

THE QUIET REVOLUTION: DOWNSIZING, OUTSOURCING, AND BEST VALUE

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In the process of governing, the government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the government to rely on commercial sources to supply the products and services the government needs.²

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2. FEDERAL OFFICE OF MANAGEMENT & BUDGET (OMB) CIR. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, para. 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76].

*We are today engaged in a quiet revolution that extends across the range of our activities.*³

I. Introduction

A quiet revolution is sweeping across the Department of Defense (DOD). In this revolution, DOD leaders are battling for more money. The weapon: Office of Management and Budget Circular (OMB Cir.) A-76.

This is not a secret weapon. Members of the DOD and the public sector are learning how OMB Cir. A-76 works: the federal government competes with contractors to see who may supply products and services more economically. Consider the following scenario: Officials at a military base solicit offers and use A-76 to cut the costs of its base services. The government submits an offer. A small business also submits an offer, but loses the award—to the government. In light of the policy from OMB Cir. A-76, how can this happen? How can a private offeror even *compete* against the government to provide service, much less *lose* to the government?

The same policy provides the answers. Office of Management and Budget Circular A-76 guides federal agencies that are deciding whether to outsource⁴ a commercial activity⁵ or perform it in-house.⁶ This policy promotes three goals: achieve economy, keep government functions “in-house,” and rely on the commercial sector for products and services, but only if more economical.⁷ That being said, how does OMB Cir. A-76 mesh with the DOD’s warfighting role? Simple: money. Shrinking budgets and

3. Sheila E. Widnall, A Quiet Revolution, Remarks to Air Force Materiel Command Civilian Leaders (Oct. 29, 1996) available at <<http://www.af.mil/cgi-bin/multigate/>>. In her remarks, then-Secretary of the Air Force Widnall identified three areas of this revolution: operations, leadership, and acquisition. Secretary Widnall attributed the changes in warfare methods to the revolution in operations. She specifically focused on how information technology has offered warfighters new ways to plan and to train for war. In turn, new technology prompted the revolution in leadership. She noted that the military must ensure that its leaders are educated and motivated to lead in an era of highly technical warfare. Likewise, Secretary Widnall cited the acquisition revolution as the heart of supporting the forces. She isolated outsourcing as one impetus to “create a leaner, more responsive Air Force.” *Id.* Her remarks apply equally to the rest of the DOD.

4. The term “outsourcing” refers to a government contractor performing what has traditionally been viewed as a government function. Another analogous term is “competitive sourcing.” The term “privatization” refers to the government completely divesting itself of a function. This paper focuses only on outsourcing, and will interchange the term “outsourcing” with the phrase “contracting out.”

dollar signs have caught the attention of many persons, both in and out of the DOD. Some experts predict OMB Cir. A-76 can save the DOD billions of dollars, money that it can then use for readiness.⁸ Talk to commanders at most military bases and you will probably hear them discuss “outsourcing.” Peruse a news service covering the DOD and you will probably find an article weighing the pros and cons of outsourcing.⁹ According to Sec-

5. OMB Cir. A-76, *supra* note 2, para. 6.a. A “commercial activity” is a product or service that a federal agency provides, but could otherwise obtain from the private sector. *Id.* In attachment A, OMB Cir. A-76 lists examples of commercial activities, such as audiovisual products and services; automatic data processing; health services; and industrial shops and services. It also lists installation support services, management support services, office and administrative services, printing and reproduction services, and transportation services. OMB Cir. A-76 cautions that the list is not exhaustive, but it should help agencies identify commercial activities. OMB Cir. A-76 recommends agencies use “informed judgment on a case-by-case basis in making these decisions.” *Id.* attachment A.

6. “In-house” means the government will continue to use federal employees to perform the commercial activity. *Id.* para. 5.b.

7. *Id.* para. 6.

8. Office of Assistant Secretary of Defense (Public Affairs), *Defense Science Board Releases Report on “Achieving an Innovative Support Structure for 21st Century Military Superiority”* (Jan. 24, 1997) <<http://www.defenselink.mil/news/>>. In its report, the Defense Science Board recommended that the DOD dramatically restructure its support infrastructure. It envisioned that the DOD would operate in only those support functions that are “inherently governmental,” such as war fighting; battlefield support; and policy and decision-making. The private sector would provide all other functions through the competitive outsourcing process. The Defense Science Board concluded that this new “vision” for the DOD could shift up to \$30 billion per year from support functions to modernization by the year 2002. In a later report, the General Accounting Office (GAO) called the Defense Science Board’s predicted savings “overstated.” GENERAL ACCOUNTING OFFICE, *OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BY DEFENSE SCIENCE BOARD’S PROJECTIONS ARE OVERSTATED*, REPORT NO. GAO/NSIAD-98-48 (1997). See *infra* note 47 and accompanying text. Composed of members from the private sector, the Defense Science Board is the senior advisory body of the DOD. The Defense Science Board advises the DOD on scientific, technical, manufacturing, and other matters important to the DOD. *Id.* More information about the Defense Science Board is available at <<http://www.acq.osd.mil/dsb/>>.

9. See, e.g., Master Sergeant Louis A. Arana-Barradas, *Self-Interest Drives Outsourcing Boom*, A. F. NEWS SERV. (visited Mar. 30, 1998) <<http://www.af.mil/cgi-bin/multigate/>> (citing modernization dollars as the spark behind outsourcing for the Air Force); *Air Force Pursues Outsourcing, Privatization Programs*, A. F. NEWS SERV. (Jan. 3, 1997) <<http://www.af.mil/cgi-bin/multigate/>> (according to Former Air Force Chief of Staff Ronald R. Fogleman, outsourcing will help the Air Force sustain readiness “by competitively selecting suppliers to ensure we get the best possible support at the least cost to the service”); John Makulowich, *Outsourcing: Management Obsession or Savings Tool?*, WASH. TECH., Apr. 24, 1997, available at 1997 WL 8578189 (calling outsourcing the “management mantra of the moment”); Kevin Power, *Feds, Get Used to Outsourcing*, GOV’T COMPUTER NEWS, June 16, 1997, available at 1997 WL 11469304 (noting that federal agencies must accept that outsourcing is here to stay).

retary of Defense William Cohen, the military services have made a difficult but necessary choice: “[t]o preserve combat capability and readiness, the services have targeted the reductions by streamlining infrastructure and outsourcing non-military essential functions.”¹⁰

An old concept with a new look, OMB Cir. A-76 has emerged with new life as the DOD looks for ways to maintain combat readiness in this time of tight budgets and dwindling resources. First promulgated as policy in 1955, OMB Cir. A-76 permits public-private competitions to see which entity performs a commercial activity more economically. As it gained new life, OMB Cir. A-76 also received a new look. In March 1996, the OMB published a Revised Supplemental Handbook (Supplement) to OMB Cir. A-76.¹¹ The Supplement changed how the DOD and other federal agencies can decide to contract a commercial activity. Among its many revisions,¹² the Supplement introduced the concept of “best value”¹³ procurement to the OMB Cir. A-76 outsourcing process.¹⁴ This change created interesting issues. While OMB Cir. A-76 is a cost-savings program, “best value” allows the government to pay more money for a better product or service. This may initially seem to benefit the government.

10. WILLIAM S. COHEN, REPORT OF THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997) [hereinafter QDR] available at <<http://www.defenselink.mil/pubs/qdr/>>.

11. FEDERAL OFFICE OF MANAGEMENT & BUDGET OMB CIR. A-76, SUPPLEMENT, PERFORMANCE OF COMMERCIAL ACTIVITIES (March 1996) [hereinafter SUPPLEMENT].

12. The OMB made significant changes in the Supplement. For example, it exempted certain activities from the OMB Cir. A-76 cost comparison process, broadened an agency’s authority to waive cost comparisons, and required agencies to conduct post-performance reviews of at least 20% of all functions retained or converted in-house. The Supplement also refined the factors for costing in-house performance to ensure a level playing field. This included a standard overhead cost factor of 12% of the direct labor costs. Finally, the Supplement established a streamlined process for competing commercial activities with less than 65 full time equivalent employees. See Major Kathryn R. Sommerkamp et. al, *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997, at 111-12.

13. Prior to the rewrite of Federal Acquisition Regulation Part 15, Contracting by Negotiation, [hereinafter FAR Part 15] the term “best value” referred to an acceptable offer more advantageous than a lower priced offer that justified paying a higher price. Effective October 1997, FAR Part 15 now defines “best value” as any acquisition that obtains the greatest overall value to the government. The term “tradeoff approach” now refers to the traditional best value procurement. GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 15.101-2 (June 1, 1997) [hereinafter FAR]. For a review of the changes to FAR Part 15, see Major David A. Wallace, et al., *Contract Law Developments of 1997—The Year in Review*, ARMY LAW., Jan. 1998, at 25-30 [hereinafter *1997 Year in Review*]. In this paper, the term “best value” and “trade-off approach” are interchangeable and refer to the traditional usage: the higher priced, more advantageous offer.

14. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, para. H.3.c.

Despite “best value,” however, OMB Cir. A-76 still requires the government to award the contract to the public or private entity offering the lowest price for the product or service.

How to apply the “best value” concept in a cost-driven program is a tough question with no easy answers. This article analyzes that question, focusing on three areas of OMB Cir. A-76 and the quiet revolution: policy, process, and recourse. “Policy” constructs the overall framework for OMB Cir. A-76. “Process” sets OMB Cir. A-76 in motion to review its procedures and identify best value issues. “Recourse” describes the possible legal challenges to the OMB Cir. A-76 process.

II. The Policy: Outsourcing and Downsizing

Often, policy is the compass directing what courses of action leaders choose. Right now, the compass points towards altering how the government does business. As government officials looked inward to discover where and how to change, they called for a more streamlined, efficient government.¹⁵ Within the DOD, leaders seized upon downsizing and outsourcing to achieve these goals. Three documents embody the driving policy behind downsizing and outsourcing and place the OMB Cir. A-76 process in context: the National Performance Review (NPR),¹⁶ the Quadrennial Defense Review (QDR),¹⁷ and the Defense Reform Initiative (DRI).¹⁸

A. The Policy: The National Performance Review—The White House Throws Down the Gauntlet

Established in 1993, the NPR set a lofty goal: establish a “new customer service contract with the American people” to mold an effective,

15. See, e.g., Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186; Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410; Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, 108 Stat. 111; Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

16. Al Gore, Report of the National Performance Review, *From Red Tape to Results, Creating a Government that Works Better & Costs Less* (1993) [hereinafter NPR], reprinted in 1199 Gov'T CONT. REP. (Sept. 15, 1993).

17. QDR, *supra* note 10.

18. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997) [hereinafter DRI] available at <<http://www.defenselink.mil/pubs/DODreform/>>.

efficient, and responsive government.¹⁹ The NPR proposed four ways to implement this “customer service contract”: cut red tape, put customers first, empower employees, and produce better government for less money.²⁰ Outsourcing fueled the drive towards these goals. The NPR emphasized that public agencies should compete “for their customers—between offices, with other agencies, and with the private sector. . . .”²¹

19. NPR, *supra* note 16, at 101-2.

20. *Id.* at 121-22. When he announced the NPR on 3 March 1993, President Clinton stated he intended for it “to redesign, to reinvent, to reinvigorate the entire national government.” *Id.* at 101. The NPR rallied around these goals. The NPR panel predicted its recommendations would revolutionize government by reducing waste, eliminating obsolete functions, improving services to the taxpayer, and creating a smaller, more productive government. *Id.* at 101.

