractors, “best value” could be used systematically to discriminate against federal employees in favor of contractors, especially when wielded by an openly and avowedly pro-contractor Bush Administration that is rushing to review for privatization at least 850,000 federal employee jobs.

Unlike other agencies, DoD is protected from a “best value” process by 10 U.S.C. 2462 and 10 U.S.C. 129a. OMB is breaking with bipartisan tradition and encouraging non-DoD agencies to use a pro-contractor “best value” in public-private competitions. However, even OMB acknowledges that there are “special considerations” that must be taken into account with the use of “best value” in public-private competitions and that its use in non-DoD agencies should be limited to a pilot project and that there should be testing before wider application is authorized. There is no reason for DoD to be the guinea pig. If “best value” boosters are so sure their much-criticized process is superior to objective, cost-based competitions, then let them prove it through the experience of non-DoD agencies participating in the OMB pilot project.

In the A-76 rewrite, OMB has created the worst possible “best value” pilot project process, one that would maximize the possibility of bias against federal employees.

A. No guidelines regarding the use of subjective competition processes, even though even OMB acknowledges the need for caution.

B. No traditional preference for sealed bidding, which would minimize management bias against in the in–house workforce.

C. No preference for the use of a lowest price technically acceptable process in the event it can be shown why sealed bidding absolutely cannot be used.

D. No limitation on the use of evaluation factors and subfactors, both objective and subjective, in the "best value" process.

E. No requirement that the weights given to evaluation factors and subfactors, both objective and subjective, be revealed before proposals are submitted.

F. No requirement that federal employees be given a chance to reformulate their proposal if the contracting officer changes the solicitation in the "best value" process.

G. No requirement that cost to be emphasized in the weighting of evaluation factors and subfactors.

H. The use of "past performance" is intrinsically biased against in-house proposals.

4. The Army's "Third Wave" privatization initiative

In his October 4, 2003, memorandum, Secretary White set in motion a process he called "Third Wave," by which the agency would review for privatization, without any public-private competition, as many as 210,000 federal and military positions. Some of the non-competitive privatization mechanisms endorsed by Secretary White, such as employee stock ownership plans and transition benefit corporations, were even criticized by OMB officials. Other options mentioned by the Secretary were quasi-governmental corporations and the ever-popular "negotiate with private sector." The one thing all of these options have in common is that they are not provided for in law. Even the Secretary acknowledged that "Most of these alternatives to A-76 will require enabling legislation that does not exist yet."

What a difference three months make. Come January 2003, the Army's privatization-related Congressional correspondence included this paragraph:

> *"The implementation of competitive sourcing will adhere to congressionally approved process, e.g., A-76. The only known exceptions to the requirement for public-private competition are*

where 10 or fewer civilian employees perform the function where preferential procurement programs are used, and where legal restrictions against using the A-76 process apply to the function."

Whether the Army will keep this assurance obviously remains to be seen. However, there are several disturbing questions that need to be answered:

A. Is the Army out there all by itself?

Some would write off the Army's preference for corporate welfare-style privatization as anomalous. However, senior DoD officials have expressed similar preferences. For example, on March 3, 2002, Michael Wynne, the Principal Deputy Undersecretary of Defense for Acquisition, Technology & Logistics, wrote in his written testimony, that the department intended to "divest" itself of "non-core" work. When asked what he meant, Mr. Wynne said that "divestiture means that you transfer assets to the private sector, and, actually, they absorb the assets in line and the employees as well, as is different, if you will, than competitive outsourcing where you only compete the positions. You might want to just transfer the assets and essentially convert that activity to the private sector."

B. Where does OMB stand on "Third Wave"-style privatization?

While offering criticisms of parts of the "Third Wave," OMB officials refused to repudiate the initiative, notwithstanding that it was completely contrary to the Administration's ostensible emphasis on "competitive sourcing." In fact, when I challenged Ms. Styles to condemn the wholly anti-competitive nature of the "Third Wave," she, according to GovExec.com, "refused. `It's quite an exaggeration to say it's a privatization effort," she said…Styles had no reservations about the size of the Army plan. `It certainly is up to the departments and agencies to determine how they want to do it,' she said."[6]

Moreover, at the 2002 hearing in which Mr. Wynne extolled the benefits of divestiture, Ms. Styles did not rebuke him. And when the discussion turned to how DoD would hit its 50% privatization quota after achieving its 15% privatization quota, Ms. Styles said purposefully, "□□□□□ □□□□ □□ □□□□□□□□ □□□□□□□ □□ □□□□□□□□□ □□□ □□□ □□□□ □ " (Emphasis added.) What does that mean?

C. What changes might OMB and DoD seek that would allow the Army to pursue the "Third Wave" and still keep its pledge?

[6] One can only assume Ms. Styles means that it "is certainly up to agencies to determine how they want to do it" when agencies want to do **even more** privatization than OMB has directed. Agencies that do less have had, according to Coast Guard memoranda, their in-house workforces slashed in retaliation by vengeful OMB privateers.

For example, it is rumored that DoD will submit in its next FY04 legislative package a proposal to gut or even eliminate 10 U.S.C. 2461, which, however inadequate, does ensure that Pentagon privateers cannot simply give away the department to contractors.

Moreover, OMB has never repudiated its September 2001 proposal to drastically expand the preferential procurement program to allow small businesses to receive contracts of any size without any public-private competition to perform work that is currently performed by federal employees.