21. *Id.* at 149. The NPR panel concluded that forcing public agencies to compete for customers would create “permanent pressure to streamline programs, abandon the obsolete, and improve what’s left.” *Id.* It proposed four steps to break public monopolies and encourage federal employees to better serve their customers. First, it would require all federal agencies to give customers a voice in critiquing and improving government service. Ironically, the NPR singled out the Internal Revenue Service (IRS) as one agency working hard to develop a customer focus. The IRS uses toll-free telephone numbers to serve taxpayers, uses electronic filing, and assigns one person to handle a taxpayer’s repeat problems. *Id.* at 150-51. Second, the NPR would require agencies to compete for their customer’s business. It noted that the federal government has created its own monopolies that serve its customers—federal workers—poorly. It identified government printing services as a public monopoly that has led to higher costs and more delays. The NPR proposed dismantling this and other public monopolies in favor of competing with the private sector. Stated succinctly, “[I]f [the Government Printing Office] can compete, it will win contracts. If it can’t government will print for less, and taxpayers will benefit.” *Id.* at 160. Third, when competition is not feasible, the NPR vowed to turn public monopolies into “business-like enterprises.” *Id.* at 150. It observed that some public activities do not lend themselves to competition, but are instead government-owned corporations. Examples include the United States Postal Service and the Tennessee Valley Authority. However, the NPR noted that even these corporations are still partial monopolies because they perform specific public tasks with limited open market competition. To improve efficiency, the NPR recommended that the federal government subject its public agencies to business dynamics. For example, the NPR praised the National Technical Information Service (NTIS) for its dramatic turnaround from near disaster. Established to distribute scientific and technical data, the NTIS lost money and customers from poor management. The NTIS immediately responded to this crisis, streamlined its management practices, and regained its customers. *Id.* at 163. Finally, the NPR would rely less on new programs to solve problems, and more on market incentives. By this, the NPR meant using the power of the federal government to trigger greater activity within the private sector. For example, it cited how the Roosevelt administration set home ownership as a national priority. The federal government did not build the homes, but instead created a mortgage loan program that allowed buyers to put down 20% of the purchase price only and pay the balance over a 30-year period. *Id.* at 164.

Though it emphasized public-private competition, the NPR cited government bias against outsourcing. Specifically, the NPR criticized the DOD for not fully embracing this freemarket-oriented concept. Noting that the DOD faced shrinking budgets, the NPR concluded that the DOD could no longer afford to conduct “business as usual.” Rather, the NPR challenged the DOD to erase its cultural bias against outsourcing.²² The NPR urged senior Pentagon leaders to face the outsourcing challenge squarely.²³ The DOD accepted this challenge, responding with the QDR.

B. The Policy: The Quadrennial Defense Review—the DOD Responds

In the National Defense Authorization Act of 1997,²⁴ Congress directed the Secretary of Defense to examine defense programs and polices “with a view towards determining and expressing the defense strategy of the United States” through the year 2005.²⁵ Congress presented the Secretary of Defense with a comprehensive list of areas to review, ranging from force structure and defense strategy to budget and infrastructure.²⁶

When Secretary of Defense Cohen presented the QDR to Congress on 15 May 1997, he announced that for the DOD to maintain the “tooth,” or combat readiness of our national defense, it must cut the “tail,” or the sup-

22. *Id.* at 161-62. The NPR observed that statutory roadblocks prevented the DOD from outsourcing. It cited the 1993 National Defense Authorization Act, when Congress stopped the DOD from outsourcing any further work to the contractors. It also cited how Congress required agencies to obtain their construction and design services from either the Army Corps of Engineers or the Naval Facilities Engineering Command. Thus, the NPR recommended that the administration propose legislation to remove these barriers. Moreover, it noted that the OMB would review OMB Cir. A-76 for potential changes to ease the contracting process. *Id.* at 162. The OMB review resulted in the SUPPLEMENT, *supra* note 11.

23. NPR, *supra* note 16, at 161. The NPR observed that while the DOD could not outsource command functions, it could outsource support functions like data processing, billing, and payroll. In fact, the NPR noted that the Pentagon’s own defense contractors contract out similar functions. *Id.*

24. National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, §§ 921-926, 110 Stat. 2422, 2623-2628 (1996).

25. *Id.* § 922(6).

26. *Id.* §§ 923-926. Section 926 of the 1997 DOD Authorization Act summarizes the required contents of the QDR. These areas include: national security threats, the impact on the force structure in preparing for peace operations and operations other than war, the effect of new technology on the force structure, the impact of manpower and sustainment policies on conflicts lasting over 120 days, the role of the reserve component, airlift and sealift capabilities, and the impact of shifting defense resources among two or more theaters.

port functions. Harkening to the NPR and its mission to reinvent government, Secretary Cohen stated that the DOD must identify and then choose between the military's core functions and the private-sector functions. He further noted a "leaner, more efficient, and more cost effective" DOD could serve the "warfighter faster, better, and cheaper."²⁷ By reducing infrastructure, the DOD would unleash money to invest in combat readiness.

The QDR offered four ways for the DOD to invest in combat readiness. First, the QDR proposed further reducing civilian and military support personnel.²⁸ Second, the QDR recommended additional rounds of base closures.²⁹ Third, the QDR proposed adopting private sector business practices to improve support activities.³⁰ Finally, the QDR advocated outsourcing more "defense agency"³¹ support functions to achieve both a "tighter focus" on essential tasks while lowering costs.³²

The QDR study, though impressive, has been challenged.³³ After issuing the QDR, the DOD further scrubbed its infrastructure costs to uncover even more ways to reduce, streamline, and outsource. To accomplish this, the Secretary of Defense commissioned a Task Force on Defense Reform,³⁴ which produced the DRI.

27. QDR, *supra* note 10, § 8 at 6.

28. *Id.* § 8 at 2.

29. *Id.* The QDR panel observed that the DOD did not begin to save money from the initial round of base closures, which occurred in 1988, until 1996. It predicted that those savings would grow. The QDR panel also noted, however, that the DOD had enough "excess" infrastructure to warrant two more rounds of base closures. The QDR panel recommended not only closing bases and other support facilities, but also the laboratories and test ranges that support research, development, test, and evaluation. *Id.*

30. *Id.* § 8 at 2-3. The QDR panel did not elaborate on how the DOD should adopt private sector practices. Instead, it noted that American business practices have undergone a "revolutionary transformation." Feeding off this revolution, the DOD must "adopt and adapt the lessons from the private sector" for the warfighter to keep a competitive edge. *Id.* § 8 at 3.

31. *Id.* § 8 at 3. "Defense agency" and "defense-wide activities" perform service and supply functions common to more than one DOD component. According to the QDR panel, 24 defense agencies and 80 defense-wide programs perform services as diverse as managing commissaries and providing intelligence. A sampling of these agencies include the Defense Logistics Agency, the Defense Financial Accounting Service, the Defense Information Service Agency, the Defense Investigative Service, and the On-Site Inspection Agency. *Id.*

C. The Policy: The Defense Reform Initiative—Taking the QDR One Step Further

When he unveiled the DRI report on 10 November 1997,³⁵ Secretary of Defense Cohen portrayed it as a sweeping program aimed at reforming the “business” of the DOD. Secretary Cohen stated, “American business has blazed a trail and we intend to emulate their success. We have no alternative if we are to have the forces we need as we enter the 21st century.”³⁶ To reshape the DOD into an agile warfighting entity, the DRI expanded upon the QDR³⁷ to propose more streamlining and outsourcing.³⁸ The DRI

32. *Id.* § 8 at 2. The QDR panel encouraged the DOD to outsource more non-warfighting support functions. It predicted that the DOD would enjoy the same benefits private industry had gained from outsourcing: better quality, better responsiveness, better access to new technology, and lower costs. The panel justified its position on several grounds. First, it noted that 61% of the DOD employees in FY 1997 performed infrastructure or support functions. These functions included training; logistics support; central personnel services; headquarters functions; medical care; science and technology services; and command, control, and communication services. The QDR panel further observed that the DOD had reduced the total force structure by 32% from 1989 to 1997. Conversely, the DOD had only reduced the infrastructure force by 28% since 1989. Thus, the panel proposed cutting an additional 109,000 civilian and military personnel who perform support functions, boosting the total infrastructure force reduction since 1989 to 39%. As noted above, the panel also suggested two additional rounds of base closures. Additionally, the QDR panel directed that the DOD reengineer its infrastructure in two ways. First, the DOD must streamline and consolidate redundant functions and adopt the lessons and best practices from the business sector. Second, the DOD must outsource those military tasks that mirror commercial functions, especially in the logistics and support areas. *Id.* § 8 at 5-6.

33. After the Secretary of Defense released the QDR, the House National Security Committee (HNSC) expressed some concerns. It questioned the DOD’s plans to contract out 109,000 civilian positions between FY 1998 and FY 2003. It also questioned how the DOD could save money by contracting out military support positions while also keeping those military personnel in the system. The HNSC further wondered if the DOD would retain enough resources to manage the increased contract workload from outsourcing. Thus, the HNSC directed the Secretary of Defense to further assess its outsourcing plans and report back on its projected costs and savings. H.R. REP. NO. 105-132, at 298-99 (1997). Finally, the HNSC criticized the DOD for failing to “challenge the inertia of ‘business as usual.’” Despite the QDR (which Congress directed the DOD to prepare), the HNSC stated that the DOD could no longer afford to further study reform. *Id.* at 293. See GENERAL ACCOUNTING OFFICE, QUADRENNIAL DEFENSE REVIEW: OPPORTUNITIES TO IMPROVE THE NEXT REVIEW, REPORT NO. GAO/NSIAD-98-155 (1998); GENERAL ACCOUNTING OFFICE, QUADRENNIAL DEFENSE REVIEW: SOME PERSONNEL CUTS AND ASSOCIATED SAVINGS MAY NOT BE ACHIEVED, REPORT NO. GAO/NSIAD-98-100 (1998).

34. Memorandum, Under Secretary of Defense, to secretaries of the Military Departments, subject: Management Reform Memorandum #1—Implementation and Expansion of Infrastructure Savings Identified in the Quadrennial Defense Review (QDR) (15 May 1997) (on file with the author).

35. DRI, *supra* note 18.

recommended melding best business practices from the private sector into defense support activities. Along with the additional base closures, the DRI suggested that the DOD consolidate redundant organizations and outsource more in-house functions.

The DRI set ambitious outsourcing goals for the DOD. By 1999, the DOD plans to review its entire military and civilian force to identify those commercial activities falling within the A-76 “net.”³⁹ According to the DRI, the DOD studied over 34,000 positions in fiscal year (FY) 1997 alone, mostly in the areas of base services, general maintenance and repair, and installation support.⁴⁰ By FY 2002, the DOD plans to study 150,000 more positions.⁴¹ By competing these positions, the DRI predicts that the DOD could save nearly six billion dollars by FY 2002.⁴²

D. The Policy: Is Everyone on the Outsourcing Bandwagon?

Despite such predictions, not everyone has climbed aboard the outsourcing bandwagon. Historically, Congress has not fully embraced OMB Cir. A-76. Until recently, Congress erected statutory roadblocks that hampered the DOD’s attempts to use the outsourcing process. For example, in

36. Office of Assistant Secretary of Defense (Public Affairs), *Secretary Cohen Reshapes Defense for the 21st Century* (Nov. 10, 1997) available at <<http://www.defenselink.mil/news/>>.

37. See *supra* notes 24-33 and accompanying text.

38. The DRI devotes a chapter to each cost-savings method it proposed. Chapter one highlights the nine best business practices that the DOD plans to adopt. Some of these business practices include paperless contracting, increased use of the government purchase credit card (IMPAC card), and increased use of internet shopping. DRI, *supra* note 18, at 1. Chapter two focuses on reorganizing and reducing the DOD headquarters elements, such as the Office of Secretary of Defense (OSD) staff, Defense Agencies, DOD Field Activities, Defense Support Activities, and the Joint Staff. By reorganizing, the OSD will key on the “corporate” level tasks, while lower echelons will zero in on the operational tasks. With a trimmer headquarters, the DRI expects that the DOD will resist mission creep: the temptation to take on new non-core functions. *Id.* at 15. Chapter three identifies outsourcing opportunities for the DOD under OMB Cir. A-76, such as payroll, personnel services, surplus property disposal, and drug testing laboratories. *Id.* at 27. Chapter four identifies ways that the DOD may eliminate unneeded infrastructure. For example, the DRI also proposes additional base closures; consolidating, restructuring, and regionalizing many support agencies; privatizing family housing; and privatizing all utility systems, except those needed for security reasons. *Id.* at 37. Congress passed legislation that established procedures for the DOD to use when privatizing housing and utilities. See 10 U.S.C.A. §§ 2871-85 (West 1998) (housing); 10 U.S.C.A. § 2688 (West 1998) (utilities). For more information on housing privatization, see <<http://www.acq.sd.mil/iai/hrso/>>. For more information on utilities privatization, see <<http://www.afcesa.af.mil/>>.

the late 1980s, Congress empowered installation commanders to decide whether or not to study commercial activities for outsourcing.⁴³ Not surprisingly, when offered the option to outsource or maintain the status quo, most commanders chose the latter course. Later, in the 1991 Defense Appropriations Act, Congress prohibited the DOD from funding lengthy OMB Cir. A-76 studies.⁴⁴ Finally, Congress flatly prohibited the DOD from outsourcing for eighteen months, from October 1992 to April 1994.⁴⁵ As a result, Congress slowed the DOD outsourcing boom until 1995, when

39. DRI, *supra* note 18, at 27. The DRI also noted that the DOD has established guidelines for pursuing public-private competitions for depot maintenance work. While depot maintenance is beyond the scope of this paper, Congress and the GAO are scrutinizing this area closely. By statute, the DOD may use only 50% of its funds to contract for depot maintenance and repair work. 10 U.S.C.A. § 2466. This is a fertile, highly publicized, and thus hotly contested area for cost savings as the private sector competes for more depot maintenance work. The GAO has issued numerous reports on depot maintenance and repair. *See, e.g.*, GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: PUBLIC AND PRIVATE SECTOR WORKLOAD DISTRIBUTION REPORTING CAN BE FURTHER IMPROVED, REPORT NO. GAO/NSIAD-98-175 (1998); PUBLIC-PRIVATE COMPETITIONS: REVIEW OF SACRAMENTO AIR FORCE DEPOT SOLICITATION, REPORT NO. GAO/OGC-98-48 (1998); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: DOD'S DETERMINATION TO COMBINE DEPOT WORKLOADS IS NOT ADEQUATELY SUPPORTED, REPORT NO. GAO/NSIAD-98-76 (1998); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: PROCESSES USED FOR C-5 AIRCRAFT AWARD APPEAR REASONABLE, REPORT NO. GAO/NSIAD-98-72 (1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: INFORMATION ON PUBLIC AND PRIVATE SECTOR WORKLOAD ALLOCATIONS, REPORT NO. GAO/NSIAD-98-41 (1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, REPORT NO. GAO/T-NSIAD-97-112 (1997); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, REPORT NO. GAO/NSIAD-97-111 (1997).

40. DRI, *supra* note 18, at 30.

41. *Id.*

42. *Id.* The DOD relied on what it called "historical experience" to conclude it could save six billion dollars through FY 2002. The DOD further predicted that it could save an additional \$2.5 billion annually after FY 2002 as a result of OMB Cir. A-76 studies. *Id.*

43. Pub. L. No. 101-189, § 11319a(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C. § 2468, this law expired on 30 September 1995. Most commanders opted not to outsource because of how much an OMB Cir. A-76 study costs in terms of money, employee morale, and workforce control. *See* GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING 2-3, REPORT NO. GAO/NSIAD-97-86 (1997).

44. Department of Defense Appropriation Act for Fiscal Year 1991, Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.

45. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

many of the restrictive laws lapsed and the DOD again attempted to employ OMB Cir. A-76.⁴⁶

The GAO has also jumped into the outsourcing fray. Now that the DOD has quickened its outsourcing pace, the GAO has questioned whether the DOD can meet its ambitious cost savings goals. In report after report, the GAO has pulled the DOD back down to earth, calling its projected savings “achievable” but often “overstated.”⁴⁷ Though the GAO has applauded the DOD’s attempts to save money, it has challenged its data for projecting savings, its overly optimistic timelines to meet savings goals, and its myopic view of meeting mission requirements in the face of severe personnel cuts.⁴⁸

Despite the DOD’s rosy outlook for savings from outsourcing, the GAO has praised it for at least using OMB Cir. A-76 as a cost-savings tool. Noting that civilian agencies have lagged behind the DOD, the GAO has decried OMB’s lack of leadership in monitoring A-76 studies. In fact, the GAO questioned how executive agencies generally could shift priorities towards using OMB Cir. A-76 when it is not a high priority within OMB. The GAO challenged OMB to get A-76 on track through strong leadership so other agencies besides the DOD might find incentives to use OMB Cir. A-76 to save money.⁴⁹

Many in the private sector view the OMB Cir. A-76 process as skewed in favor of the government. Not surprisingly, some contractors claim that in its present form, OMB Cir. A-76 “does not work” because the government lacks incentive to review some commercial activities for their cost-savings potential.⁵⁰ Others oppose public-private competitions from

46. From 1 October 1995 to 15 January 1997, the DOD projected OMB Cir. A-76 studies of over 34,000 base support positions. At that time, the DOD announced plans to study nearly 100,000 more positions over a six-year span. See GENERAL ACCOUNTING OFFICE, *BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING*, *supra* note 43, at 1.

47. See, e.g., GENERAL ACCOUNTING OFFICE, *OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BY DEFENSE SCIENCE BOARD’S PROJECTIONS ARE OVERSTATED*, REPORT NO. GAO/NSIAD-98-48 (1997). The GAO reviewed findings from the Defense Science Board predicting that the DOD could save \$30 billion annually by the year 2002 by outsourcing support functions. The GAO noted, however, that the Defense Science Board overstated the DOD’s total savings from outsourcing, labeling the estimates unfounded. For example, the GAO observed that the Defense Science Board did not have any data for estimating some logistics costs, such as those for supply and repair functions. Thus, the GAO opined that the Defense Science Board conservatively and inaccurately estimated these DOD expenses. *Id.* at 3-9.

a philosophical stance and argue that the taxpayer suffers when the government competes with its citizens. These critics recognize, however, that outsourcing is popular in some circles, but urge for a legislative rather than a pure policy approach to public-private competitions.⁵¹

48. Prior to the Secretary of Defense releasing the QDR, the GAO addressed the DOD's efforts to cut costs to fund modern weapons systems. In one report, the GAO noted that the DOD could "achieve savings in military personnel accounts" by replacing active duty military personnel with less costly civilian personnel. According to the GAO, civilians cost less because they rotate less frequently. GENERAL ACCOUNTING OFFICE, DEFENSE BUDGET: OBSERVATIONS ON INFRASTRUCTURE ACTIVITIES 20-23, REPORT NO. GAO/NSIAD-97-127BR (1997). In another report, the GAO lauded the DOD's outsourcing push, but cautioned that each service must evaluate the individual cost benefits of outsourcing opportunities. The GAO questioned the projected DOD savings from outsourcing, noting that the services may not achieve such ambitious savings with a reduced force structure. If the DOD could not achieve its projected savings, the GAO recommended that Congress squarely address the difficult issue of how to fund modern weapons systems. GENERAL ACCOUNTING OFFICE, DEFENSE OUTSOURCING: CHALLENGES FACING DOD AS IT ATTEMPTS TO SAVE BILLIONS IN INFRASTRUCTURE COSTS, REPORT NO. GAO/NSIAD-97-110 (1997). See GENERAL ACCOUNTING OFFICE, DEFENSE MANAGEMENT: CHALLENGES FACING DOD IN IMPLEMENTING DRI, REPORT NO. GAO/T-NSIAD-98-122 (1998). In this report, the GAO noted that the DOD faced a difficult task when trying to implement the DRI. It supported the DRI, but observed that the DOD needed to embrace other opportunities to save money and meet mission needs. In this regard, the GAO focused on four key points from the DRI. First, the GAO expressed concern that the DOD will reduce future budgets based only on expected savings from OMB Cir. A-76 competitions and base closings. The GAO noted that these tools produced savings, but not as much or as quickly as the DOD initially estimated. Consequently, the GAO viewed the DOD's approach as a readiness risk. Second, the GAO concluded that the DOD failed to think broadly enough about how to implement its business reengineering reforms. Although the GAO noted that the DOD expected these initiatives to save money and provide quality service, it cautioned that the DOD failed to consider how to implement them in a timely, efficient, and effective manner. Third, the GAO found that the DOD needed to fully capitalize on the savings potential from initiatives to consolidate, restructure, and regionalize functions. Finally, the GAO criticized the DOD for not addressing systemic management problems that hamper change. It focused on such hurdles as service parochialism, lack of incentive to change, lack of goals to achieve change, and lack of data to measure change. *Id.* at 2-4. See GENERAL ACCOUNTING OFFICE, DEFENSE INFRASTRUCTURE: CHALLENGES FACING DOD IN IMPLEMENTING REFORM INITIATIVES, REPORT NO. GAO/T-NSIAD-98-115 (1998).

49. See GENERAL ACCOUNTING OFFICE, OMB CIRCULAR A-76: OVERSIGHT AND IMPLEMENTATION ISSUES, REPORT NO. GAO/T-GGD-98-146 (1998).

50. See *Improve Federal Procurement System: Hearings on H.R. 4244 Before the Subcomm. on Government Management, Information, and Technology of the Comm. on Reform and Oversight*, 105th Cong. (1998) (statement of John M. Palatiello, President, Management Association for Private Photogrammetric Surveyors) available at 1998 WL 469554.

51. See *id.* (statement of Gary D. Engebretson, President, Contract Services Association of America).

Congress has answered these critics. After several near misses,⁵² Congress recently passed outsourcing legislation entitled the Federal Activities Inventory Reform Act of 1998 (FAIR).⁵³

The FAIR does not create new outsourcing policy, but gives “teeth” to the current policy stated in OMB Cir. A-76. Significantly, the FAIR gives federal agencies⁵⁴ certain marching orders. First, agencies must annually prepare a list of noninherently governmental functions performed by federal employees, submit the list to OMB for review, and then make the list publicly available.⁵⁵ Second, the FAIR establishes an appeal process for “interested parties” within each agency and the private sector to challenge the contents of the list.⁵⁶ Significantly, the FAIR creates a statutory definition—identical to OMB Cir. A-76—of “inherently governmental function.”⁵⁷ Finally, the new bill requires agencies to conduct “fair and reasonable cost comparisons,” a term Congress left largely undefined.⁵⁸

Even with the FAIR, therefore, agencies must continue to rely on OMB Cir. A-76 for the outsourcing process.⁵⁹ For the DOD, this means culling lessons from the current outsourcing policy and fervor highlighted in the NPR and the QDR. These reports brandish a constant theme: out-

52. In the past, Senate and House members have introduced varying versions of a bill to codify the outsourcing process. This early bill was initially known as the Freedom from Government Competition Act. This Act would have prohibited agencies from providing or obtaining goods or services from other agencies unless the goods or services are inherently governmental, dictated by national security, or offer the federal government the best value for the goods or services. Regarding best value, the initial bill would have required the OMB to write regulations considering cost, qualifications, past performance, technical capability, and other relevant non-cost factors for both the public and private sector. *See* S. 314, 105th Cong. (1997); H.R. 716, 105th Cong. (1997). *See* GENERAL ACCOUNTING OFFICE, *PRIVATIZATION AND COMPETITION: COMMENTS ON H.R. 716, THE FREEDOM FROM GOVERNMENT COMPETITION ACT*, REPORT NO. GAO/T-GGD-97-185 (1997); GENERAL ACCOUNTING OFFICE, *PRIVATIZATION AND COMPETITION: COMMENTS ON S. 314, THE FREEDOM FROM GOVERNMENT COMPETITION ACT*, REPORT NO. GAO/T-GGD-97-134 (1997) (providing a general summary of the pros and cons of the prior proposed legislation).

53. Pub. L. No. 105-270, 112 Stat. 2382 (1998). On 30 July 1998, the Senate passed the FAIR and referred it back to the House Committee on Government Reform and Oversight. On 5 October 1998, the House passed the FAIR, which President Clinton signed into law on 19 October 1998.

54. The FAIR applies to executive and military departments, but does not apply to the GAO, government corporations, nonappropriated fund instrumentalities, or DOD depot maintenance and repair functions. Pub. L. No. 105-270, 112 Stat. 2382, 2384 (1998).

55. Agencies must submit their lists to the OMB by the end of the third quarter of each FY. After the OMB review, the agency must then send the list to Congress and make it available to the public. The OMB will publish a notice in the federal register that the list is publicly available. Pub. L. No. 105-270, 112 Stat. 2382 (1998).

sourcing is fueling the quiet revolution for a leaner and more efficient government, especially within the DOD. So, as part of the current DOD landscape, how does outsourcing work?

56. The FAIR defines an “interested party” as follows:

(1) A private sector source that—

(A) is an actual or prospective offeror for any contract, or other form of agreement, to perform the activity; and

(B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

(2) A representative of any business or professional association that includes in its membership private sector sources referred to in paragraph (1).

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity.

(4) The head of any labor organization referred to in section 7103(a)(4) of title 5, United States Code, that includes within its membership officers or employees of an organization referred to in paragraph (3).

Pub. L. No. 105-270, 112 Stat. 2382, 2383 (1998).