However, it is actually OMB's ongoing rewrite of the A-76 process that will allow the Army—and the other services as well—to ride the anti-public-private competition "Third Wave." The rewrite expands on the already-existing direct conversion authorities to give work performed by federal employees to contractors without public-private competition. More importantly, as noted earlier in my testimony, the rewrite creates a multitude of hidden direct conversion authorities, particularly if competitions are not concluded within arbitrary deadlines. A DoD official who appeared at a recent American Bar Association event, in Annapolis, MD, confirmed during a question-and-answer session that all of the services are interested in the direct conversion possibilities of the arbitrary competition deadline. In other words, the A-76 rewrite is in many ways a stealthy continuation of the discredited "Third Wave" by other means.

5. The threat to eliminate in-house depot maintenance and arsenal capabilities

Section 324 of the defense authorization bill would lead to the destruction of any in-house depot maintenance capacity by radically changing the 50/50 rule governing the split of depot maintenance workload between federal employees and contractors. Under the Pentagon's proposal, contractors would keep their 50% of the depot maintenance workload and then be given a chance to gradually take away the 50% of the work performed by federal employees.

Without that safeguard DoD would have privatized all public sector depot maintenance workload long ago. Although chronically underfunded, the depots are the one part of DoD that has managed to escape the devastating consequences of DoD's self-inflicted "human capital crisis," precisely because of rules like 50/50, that ensure a strong in-house capability.

It is important to note that even with the necessary statutory safeguards, depot employees are still better service providers than their contractor counterparts. According to GAO, depot prices are lower for 62% of items repaired by both depots and contractors.

The Pentagon's recommendation ignores the reason for having public sector depots--so the warfighters always have a reliable capability to maintain national security-critical hardware that can respond instantly to ever-changing geopolitical conditions.

Some may try to sell this unwise proposal by arguing that the only way depots will be able to bring more work on site, and thus make the installations less vulnerable to the next round of base closure, will be through public-private partnerships, and that the only way to establish such partnerships is by gutting the 50/50 rule. Wrong. Per 10 U.S.C. 2474, work performed by contractors at depots with Centers of Industrial and Technical Excellence, which were established by the Congress precisely to encourage public-private partnerships, doesn't count towards the 50/50 rule. Consequently, there is no rationale for gutting the 50/50 rule other than destroying the in-house depot maintenance capacity.

AFGE is also concerned about the privatization threat faced by the Army's arsenals. Per 10 U.S.C. 4532, Secretary White could "abolish any United States arsenal that he considers unnecessary" without any Congressional input. Given the Army's privatization bias, it is imperative that such unfettered discretion be restricted, perhaps in the same fashion as the Congress restricted Secretary White's discretion to privatize, divest, or transfer the Corps of Engineers in the FY03 Omnibus Appropriations Bill.

6. The threatened introduction of the Service Acquisition Reform Act

Perhaps the most anti-taxpayer bill to be considered in the House of Representatives during the last Congress was the Service Acquisition Reform Act (SARA, H.R. 3832). The legislation was strongly criticized by agencies' inspectors general; public interest groups such as the Project on Government Oversight; and several unions, including the American Federation of Government Employees, American Federation of State, County, and Municipal Employees, International Association of Machinists, National Association of Air Traffic Controllers, National Treasury Employees Union, Professional Airways Systems Specialists, and AFL-CIO Professional Employees Department.

Last year's SARA was a lengthy service contractor wish-list that would have, among other things, drastically reduced government oversight of service contractors, created many additional possibilities for service contractor conflicts of interest, substantially reduced competition between service contractors, and significantly increased the losses to taxpayers from service contractor waste, fraud, and abuse. SARA is being redrafted, and it is rumored that the legislation may have found something it didn't have in the 107th Congress: a Senate sponsor. If the SARA to be introduced in the 108th Congress is anything like its predecessors, keep your hands on your purses and wallets at all times.

Among other things, the legislation would have encouraged the use of risky share-in-savings contracts, which are proven losers and completely antithetical to public-private competition. Share-in-savings contracts are grievously mislabeled since they require agencies to borrow from contractors at high interest rates in exchange for services. This form of contracting has been criticized for locking agencies into long-term contracts that prevent shifting to superior contract or in-house options. Moreover, according to Ms. Styles' own testimony, although in existence for more than 25 years, share-in-savings contracts have not produced any savings.

A contractor lobbyist, who is close to the bill's House sponsor, had touted the bill in testimony on the basis of a share-in-savings contract at the Department of Education (DoEd). It wasn't until recently that an Inspector General (IG) investigation determined that DoEd's experience with share-in-savings was actually disastrous. According to the IG, "Performance measures were so inadequate that it could not be determined if the contractor was in compliance with the terms of the contract. There was no annual comparison of costs under the agreement to an outside market to determine whether the agreement actually provided the best value. Even more alarming, an overstated baseline "create(d) a larger contractor payment than is actually earned."

Finally, the use of share-in-savings is indisputably anti-public-private competition and clearly promotes privatizing the jobs of federal employees without giving them a chance to compete. At the last moment, as an amendment to a popular piece of E-Government legislation, a controversial pilot program was established late in 2002 allowing agencies to undertake a handful of share-in-savings contracts. Each and every one of these experiments will surely be the subject of very thorough scrutiny because of the serious threat each and every one of them poses to the interests of taxpayers.

Conclusion

Chairman Ensign, I thank you again for holding this morning's hearing and inviting AFGE to testify. Please let me know if AFGE can be of any service as you prepare your subcommittee's portion of this year's defense authorization bill. I look forward to attempting to answer any questions that you and your colleagues might ask.