57. Pub. L. No. 105-270, 112 Stat. 2382, 2384-85. See *infra* notes 107-108 and accompanying text.

58. The FAIR does not define the term “realistic and fair cost comparisons.” Rather, the bill directs the agencies to ensure that “[a]ll costs (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are considered and that the costs are considered realistic and fair.” Pub. L. No. 105-270, 112 Stat. 2382, 2383.

59. The OMB has indicated that it will issue new guidance to OMB Cir. A-76 to assist agencies in complying with the FAIR. Viewing the FAIR as an “important reinvention and management tool,” the OMB has emphatically stated that it plans to do more than just “tweak and reissue A-76.” The OMB has assured its critics that it is “quite committed to fully implementing the FAIR.” *Contracting Out: OMB To Issue Supplemental A-76 Guidance To Help Agencies Comply With New Statute*, Fed. Cont. Daily (BNA), Nov. 17, 1998, available at WESTLAW Legal News, BNA-FCD, Nov. 17, 1998 FCD, d3. The overall potential impact of the FAIR on outsourcing remains unknown. Interestingly, some commentators predict the FAIR will allow Congress and the private sector to more closely scrutinize the activities government employees currently perform. They opine that Congress will have a more direct hand in outsourcing oversight. By requiring agencies to submit annual lists of noninherently governmental functions, Congress can ask the tough questions and hold agencies’ “feet to the fire” for why they either labeled a function “noninherently governmental” or excluded it from their lists. The FAIR, however, does not articulate any outsourcing procedures, other than to require “fair and reasonable cost comparisons.” See Leroy H. Armes, *House Passes Compromise Bill Requiring Federal Agencies To List Activities That Could Be Contracted Out*, 70 FED. CONT. REP. 355 (1998).

III. The Process: OMB Cir. A-76 Procedures⁶⁰

A. The Process: An Overview

Like it or not, the OMB Cir. A-76 process is here to stay. For nearly forty years,⁶¹ OMB Cir. A-76 has offered federal agencies a tool to save money as budgets dwindled. Several statutes,⁶² directives,⁶³ and regulations⁶⁴ reference OMB Cir. A-76. Its process generally resembles other government contracting procedures, with one notable exception: the *government* also submits an offer. A snapshot of the OMB Cir. A-76 procedures provides a backdrop for analyzing how best value contracting fits in this process.

Often, an example illustrates concepts better than mere theory. Assume the following facts:⁶⁵ A military base has conducted an OMB Cir. A-76 competition. Using a base operating services solicitation (BOS),⁶⁶ base officials bundled⁶⁷ three functions together: civil engineering, transportation, and supply. Civil engineering encompassed family housing, lodging, ground maintenance, and general operations. Supply encompassed the entire base supply system. Transportation encompassed vehicle maintenance and operations.

The OMB Cir. A-76 process began when the DOD notified Congress of the A-76 study for the BOS functions.⁶⁸ A local base team⁶⁹ then developed several plans for the study, including a performance work statement (PWS),⁷⁰ the quality assurance surveillance plan (QASP),⁷¹ and the management plan.⁷² Together, these plans formed the government's "Most Efficient Organization" (MEO).⁷³ The government MEO team also prepared a cost estimate of the government's performance.⁷⁴ The contracting

60. See Major Gregory S. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F. L. REV. 239 (1997) (providing an overview of the OMB Cir. A-76 procedures).

61. OMB Cir. A-76, *supra* note 2, para. 4.a. In 1955, the Bureau of Budget issued a bulletin establishing the federal policy to buy goods and services from the private sector. Bureau of Budget Bulletin 55-4 (Jan. 1955) *reprinted in* Diebold v. United States, 947 F.2d 787, 799 (6th Cir. 1991). The OMB issued OMB Cir. A-76 in 1966, which restated this policy but justified outsourcing for its cost-savings. The OMB revised the circular in 1967, 1979, and 1983. OMB Cir. A-76, *supra* note 2, para. 4.b. The OMB recognized that the private sector could not provide all goods and services. Therefore, it also carved out some exceptions. These exceptions include the unavailability of a commercial source, patient care, national defense interests, inherently governmental functions, time of war or military mobilization, and research and development. OMB Cir. A-76, *supra* note 2, para. 8; SUPPLEMENT, *supra* note 11, pt. 1, ch.1, § C.

officer received the MEO, management plan, and in-house estimate as sealed documents, which the contracting officer safeguarded until the base received bids or proposals from the contractors.⁷⁵

The contracting officer also selected the best value procurement method⁷⁶ for the OMB Cir. A-76 BOS competition. Three private contractors then submitted offers for the BOS contract. After receiving these

62. See 10 U.S.C.A. § 2460 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 341, 112 Stat. 1920, 1973 (1998) (defining depot-level maintenance and repair); 10 U.S.C.A. § 2461 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998) (requiring notice to Congress and a cost comparison study before changing any commercial activity with 50 or more DOD civilians to contract performance); 10 U.S.C.A. § 2462 (West 1998) (requiring the Secretary of Defense to purchase goods and services from the private sector if more economical, but exempting goods and services that military or government personnel must perform); 10 U.S.C.A. § 2463 (requiring the Secretary of Defense to collect and maintain cost comparison data for the term of the contract or five years when converting a contractor-operated DOD commercial activity with 50 or more employees to DOD civilian employee performance); 10 U.S.C.A. § 2464 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 343, 112 Stat. 1920, 1976 (1998) (requiring the Secretary of Defense to identify logistics capability that the DOD must have to ensure a ready and controlled source of technical competence and resources); 10 U.S.C.A. § 2465 (prohibiting the DOD from using appropriated funds to contract for fire-fighting or security guard functions at domestic bases, except as follows: overseas; on a government-owned but privately operated installation; for services prior to 24 Sept. 1983; or for services with local governments at an installation closing within 180 days); 10 U.S.C.A. § 2466 (permitting the DOD to use only 50% of funds to contract for depot-level maintenance and repair work); 10 U.S.C.A. § 2467 (requiring the Secretary of Defense to include any retirement costs in an A-76 cost comparison, and to consult with affected employees and their labor organizations); 10 U.S.C. § 2468 (1994) (authorizing the DOD installation commanders to enter A-76 contracts for performing commercial activities until 30 Sept. 1995); 10 U.S.C.A. § 2469 (requiring the Secretary of Defense to use merit-based procedures when moving depot-level activities over three million dollars million to another DOD depot activity, and to use public-private competition when moving a depot level workload over three million dollars to contractor performance); 10 U.S.C.A. § 2469a (establishing the procedures for converting depot-level maintenance and repair workload from the DOD to the private sector on installations approved for closure or realignment under the Base Closure and Realignment Act of 1990). See also Federal Workforce Restructuring Act of 1994, Pub. L. 103-226, 108 Stat. 111, 117 (requiring the President to ensure that buyouts or streamlining do not increase service contracts without a cost comparison); Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (requiring federal agencies to improve the confidence of the American people in government by focusing on government results, service, quality, and customer satisfaction).

63. See U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989); U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES (9 Sept. 1985).

offers, a senior base official evaluated them and identified one of the con-

64. See FAR, *supra* note 13, subpt. 7.3. The military departments have implemented OMB Cir. A-76 via commercial activity programs. See, e.g., U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE POLICY DIR. 38-6, OUTSOURCING AND PRIVATIZATION (1 Sept. 1997); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM (26 Apr. 1994); U.S. DEP'T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct. 1997); U.S. DEP'T OF ARMY, PAM. 5-20, COMMERCIAL ACTIVITIES STUDY GUIDE (31 July 1998) [hereinafter DA PAM 5-20]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 4860.44F, COMMERCIAL ACTIVITIES (29 Sep. 1989).

65. This scenario resembles the facts in *Madison Services*. See *Madison Services, Inc.*, B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136. In *Madison*, agency officials issued the request for proposals in January 1996, before the OMB issued the Supplement in March 1996. Even so, agency officials still used best value contracting, and the facts offer a good example of some key issues. Beyond these facts, the hypothetical scenario in this article is not modeled precisely after *Madison*. Moreover, the hypothetical assumes additional facts. For example, in the BOS hypothetical, the base officials not only used best value contracting, but they also used a PWS, selected certain evaluation criteria, communicated with the government MEO team, and eventually kept the BOS functions in-house.

66. See AIR FORCE LOGISTICS MANAGEMENT AGENCY (AFLMA), U.S. DEP'T OF THE AIR FORCE, PROJECT NO. LC9608100, OUTSOURCING GUIDE FOR CONTRACTING 60-61 (1996) [hereinafter AFLMA OUTSOURCING GUIDE] (on file with the author). According to AFLMA, the Air Force has found that BOS contracts offer cost savings and efficiency. Specifically, BOS contracts use private sector expertise while saving money, and also reduce the number of overall contracts to a manageable level. When using a BOS contract, the Air Force typically "bundles" certain requirements together, such as supply, transportation, civil engineering, and services. It then appoints an in-house manager to administer the contract. *Id.* at 61.

67. See *id.* at 59-60. "Bundling" occurs when an agency consolidates several functions into one contract, usually at one location. In the DOD, numerous functions lend themselves to bundling, such as civil engineering, logistics, and services. Bundling presents two challenges, however. First, the installation must have the ability to manage a multi-function contract. Second, the installation must find a qualified source to perform multi-function tasks. When outsourcing, the installation should consider how bundling impacts small businesses and their resources to perform within a larger "umbrella" contract. The small businesses currently performing a function on a base may suffer if that function is bundled with others and then outsourced. The AFLMA recommends including a subcontracting requirement in the solicitation when a small business is unavailable as a prime contractor. *Id.* at 59-60, 64.

68. See 10 U.S.C.A. § 2461 *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998) (requiring notice to Congress and a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study); 10 U.S.C.A. § 2467 (requiring the DOD to consult with employees and their labor organizations after identifying a function for a cost comparison study).

69. The Supplement refers to this team as the "cost comparison study team" (CCST). It consists of agency experts in contracting, civilian personnel, civil engineering, financial management, legal, manpower, and the functional area under review. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § B, para. 1.

tractors as offering the “best value” to the government.⁷⁷ The same base official also reviewed the in-house offer (not the cost estimate) and decided it did not meet the same performance standards as the selected best value

70. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § C. The PWS defines the agency’s needs, the performance standards and measures, and the timeframes for performance. The PWS also serves as the basis for all costs. The Supplement encourages a performance-based PWS, and refers agencies to various Office of Federal Procurement policy letters for guidance. See Office of Federal Procurement Policy Letter 91-2, Service Contracting, (9 Apr. 91); Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting, (18 May 94); Office of Federal Procurement Policy, Best Practices Guide to Performance-Based Service Contracting (Apr. 1996). See SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § C. The Supplement cautions that the PWS should not limit service options, arbitrarily increase risk, reduce competition, violate industry service norms, or omit statutory or regulatory requirements without full justification. After OMB published the Supplement in 1996, the Federal Acquisition Council issued final rules on performance-based service contracting. See Federal Acquisition Council (FAC) 97-01, 62 Fed. Reg. 44,813 (1997). These rules encourage contracting officers to use positive or negative performance incentives. To assist contracting officers and legal advisors, the Office of Federal Procurement Policy (OFPP) has placed several model performance-based performance work statements on the internet. See <<http://www.arnet.gov/>>. See generally 1997 Year in Review, *supra* note 13, at 94 (providing a brief discussion of FAC 97-1).

71. SUPPLEMENT, *supra* note 11, app. 1. The QASP outlines how the federal employees will inspect the in-house or contract performance to determine if their service meets standards.

72. *Id.* The management plan defines the organizational structure, operating procedures, equipment, and inspection plans for the MEO.

73. *Id.* The MEO describes the way the government will perform the commercial activity. Together with the management plan, the MEO forms the basis for the government’s in-house estimate. It must reflect the scope of the PWS. It must also identify the organization structures for the MEO, including the staffing and operating procedures, equipment, and transition plans to ensure that MEO performs the in-house activity in a cost-effective manner.

74. *Id.* pt. 2, ch. 2, § A. The government MEO prepares the in-house estimate from the PWS and then forwarded the MEO to the independent review officer for an audit. The in-house cost estimate includes the following items: personnel costs, material and supply costs, depreciation, capital costs, rent, maintenance and repair, utilities, insurance, travel, MEO subcontracts, overhead costs, and any additional costs. The agency calculates these costs using formulas in part two of the Supplement.

75. *Id.* pt. 1, ch. 3, § F. The contracting officer seals the MEO after the independent review officer completes the audit.

76. *Id.* pt. 1, ch. 3, § H. The Supplement permits all competitive methods under the FAR. This includes sealed bid, two-step, source selection, and other competitive-procedures. Time restraints should guide this choice. Congress has limited the DOD OMB Cir. A-76 studies to 24 months for a single function and 48 months for multiple functions. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).

offer. After adjusting its offer and cost estimate, the government MEO resubmitted its in-house offer for review.

Base officials then selected a winner. To win, a private offeror's cost estimate must be at least ten percent lower than that offered by the government MEO.⁷⁸ Otherwise, the government MEO "wins" and the base keeps the function in-house.⁷⁹ For the BOS competition, base officials compared the contractor and MEO cost estimates. Because the government MEO offered comparable performance at a lower cost, the base retained the BOS functions in-house.

Following the cost comparison, several events took place. First, the contractor⁸⁰ appealed the decision to keep the BOS functions in-house to the appeal authority.⁸¹ After the appeal authority denied the appeal, the contractor protested the government's decision to the General Accounting Office (GAO).⁸² Additionally, the base MEO began performing the BOS

77. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § G. If the agency chooses a negotiated procedure, the Supplement establishes guidelines to ensure equity in the cost comparison process. First, the government submits a technical performance plan, like the commercial offerors. The technical performance plan also reflects the MEO and is sealed prior to the decision authority considering any part of any contract offer. *Id.* pt. 1, ch. 3, § H, para. 3.a. Second, the agency establishes a source selection authority (SSA). The SSA reviews the contract offers and identifies the one representing the best overall value to the government. This offer competes with the government's in-house cost estimate. *Id.* pt. 1, ch. 3, § H, para. 3.c. After selecting the competitive offer, the SSA evaluates the in-house offer and assesses whether or not it achieves the same level of performance. The SSA performs this review without viewing the in-house cost estimate. The government then adjusts the MEO to meet the performance standards accepted by the SSA. It submits a revised cost estimates to the independent review officer to ensure that the revised in-house cost estimate meets the same scope of work and performance levels as the best value commercial offer. *Id.* at pt. 1, ch. 3, § H, para. 3.e.

78. According to the Supplement, the "minimum cost differential" is the lesser of ten percent of personnel costs or ten million dollars over the performance period. Unless the private offer "beats" the MEO by the lesser amount, the government keeps the commercial function in-house. SUPPLEMENT, *supra* note 11, pt. 2, ch. 4, § A, para. 1.

79. SUPPLEMENT, *supra* note 11, pt. 2, ch. 4. The Supplement explains that the ten percent differential ensures "that the [g]overnment will not convert for marginal cost savings." *Id.*

80. *Id.* pt. 1, ch. 3, § K. In the hypothetical BOS competition, the losing private offeror is an "interested party." This term includes federal employees and contractors who submitted bids or offers. It also includes agencies that submitted formal offers to compete for the right to provide the service through an inter-service support agreement (ISSA).

81. The appeal authority is an impartial government official at a level organizationally higher than the official who made the original award decision. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K, para. 3.

function.⁸³ Finally, after one year, base officials will review the MEO's performance to ensure it is performing the function in line with the PWS and the in-house estimate.⁸⁴

With our hypothetical BOS competition, we have set the stage to explore the OMB Cir. A-76 process. Specifically, we may now delve into the issues our base officials face after selecting the best value procurement method for the cost study.

B. The Process: An Overview of Best Value Contracting⁸⁵

When buying a product or service, a savvy shopper might look beyond mere cost to other areas before making a final choice. For example, our shopper might explore if the company offers a quality service or enjoys a good reputation. Or, our shopper may examine the company's performance or the quality of its employees. In the end, the consumer may select the company providing the best value for the product or service, despite the higher cost. In such a case, the consumer obviously believes that the higher cost is more than outweighed by the non-cost considerations.

Similarly, in negotiated government procurements,⁸⁶ best value contracting permits an agency to evaluate cost and non-cost factors so as to select the offer providing the "biggest bang for the proverbial dollar."⁸⁷ In

82. *Id.* pt.1, ch. 3, § K, para. 7. Note that if a party files an agency appeal, the appeal authority must decide within 30 days to either award the contract or cancel the solicitation. *Id.* pt. 1, ch. 3, § K, para. 8. The contractor may also file a protest in federal court. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (amending 28 U.S.C. § 1491).

83. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § E, para. 4d. The government's management plan contains a transition plan designed to minimize any disruption, adverse impact, or start-up requirements when shifting work from in-house to contract or vice versa.

84. *Id.* pt. 1, ch. 3, § L. The agency must conduct a post-MEO performance review on not less than 20% of the functions the government performs resulting from a cost comparison. If this review reveals any in-house deficiencies, the agency should give the MEO personnel adequate time to correct them. If the MEO personnel fail to correct these deficiencies, or deviate from the PWS, the contracting officer has two options. If possible, the contracting officer must first award the work to the next lowest offer that participated in the cost comparison. Otherwise, the contracting officer must immediately resolicit the cost comparison. *Id.*

85. *See generally* Carl J. Peckinpaugh & Joseph M. Goldstein, *Best Value Source Selection: Contracting for Value, or Unfettered Agency Discretion?*, 22 PUB. CONT. L. J. 275 (Winter 1993) (providing an overview of best value contracting).

the underlying solicitation, the agency must state every factor and significant subfactor and its “relative importance.”⁸⁸ Additionally, it must always evaluate certain factors, such as cost or price,⁸⁹ the quality of the product or service,⁹⁰ and past performance.⁹¹ The agency may also communicate with offerors on limited subjects.⁹² Following any discussions, the agency selects a competitive range and allows certain offerors to submit revised proposals.⁹³

86. See generally RALPH C. NASH, JR. & JOHN CIBINIC, JR., *COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS* (1993). The negotiated procurement process evolves as follows: Once the agency has developed the PWS and the evaluation factors, it then solicits proposals from offerors. Upon receiving the offers, the contracting officer or the source selection evaluation team reviews them against the evaluation factors and subfactors. The contracting officer may then communicate with certain offerors to help determine the competitive range. After selecting the offerors who fall within the competitive range, the contracting officer conducts discussions. The contracting officer’s overall purpose is to enhance the government’s ability to obtain the best value from the procurement. During discussions, the contracting officer and the offeror address past performance and any weaknesses or deficiencies in the proposal. However, the contracting officer may not reveal another offeror’s price, favor one offeror over another, or reveal an offeror’s technical solution to another offeror. When the contracting officer has completed discussions, the offerors may submit a revised proposal. After conducting a tradeoff analysis, the source selection authority then selects the offeror that represents the best value to the government.

87. FAR, *supra* note 13. When OMB published the Supplement, the FAR did not specifically define “best value.” Rather, it stated that an agency should structure a negotiated procurement “to provide for the selection of the source whose proposal offers the greatest value to the government in terms of performance, risk management, cost or price, and other factors.”

88. FAR, *supra* note 13, at 15.304(d).

89. *Id.* at 15.304(c)(1).

90. *Id.* at 15.304(c)(2). When evaluating quality, the agency must consider one or more non-cost evaluation factors, such as past performance, technical excellence, management capability, personnel qualifications, and prior experience.

91. *Id.* at 15.304(c)(3)(ii). According to the FAR, agencies must evaluate past performance in contracts expected to exceed one million dollars. Effective 1 January 1999, agencies must evaluate past performance for contracts expected to exceed \$100,000. See *1997 Year in Review*, *supra* note 13, at 27. See generally Sunita Subramanian, *The Implications of the FAR Rewrite for Meaningful Discussions of Past Performance*, 26 PUB. CONT. L. J. 445 (1997).

92. FAR, *supra* note 13, at 15.306(b), (d)(3), (e). The agency limits these discussions to offerors who have not responded to inquiries about adverse past performance and offerors whose competitive range status is uncertain. The agency may also communicate with an offeror to decide whether that offeror’s proposal belongs in the competitive range. The agency may also award the contract without discussions if it notified the offerors of this fact in the solicitation. If so, the agency may only allow the offeror to resolve minor or clerical errors, or clarify certain parts of the proposal, such as past performance. *Id.* 15.306(a)(1)-(3).

Effective October 1997,⁹⁴ the Federal Acquisition Regulation (FAR) defines “best value” as the “expected outcome of an acquisition that provides the greatest overall value for the agency.”⁹⁵ To help agencies select the offer with the “greatest overall value,” the FAR creates a “best value continuum.” On one end, cost factors may drive an agency’s award decision.⁹⁶ The agency selects the lowest priced, technically acceptable offer as the best value.⁹⁷ On the other end of the best value continuum, non-cost factors drive the agency’s award decision.⁹⁸ Thus, the agency may tradeoff cost and non-cost factors to select the best value offer, which may not be the lowest priced offer.⁹⁹

The Supplement to OMB Cir. A-76 thrust best value contracting into the outsourcing arena. By choosing the negotiated procurement method in an OMB Cir. A-76 study, an agency triggers the best value tradeoff process. For example, the SSA¹⁰⁰ initially compares the private sector offers to each other and makes tradeoffs between various cost and non-cost fac-

93. FAR, *supra* note 13, at 15.307(b). Formerly known as “best and final offers,” the FAR part 15 rewrite now refers to them as “revised proposals.”

94. On 30 September 1997, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council issued Federal Acquisition Circular (FAC) 97-02, which revised part 15 of the FAR and made conforming changes to other parts of the FAR. Although effective on 10 October 1997, FAC 97-02 allowed agencies to delay implementing the FAR part 15 changes until 1 January 1998. *See supra* text accompanying note 13.

95. *See* FAR, *supra* note 13, at 2.101. This section defines “best value” as follows: “Best value means the expected outcome of an acquisition that, in the [g]overnment’s estimation, provides the greatest overall benefit in response to the requirement.” *Id.*

96. *Id.* at 15.101. This section states:

In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.

Id.

97. *Id.* at 15.101-2(a). This section further states that “solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.” *Id.* at 15.101-2(b)(1).

98. *Id.* at 15.101.

99. *Id.* at 15.101-1(a). This section requires the agency to state in the solicitation all evaluation factors and significant subfactors and their relative importance to each other. It also requires the agency to state whether the non-cost factors are “significantly more important than, approximately equal to, or significantly less important than cost or price.” *Id.* at 15.101-1(b)(1)-(2).

tors. After selecting the best value offeror, the SSA then compares the private offer with the MEO's technical and other proposal data, except cost.¹⁰¹ This step permits the SSA to determine if the MEO meets the same scope of work and performance levels as the private sector's best value offer. If not, the MEO team must revise its technical proposal and cost estimate before the agency conducts the final cost comparison and chooses a winner. Even best value, however, cannot escape the proverbial "bottom line": the private offeror, best value or not, must still "beat" the MEO by ten percent.

An agency must determine when to choose the best value procurement method in an OMB Cir. A-76 study. The GAO has reviewed OMB Cir. A-76 studies employing best value competitions.¹⁰² It found the best value method most appropriate for complex work requiring technical expertise and carrying some risk. Initial OMB Cir. A-76 "best value" studies completed since 1996 rated non-cost evaluation factors above cost factors. Some claimed that best value in these OMB Cir. A-76 studies balanced the competition because the MEO had to submit a technical proposal, allowing the agency to better compare the contractor's proposal with the MEO's proposal.¹⁰³ According to the GAO, "best value" leveled the playing field and arguably allowed the agency to better compare the technical aspects of the private offeror's proposal with those of the MEO's proposal.¹⁰⁴

With or without best value, outsourcing promises to save money. The question remains, however, whether "best value" helps or hinders this promise, and what issues arise when best value is mixed with OMB Cir. A-76.

100. The SSA is the government official responsible for selecting the private sector offer providing the best overall value to the government and deciding whether the MEO meets the same level of performance as the private sector offer. *See also supra* note 77 and accompanying text.

101. If the agency selects negotiated procedures, the Supplement directs the government, like the private offerors, to submit a technical management plan based on the solicitation requirements. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § H, para. 3.a.

102. GENERAL ACCOUNTING OFFICE, DEFENSE OUTSOURCING: BETTER DATA NEEDED TO SUPPORT OVERHEAD RATES FOR A-76 STUDIES 10-11, REPORT NO. GAO/NSIAD-98-62 (1998).

103. *Id.* at 11.

104. *Id.*

IV. The Process in Action: Selected Issues in OMB Cir. A-76

When using OMB Cir. A-76 and best value, an agency will address several issues. Three of the more significant issues are as follows: selecting evaluation factors; evaluating past performance; and conducting discussions. First, however, an agency must decide whether or not a function is “inherently governmental.”¹⁰⁵ Identifying a function as “inherently governmental” exempts it from the OMB Cir. A-76 process.

A. Selected Issues: Inherently Governmental Functions

In our hypothetical BOS competition, the base officials competed the installation civil engineering, transportation, and supply functions. The base officials first decided that they could compete these functions. To a large extent, this decision hinges on whether or not those functions are inherently governmental. The OMB has exempted inherently governmental functions from OMB Cir. A-76 coverage because they are “so intimately related to the exercise of the public interest as to mandate performance by federal employees.”¹⁰⁶

105. Conflict of interest questions may also arise during an OMB Cir. A-76 competition, especially as they impact employees. Here, a legal advisor can offer invaluable advice and guidance on several critical and potentially “show-stopping” issues. For example, employees preparing the MEO or developing the PWS have access to procurement sensitive data. The Procurement Integrity Act forbids them from disclosing or obtaining “contractor bid or proposal information” and “source selection information.” 41 U.S.C.A. § 423(a)-(b) (West 1998). Employees who participate “personally and substantially” in preparing the PWS must also report employment contacts from bidders or offerors under 41 U.S.C.A. § 423(c). Some employees may not accept jobs with the winning bidder or offeror under 41 U.S.C.A. § 423(d). This ban applies if the procurement exceeds \$10 million and the employee held certain jobs or roles, such as source selection authority or contracting officer, or made certain contract decisions. Employees working on the MEO or PWS may also run afoul of the financial conflict of interest ban of 18 U.S.C.A. § 208 (West 1998). For example, an employee offered a job from a bidder must either reject the offer or disqualify himself from the OMB Cir. A-76 process. Finally, an employee who accepts a job from a winning bidder must avoid the “side-switching” ban in 18 U.S.C.A. § 207 (West 1998). Throughout the process, the legal advisor should also consider how these statutes affect an employee’s right of first refusal for employment with a winning bidder under FAR 7.305(c). As always, the legal advisor should consult the Office of Government Ethics regulations and the Joint Ethics Regulation for further guidance. See Standards of Conduct for the Executive Branch, 5 C.F.R. § 2635 (1998); U.S. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993).

106. OMB CIR. A-76, *supra* note 2, para. 6.e. See SUPPLEMENT, *supra* note 11, pt. 1, ch.1, § B.

When analyzing this issue, agency officials should rely on policy guidance. Office of Federal Procurement Policy Letter 92-1 outlines the scope of inherently governmental functions, defining them as activities requiring a federal employee to exercise discretion or make value judgments for the government.¹⁰⁷ The Policy Letter distinguishes between discretionary and “value” judgments and ministerial acts. It encourages agencies to consider whether an agency official uses discretion to commit the agency to a course of action.¹⁰⁸ For example, the agency official might consider whether the employee makes hiring or purchasing decisions, or whether the employee only performs assigned tasks. Appendix A to Policy Letter 92-1 also lists examples of inherently governmental functions that the DOD may not outsource. These include conducting criminal investigations; controlling prosecutions; managing and directing the military; and commanding military forces in a combat, combat support, or combat service support role.¹⁰⁹ Likewise, OMB Cir. A-76 and its Supplement cite

107. Policy Letter on Inherently Governmental Functions, (Sept. 23, 1992), *reprinted in* SUPPLEMENT, *supra* note 11, app. 5. The policy letter further states:

Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlement.

An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers or employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature. . . .

Id. app. 5, para. 5.

108. *Id.* app. 5, para. 7(a).

109. *Id.* app. 5, app. A.

examples of commercial activities that the DOD may outsource¹¹⁰ absent a congressional bar.¹¹¹ These include installation support services, management support services, and transportation services, akin to those in our BOS hypothetical.

What about those so-called “gray areas,” where a function sports characteristics of both an inherently governmental and a commercial activity?¹¹² Outsourcing military legal services illustrates the vexing nature of this issue. Some military legal functions are inherently governmental because of how they affect command and control, such as prosecuting courts-martial. Military attorneys interpret and execute laws in a criminal proceeding by exercising discretion and making decisions for the government. Hence, military attorneys must perform these roles, not contractors.

Other legal services, such as legal assistance, may lend themselves to outsourcing.¹¹³ On the installation, the military could arguably contract out legal assistance. Contractors may provide both the ministerial and legal counseling that judge advocates currently perform. These tasks include preparing documents (especially wills and powers of attorney), one-on-one counseling, and legal negotiations. Off the installation, however, legal assistance arguably becomes more of an inherently government-

110. See OMB Cir. A-76, *supra* note 2, attachment A; SUPPLEMENT, *supra* note 11, app. 2. See also *supra* note 5 and accompanying text.

111. See, e.g., 10 U.S.C.A. § 2465 (West 1998). An anachronism of days past, this statute prohibits the DOD from using appropriated funds to contract for firefighting or security guard functions at domestic bases. The statute permits contracting for these functions only if the contract is performed overseas; on a government-owned but privately operated installation; existed prior to 24 September 1983; or is for services with a local government at an installation closing within 180 days. Congress enacted this statute to allay concerns about the reliability of private firefighting and security services; control over contractor personnel; and the contractor's right to strike. Recently, the GAO has reviewed whether the DOD should contract out these services in light of the DOD's belief that doing so could save money. After reviewing some active contracts, however, the GAO found mixed results. Though some bases rated the firefighters and security personnel as “outstanding,” other bases employed contractors who went bankrupt or failed to perform. Despite 10 U.S.C.A. § 2465, the GAO recommended that bases wanting to compete these services conduct a cost comparison study to see if they actually will reap any cost savings. GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CONTRACTING FOR FIREFIGHTERS AND SECURITY GUARDS, REPORT NO. GAO/NSIAD-97-200BR (1997). The HNSC, however, expressed concern that repealing 10 U.S.C.A. § 2465 would seriously impact national security. Instead, it directed the Secretary of Defense to identify those firefighting and guard functions that are inherently governmental and propose a plan to outsource these functions should Congress repeal the current prohibition. H.R. REP. NO. 105-132, at 293-94 (1997). Congress' treatment of this function belies the clear political nature of the outsourcing process.

tal function. For example, judge advocates perhaps can offer immediate legal assistance not otherwise available to troops in a deployed environment. Conversely, the military may just as easily deploy contracted attorneys to meet the immediate needs of the troops.¹¹⁴

112. Labeling a function “inherently governmental” is a prickly issue for DOD agencies. The term is slippery and agencies have wide discretion. Congress has also struggled with the slippery and highly political definition of “inherently governmental.” Noting that the DOD lacked a “clear definition” of inherently governmental functions, Congress directed it to propose a DOD-wide definition. Of note, the HNSC expressed concern that each military department defines differently “inherently governmental functions” and “commercial activities.” For example, it criticized the Air Force after it redefined nearly 194,000 personnel from the commercial activity category to the inherently governmental category between FY 1994 and FY 1996 without changing their role or mission. By 1 March 1998, the HNSC directed the DOD to prepare a report addressing inherently governmental functions. It directed the DOD to propose a way to uniformly define this term, and to list all “inherently governmental” functions. H.R. REP. NO. 105-132, at 296 (1997). In response, the DOD issued Defense Reform Initiative Directive (DRID) 20. As of 31 October 1998, DRID 20 required all DOD components to use the same guidelines to classify functions and positions as inherently governmental, commercial activities exempt from OMB Cir. A-76, and commercial activities subject to OMB Cir. A-76 study. Upon completing their individual inventory, DRID 20 directed the services and other offices within the OSD to complete a joint review by 30 November 1998. This review will uniformly identify within the DOD the inherently governmental functions and those subject to OMB Cir. A-76 procedures. See Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive #20: Review of Inherently Governmental Functions (16 Jan. 1998) (on file with the author). To date, the DOD has issued 45 DRIDs under the auspices of the DRI. For a sampling of other DRIDs, see Defense Reform Initiative Directives (visited Sep. 14, 1998) <<http://ca.dtic.mil/dri/drids/>>.

113. Contracting attorneys for legal assistance present a special problem: working against their own financial interests. Usually, a successful preventive law program educates troops before they need an attorney. A contract legal assistance attorney lightens his wallet if he decreases this demand. The role of the acquisition attorney raises similar issues. A typical acquisition attorney reviews contracts and documents for legal sufficiency, renders advice, attends meetings, and offers litigation support for bid protests, contract claims, or other legal proceedings. These tasks do not always require the acquisition attorney to exercise discretion. Of course, the same attorney who reviews a contract file for legal sufficiency may also advise a source selection panel. In this role, the acquisition attorney may exercise discretion or provide advice directly related to the contract award decision. This blurs the role between reviewing a contract file and advising a SSA. It also creates additional administrative problems. The supervising attorney in the office must ensure that the contractor does not participate in reviews or actions that conflict with his employment contract. Other questions arise. For example, does the legal office use some attorneys only for routine legal reviews and advice, while using other attorneys for the complex contracts? If so, the staff judge advocate may need more manpower, which arguably defeats the cost savings goal of outsourcing.

An even more immediate issue centers on how much legal support the military should outsource. At a military base, the staff judge advocate plays an inherently governmental role. Does the military service then outsource the other base-level attorneys? Or, does the military service designate the major command staff judge advocate slot as inherently governmental and outsource all subordinate base level legal services? Either option presents an alarming problem. The military must decide how to train future staff judge advocates from the current pool of company grade officers if contract attorneys perform military legal services.¹¹⁵ One wonders, though, if the overall quality of military legal services will suffer needlessly in the long run for the sake of a few dollars? Though difficult, these issues graphically show the challenges facing agencies as they struggle to classify functions as either commercial activities or inherently governmental functions.

Our hypothetical BOS competition discussed above also illustrates how an agency may decide whether a function is inherently governmental. Base officials did not label the civil engineering, transportation, and supply functions as inherently governmental, but classified them as commercial functions subject to OMB Cir. A-76. The OMB Cir. A-76, its Supplement, and Policy Letter 92-1 all guided this choice.

Using Policy Letter 92-1, assume base officials in our hypothetical distinguished between an employee's discretionary or ministerial roles. Using a simple example, suppose a base employee properly approved purchasing new lawnmowers for the installation. The employee committed the base to a course of action (purchasing equipment) and spent money. Thus, the employee exercised discretion, an inherently governmental act,

114. Contractors are already on the battlefield. In Bosnia, the Army used the Logistics Civil Augmentation Program (LOGCAP) contract to provide logistics support. The LOGCAP contractor, Brown and Root Services Corporation, provided services in civil engineering, environmental support, maintenance, and cargo handling. The GAO found that the LOGCAP contractor "performed well," despite some financial and oversight problems. GENERAL ACCOUNTING OFFICE, CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, REPORT NO. GAO/NSIAD-97-63 (1997). If the military uses logistics contractors on the battlefield, may it also use contract attorneys on the battlefield?

115. One service has addressed this overall issue. The Navy General Counsel has opined that the Navy Office of General Counsel provides an inherently governmental function that only federal employees can perform. *See* Memorandum, General Counsel of the Navy, to Principal Deputy General Counsel, Deputy General Counsel, Associate General Counsel, Assistant General Counsel, and Command Counsel, subject: Out-Sourcing Legal Services (9 July 1997) (on file with the author).

and the base may not compete this function in the BOS competition. Suppose, however, the base employee's only job is to cut the grass. The employee performed a ministerial act, one that is not inherently governmental. The base may compete this function. Moreover, Appendix B to the Supplement offers more guidance, specifically listing a multi-function contract as a commercial activity.¹¹⁶ The Supplement also lists the BOS functions (civil engineering, transportation, and supply) as commercial activities under the heading "installation services," as well as "maintenance, repair, alteration, and minor construction of real property."¹¹⁷

Even though base officials labeled the BOS functions commercial activities, they must perform one last review: ensuring that no congressional statutes bar the DOD from outsourcing the BOS functions. Absent such statutory bars, base officials may continue with the OMB Cir. A-76 BOS competition.¹¹⁸

B. Selected Issues: Evaluation Factors

In the hypothetical BOS competition, base officials selected and used the best value procurement method. Best value contracting may allow an agency to meet its needs better in certain procurements. The issue becomes: does best value contracting allow an agency to meet its needs in an OMB Cir. A-76 cost comparison?

To meet its needs, an agency must have well-defined evaluation factors and a well-defined PWS. The PWS is the heart of an OMB Cir. A-76 competition.¹¹⁹ It captures the workload and defines the requirements. Unlike a statement of work, a PWS defines what the agency wants, not how the contractor or the government MEO must perform those tasks. The PWS must also allow the agency to determine if either acceptably performed the work.

Another simple example illustrates this point. Suppose that the hypothetical BOS solicitation contained a requirement for grounds maintenance, specifically grass cutting. Using a statement of work, base officials

116. SUPPLEMENT, *supra* note 11, app. 2.

117. *Id.*

118. *See, e.g., supra* note 111 and accompanying text. *See also* 10 U.S.C.A. § 2464, amended by Pub. L. No. 105-261, § 343, 112 Stat. 1920, 1976; 10 U.S.C.A. § 2466. 10 U.S.C.A. § 2464 prohibits the DOD from using OMB Cir. A-76 for logistic capability, absent a waiver from the Secretary of Defense. 10 U.S.C.A. § 2466 allows the DOD to use only 50% of its funds to contract for depot-level maintenance and repair work.

would have defined the grass cutting requirement for the offerors, telling them both how and when to cut the grass. A statement of work might have defined for the offeror what type of equipment to use when cutting the grass, how short to cut the grass, how often to cut the grass, and when to fertilize the grass. Using a carefully drafted PWS, however, base officials need only define the grass-cutting requirement. The PWS might state that the grass must be green and not exceed three inches in length. The offerors then decide how and when to cut the grass, how and when to fertilize, and other ways to meet the performance standard.¹²⁰

Well-defined evaluation criteria are equally important.¹²¹ In the solicitation, agency officials may weigh each factor equally or weigh them differently. For the BOS competition hypothetical, assume that base officials evaluated three factors: the offeror's technical capability, past performance, and price. Technical capability requires the offeror to understand the mission and staff each function with skilled personnel to perform the numerous technical tasks. Past performance gauges the offeror's track record for quality, responsiveness, and timeliness. The offeror's price must also be realistic and complete in light of the technical proposals.

From the hypothetical, recall that base officials selected the government MEO to perform the BOS functions because it prepared a lower cost estimate than the private offeror. Yet base officials evaluated the contractor on cost and other non-cost factors. This discrepancy highlights the tension between best value and OMB Cir. A-76. Both have different goals.

119. On 22 August 1997, the FAR Council issued new rules and policy guidance on performance-based service contracting (PBSC). See FAC 97-01, 62 Fed. Reg. 44,813 (1997). These final rules amend the FAR to implement the Office of Federal Procurement Policy Letter 91-2, Service Contracting. This policy letter prescribes policies and procedures for PBSC methods. See Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (Apr. 15, 1991). Performance-based contracting methods ensure that the agency receives and the contractor achieves performance quality levels, and the total cost relates to how the contractor meets the performance standards. FAR, *supra* note 13, at 37.601. The key to performance-based contracting methods is the PWS. It must define the requirements in "clear, concise language identifying specific work to be accomplished." *Id.* at 37.602-1. When preparing a PWS, agency officials "shall, to the maximum extent practicable," describe the work by what tasks the contractor should accomplish, rather than how it would accomplish those tasks. The PWS should also use measurable performance standards and financial incentives to encourage competitors to develop innovative and cost-effective methods for performing the work. *Id.* at 37.602-1(b)(1)-(4). The new rules also require agencies to use competitive negotiations "when appropriate to ensure selection of services that offer the best value to the government, cost and other factors considered." *Id.* at 37.602-3.

120. AFLMA OUTSOURCING GUIDE, *supra* note 66, at 29.

By using best value, base officials evaluated the overall quality of the offeror's performance, including cost. With OMB Cir. A-76, base officials evaluated the overall cost of the MEO. Moreover, the SSA allowed the base MEO to revise its proposal to meet the same performance level as the contractor. Cost saved the day for the MEO because it eventually "won" the competition. When used together, though, could the base officials easily reconcile these two different approaches, best value and cost? If answered honestly, their response would have to be "no." The OMB Cir. A-76 process forces agency officials to ultimately focus on cost when selecting a "winner," that is, giving them "best value" on a budget.

Second, the BOS solicitation highlights a potential "gaming" issue between the MEO and the ultimate award decision. The losing offeror may accuse the agency of deliberately inflating the evaluation factors to exceed its minimum needs. The motive: to favor the MEO and to keep the function in-house. In such a scenario, the evaluation factors and the PWS clash with OMB Cir. A-76. The PWS is a budget-driven document and it must state only the agency's minimum needs. This presents an interesting issue: does best value contracting permit an agency to propose performance requirements and factors above what it really needs, thus allowing it to "game" the process?

121. See NASH & CIBINIC, *supra* note 86, at 211-12. The agency has three options when drafting the evaluation factors for the base operating services contract. First, if technical and other factors outweigh cost, the evaluation factors must still state that the government will not award to the higher cost offeror for only slightly superior technical or other factors. Second, if the agency weighs cost and technical factors equally, the evaluation factors should recite that the government's goal is to achieve a balance between these factors. Finally, if cost outweighs technical or other factors, the evaluation factors should state that the government will not award to the lowest cost offeror for inferior technical or other factors. The AFLMA suggests the following language in an OMB Cir. A-76 best value procurement for base operating services:

The services to be performed under any contract resulting from this solicitation are highly technical and essential to the Air Force mission. THEREFORE, TECHNICAL CAPABILITY IS MORE IMPORTANT THAN PRICE. THE LOWEST PRICED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. LIKewise, THE HIGHEST TECHNICALLY RATED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. FINAL SELECTION IS BASED ON THE PROPOSAL [THAT] IS MOST ADVANTAGEOUS TO THE GOVERNMENT.

AFLMA OUTSOURCING GUIDE, *supra* note 66, app. 4 (emphasis in original).

The cost-savings goal of OMB Cir. A-76 drives the answer to these questions. Returning to our hypothetical, suppose an offeror submitted a highly rated technical proposal for the BOS solicitation that met the minimum needs for the base. Suppose also that the offeror proposed an innovative, fast way to automate the entire supply system to track inventory. Base officials rated the proposal highly and selected it as the “best value” offer. However, the MEO team offered a lower cost and base officials kept the function in-house. The offeror may argue that the base deliberately rated the technical factor higher than cost. As a result, the private offeror may have estimated a higher cost for performing the function because of its technical requirements. The offeror could assert that the agency “gamed” the OMB Cir. A-76 process, knowing that virtually any best value offer could ultimately lose to the MEO on cost.¹²² This process may not seem fair to the disgruntled offeror. Fair or not, however, the OMB Cir. A-76 process protects an agency if it followed the rules. The offeror will prevail before the GAO only if it shows that base officials conducted a faulty or misleading cost comparison, failed to act in good faith, or failed to follow the OMB Cir. A-76 “ground rules.”¹²³

From the previous two issues comes the final, and perhaps most vexing issue: encouraging private offerors to submit quality best value proposals, knowing that OMB Cir. A-76 is a cost-driven process. In the hypothetical BOS competition, assume that the offeror spent money and time preparing an innovative proposal that met the best value criteria. Even so, base officials selected the government MEO because it offered a lower cost. The losing offeror might take one of three approaches in the future. First, it could still spend a massive amount of time and money to prepare a superior proposal that meets both the best value criteria and the agency’s minimum needs, hoping to beat the MEO on cost. Or it could simply prepare an average proposal that competes with the MEO only on cost. Both proposals might then meet, but not exceed, the PWS and the

122. Exposing this “gaming” issue is intended to show a flaw in the OMB Cir. A-76 process, not to suggest that agency officials would deliberately “game” the competition to favor the MEO. Based on the author’s experience, the DOD officials working OMB Cir. A-76 issues strive to level the playing field for both sides. Nevertheless, the OMB Cir. A-76 process seems to inherently favor the agency.

123. *See, e.g.*, Madison Services, Inc., B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136 (finding cost comparison was neither faulty nor misleading, and agency personnel acted in good faith); Crown Healthcare Laundry Services, Inc., B-270827, B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207 (limiting the scope of review to determining if the agency conducted a faulty or misleading cost comparison). For a detailed discussion of available legal recourses, *see* Part V, *infra*.

evaluation factors. Finally, the private offeror could choose not to even submit a proposal, assuming the process is skewed towards the agency.

If OMB Cir. A-76 drives away contractors, who wins? Arguably, nobody wins. The agency loses because cost alone may or may not always yield a “best value” for the government. The contractor loses if it spends time and money only to fall short to the government MEO. Even if the agency makes tradeoffs between various cost and non-cost factors to obtain a best value, cost still rules the result. The private offeror must still “beat” the MEO’s cost estimate by ten percent to win the competition. Any *successful* MEO must perform to the same performance standards as the best value offeror, but at a lower cost.

Despite these issues, may a DOD agency still receive “best value” in an OMB Cir. A-76 competition? Perhaps, but only within budget constraints. To receive an outstanding product or service, agency personnel must carefully draft the evaluation factors and the PWS. Sensible evaluation factors and a clear, “results-oriented” PWS encourages offerors to propose unique, cost-effective ways to meet the agency’s needs. No matter what the outcome, however, the government will realize cost savings thanks to the A-76 process—at least for the short term.

This approach has, in fact, worked in non-OMB Cir. A-76 procurements. A recent report from the OFPP validates the overall PWS performance-based contracting method. The OFPP study, entitled “A Report on the Performance-Based Service Contracting Pilot Project”¹²⁴ (Pilot Project), caps a four year government-wide test. In 1994, OFPP kicked off the Pilot Project after executive officials from twenty-seven agencies volunteered to participate.¹²⁵ Agencies identified non-PBSC contracts about to expire and resolicited them using PBSC methods. The Pilot Project studied twenty-six contracts totaling \$585 million and measured them on the following factors: price, agency satisfaction, type of work performed, contract type, competition, audit workload, and procurement lead-time.¹²⁶

124. FRANKLIN D. RAINES, A REPORT ON THE PERFORMANCE-BASED SERVICE CONTRACTING PILOT PROJECT (May 1998) [hereinafter PILOT PROJECT], available at <http://www.arnet.gov/References/Policy_Letters/>.

125. *Id.* at 6. Executive officials from the participating agencies signed a pledge committing them to use PBSC for the volunteered contracts. The pledge committed the agencies to use PBSC and measure its effects on volunteered contracts. Four industry associations representing over one thousand companies also endorsed the Pilot Project and promised to promote PBSC methods in their member firms. *Id.* at 3, 6.

Significantly, the Pilot Project showed that PBSC saved the government money and improved contractor performance. Not only did PBSC reduce contract price by an average of fifteen percent,¹²⁷ it also increased agency satisfaction with its contractors by eighteen per cent.¹²⁸ The Pilot Project revealed drastically improved contractor performance in terms of quality, quantity, and timeliness. Additionally, the Pilot Project reduced contract audits by ninety-three per cent.¹²⁹ As a result, OMB instructed its staff to “adopt a priority objective” of increasing PBSC government-wide.¹³⁰

The Pilot Project is hard evidence that the DOD can receive “best value” in an OMB Cir. A-76 competition. To achieve “best value” with PBSC, however, the DOD agencies must craft a thorough PWS and solid evaluation factors. Letting both the MEO and the contractor decide how to best meet the PWS encourages them to be innovative. As the Pilot

126. *Id.* at 3, 7. In the Pilot Project study, the OFPP encouraged agencies to choose contract services not traditionally acquired by PBSC methods. From the contracts resolicited, the OFPP and the participating agencies compared the before and after results against these criteria.

127. *Id.* at 8. The Pilot Project did not consider that, absent the conversions to PBSC, additional inflation-related price increases could have been expected. According to the report, the Bureau of Labor Statistics Employment Cost Index for Private Industry Workers reported a compensation increase of 16% for the 1993-1997 timeframe. *Id.* From this data, the OFPP concluded that the PBSC savings would have been even greater if the Pilot Project study had factored in the inflation:

[I]t may be concluded that, after taking inflation into account, the contract price savings would have been substantially larger. It is important to point out that while inflation-related price increases have not been factored into the data contained in this report, the additional savings they represent should be considered in discussing the benefits of PBSC and agency decisions regarding whether to convert requirements to PBSC.

Id.

128. *Id.* at 11. The Pilot Project obtained data on the following five criteria: (1) quality of work performed, (2) quantity of work performed, (3) timeliness of work performed, (4) cost effectiveness of work performed, and (5) overall performance. The PBSC methods generated higher customer satisfaction ratings when agencies converted cost reimbursement requirements to fixed-price contracts. According to the OFPP, these results validated the “strong preference” for fixed price contracts emphasized in various OFPP checklists for PBSC. *Id.* at 13.

129. *Id.* at 16. According to the OFPP, the total number of audits decreased from 44 to 3. The OFPP predicted this result because agencies converted cost contracts to fixed-price contracts. In turn, this highlighted the “reduced process-oriented expense that PBSC promises to offer, at least for this one significant burden of contract administration.” *Id.*

130. *Id.* at 1.

Project suggests, this method saves the government money. It also shows that OMB Cir. A-76 and best value can co-exist to give the agency “more bang for its buck.”

C. Selected Issues: Evaluating Past Performance

In the hypothetical BOS competition, the base officials did not evaluate the past performance of the government MEO. Yet, the FAR requires agencies to evaluate a private offeror’s past performance.¹³¹ A critical factor, past performance is a good barometer of an offeror’s future contract performance.¹³²

When reviewing past performance, an agency must allow contractors to identify past or current contracts for similar efforts. It must also allow contractors to explain any problems they encountered with other contracts, plus corrective actions.¹³³ With this past performance data in hand, our base officials evaluated offers in the hypothetical BOS competition. The date permitted them to scrutinize how well an offeror and its employees previously performed as a prime and subcontractor. Past performance also led base officials to consider other aspects of an offeror’s past performance. For example, has the offeror previously performed a BOS contract? Did the offeror meet contract requirements? Did it meet performance schedules? How well did it manage costs? What feedback did it receive from its customer, the end user? Acquiring the names and resumes of the offeror’s key personnel would further verify their experience and availability to perform the contract tasks.¹³⁴

131. FAR, *supra* note 13, at 15.304(c)(3)(i). This applies to all competitive negotiations expected to exceed one million dollars. After 1 January 1999, agencies must evaluate past performance for all acquisitions expected to exceed \$100,000.

132. *See, e.g.*, Rotair Indus., Inc., B-276435.2, July 15, 1997, 97-2 CPD ¶ 17; Int’l Bus. Sys., Inc., B-275554, March 3, 1997, 97-1 CPD ¶ 114.

133. FAR, *supra* note 13, at 15.305(2)(ii). For an offeror without a record of relevant past performance, or for whom past performance information is unavailable, the agency gives the offeror a neutral rating on this factor. *Id.* at 15.305(2)(iv). In an OMB Cir. A-76 competition, this raises an interesting issue: does a neutral rating hurt or help a private offeror when the agency does not evaluate the MEO’s past performance? A neutral rating arguably hurts the private offeror because this is one area where it could have offered a “best value.” Even though the agency gives the offeror a neutral rating, it might still view the lack of past performance as a moderate risk. Conversely, a neutral rating arguably helps the private offeror because it levels the playing field. The agency does not evaluate the past performance of either the private offeror or the MEO.

134. *See* AFLMA OUTSOURCING GUIDE, *supra* note 66, app. 4.

Even so, some critics still cry “foul” when an agency only evaluates the private offeror on non-cost factors, such as past performance, claiming this favors the MEO.¹³⁵ If so, then agencies must find ways to avoid bias. The Supplement to OMB Cir. A-76 requires an agency to evaluate a MEO’s performance after one year if it kept the function in-house.¹³⁶ In our hypothetical BOS competition, base officials must review in-house performance under the MEO to see if the work was performed within the PWS and the cost estimate. If not, the MEO team must correct any problems. Otherwise, base officials must either award the work to the next lowest offeror or re-compete the functions. Though not ideal, this belated review of the MEO’s performance represents an attempt to protect the integrity of the OMB Cir. A-76 process.¹³⁷

135. Until recently, Congress unsuccessfully tried to legislate the outsourcing process in order to level the playing field. *See supra* note 52 and accompanying text. Testimony supporting early legislation, which included “best value” language, offered three reasons why outsourcing should, but does not, always provide the best value. First, the OMB Cir. A-76 procedures fail to account for a comprehensive and realistic cost comparison and thus favor the in-house MEO. Second, certain statutes still require the DOD to base outsourcing decisions on the lowest cost. *See* 10 U.S.C.A. § 2462 (West 1998). Although OMB Cir. A-76 encourages “best value,” these statutes make that assessment specious. The DOD evaluates the in-house offer only for cost, but evaluates the private sector offer on cost and other factors. This fails to equally account for non-cost factors and circumvents best value. Early proposed legislation would have amended these statutes to refer to “best value” rather than lowest cost. Third, some proponents testified that subordinate commands within the DOD do not support outsourcing and either ignore or subvert the process. *See Privatization and Outsourcing DOD Reform Initiatives: Hearings on H.R. 716 Before the Subcomm. on Readiness of the Comm. on National Security*, 105th Cong. (1997) (statement of Gary D. Engebretson, President, Contract Services of America), available at 1997 WL 8220135.

136. *See supra* note 84 and accompanying text.

137. This raises an interesting question: If an agency could evaluate the MEO’s past performance, how would it do so? Would it evaluate the employees in the MEO currently performing the functions? Would this be meaningful if the agency must implement a reduction-in-force (RIF), where employees have bump and retreat rights? If so, the agency may have to staff the MEO with different personnel. Would the personnel in the “new” MEO perform the functions as efficiently as the personnel in the original MEO? Second, the agency must decide what to evaluate. Unlike the private offeror, the MEO does not have prior contracts for the agency to review. There are alternatives, however. For example, the MEO might have won current performance-related awards that indicate its probable future performance. An agency could also review the MEO’s quality assurance reports or other inspections for positive and negative data about the MEO. Finally, the DOD’s emphasis on “total quality management” provides yet another source of data about the MEO in the form of metrics, goals, progress towards those goals, and customer feedback.

D. Selected Issues: The Scope of Discussions

In our hypothetical BOS competition, base officials selected a “best value” offeror, but concluded that the MEO could not meet the same performance standards. In an OMB Cir. A-76 competition, agency officials may discuss with the MEO team the deficiencies in their offer as compared to the private offer. They must, however, avoid technical leveling and technical transfusion.

Prior to the rewrite of FAR Part 15, the FAR defined technical leveling as “helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror’s lack of diligence, competence, or inventiveness in preparing the proposal.”¹³⁸ The FAR defined technical transfusion as disclosing technical information about a proposal to improve a competing proposal.¹³⁹ The revised FAR Part 15 does not use the terms “technical leveling” or “technical transfusion,” but retains the concept. The FAR now prohibits agency officials from favoring one offeror over another, revealing an offeror’s technology, revealing an offeror’s price without permission, revealing the names of persons providing past performance data, or revealing source selection information.¹⁴⁰

Does OMB Cir. A-76 invite technical leveling and technical transfusion? That danger exists when agency officials communicate with the MEO team as they adjust performance standards. Officials risk tainting the entire process if they disclose to the MEO team the technical, cost, or past performance data from the best value offer. After all, the offeror has spent time and money figuring out how to meet or even exceed the agency’s needs. If agency officials disclose the offeror’s approach, ideas, or cost to the MEO team, it arms them with an unfair advantage. Using

138. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.610(d) (Apr. 1, 1984) [hereinafter 1984 FAR]. See Steven W. Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practice in Negotiated Federal Acquisitions: Technical Transfusions, Technical Leveling, and Auction Techniques*, 17 PUB. CONT. L.J. 211, 238-246 (1987) (providing an overview of technical leveling).

139. 1984 FAR, *supra* note 138, at 15.610(e)(1). This provisions of the 1984 FAR defined technical transfusion as “[g]overnment disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal.” *Id.* See Feldman, *supra* note 138, at 227-38.

140. FAR, *supra* note 13, at 15.306(e). However, FAR 15.306(e) permits a contracting officer to inform an offeror that its price is too high or too low, and reveal the basis for that conclusion. *Id.* See Policy Letter on Service Contracting, *supra* note 119 and accompanying text.

this data, the MEO team may then adjust the in-house offer to perform the function at a lower cost than the private offeror. The result: the contractor essentially provides a free consulting service to the agency. The impact: the contractor loses any incentive to propose innovative ideas or a higher level of performance in future OMB Cir. A-76 competitions.

Agency officials may use case law and statutes as guides to avoid technical leveling or transfusion when communicating with the MEO team. The GAO has ruled time and again that agency officials may generally lead offerors into deficient areas of their proposal without running afoul of the bar prohibiting technical transfusion and leveling. For example, in *Simmonds Precision Products, Inc.*, the GAO ruled that the Air Force properly asked other offerors during discussions if they considered alternate approaches to the design standards in the solicitation.¹⁴¹ The GAO concluded that the Air Force did not reveal the other offeror's unique design or approach. Rather, by merely inquiring about alternative methods, the Air Force encouraged all offerors to explore alternate--and more acceptable--alternatives.¹⁴² The GAO ruled differently in *Litton Systems, Inc.*¹⁴³ In that case, the agency blatantly disclosed another offeror's source

141. B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 (finding that the agency properly informed the other offerors that solicitation contemplated an alternate approach without suggesting a certain design or another offeror's proposal). In *Simmonds*, the Air Force issued a Request for Proposals (RFP) for the fuel savings advisory system (FSAS) for the KC-135 aircraft. The FSAS consisted of three components: a fuel management advisory computer (FMAC), an integrated fuel management panel (IFMP), and the fuel savings advisory computer (FSAC). In its offer, Simmonds offered two alternatives for replacing the FSAS. First, it recommended replacing the three original boxes with three new boxes. Alternatively, Simmonds recommended a two-box approach that combined the FSAC and the FMC into one unit and also directly replacing the IFMP. Another offeror, Lear, offered a three-box approach in its initial proposal. During discussions, the Air Force asked Lear, in writing, if it had considered any alternate approaches to the RFP requirements. The Air Force did not ask a similar question of Simmonds because it viewed its two-box approach as an acceptable alternative method. In response, Lear stated it had considered a two-box approach and ultimately submitted this alternative to the Air Force as its best and final offer (BAFO). After evaluating the BAFOs, the Air Force found Lear offered the technically acceptable proposal with the lower price and awarded it the contract.

142. *Id.* at 10. In reaching its decision, the GAO quickly dismissed Simmonds' argument that the two-box approach was an "obvious technical solution" leading to technical transfusion or leveling. Instead, the GAO called the two-box approach the product of a "natural design evolution" within the industry. It noted that Lear, being familiar with this trend, would have initially offered the two-box approach if it had understood the RFP to permit alternative design models. Thus, the GAO opined that the question the Air Force posed to Lear merely "clarified that the agency was prepared to consider alternate approaches under the RFP, without suggesting a particular design approach or disclosing another offeror's proposal information." *Id.* at 5.

selection information to the awardee. The awardee then used this data to improve its offer. The GAO concluded that the agency *improperly* disclosed protected data to the awardee, giving it an unfair advantage.¹⁴⁴

A more recent case depicts how easily an agency may gain access to and use a private offeror's cost estimate in an OMB Cir. A-76 competition. In *Madison Services, Inc.*,¹⁴⁵ the Air Force solicited offers for a base operating services contract. After performing the OMB Cir. A-76 cost comparison, the Air Force kept the functions in-house because the MEO offered the overall lower cost. Madison filed an agency appeal. Although the

143. B-234060, May 12, 1989, 89-1 CPD ¶ 450 (finding that the agency tainted the procurement process when it disclosed the competitor's source selection sensitive information to the awardee, thus giving the awardee an unfair competitive advantage about the competitor's product). The facts in *Litton* portray a classic scenario from the "Ill Wind" investigation conducted in the late 1980s. The Air Force solicited proposals from Litton and Loral Systems Manufacturing Company (Loral) for an advanced radar warning receiver (ARWR). Both companies submitted technically acceptable offers, but Loral proposed a lower cost. As a result, the Air Force awarded the contract to Loral. One week later, on 27 December 1989, the federal district court in Maryland unsealed an affidavit filed as part of the Ill Wind scandal. The affidavit reported that the Assistant Air Force Secretary of Acquisition for Tactical Systems provided sensitive data to a private consultant whom, in turn, exchanged the information to a Loral official for money. Regarding the ARWR, the affidavit stated that the consultant told Loral about the Air Force official's visit to Litton to evaluate its ARWR progress. Moreover, the consultant gave Loral a copy of a book describing Litton's ARWR methodology, as well as a copy of a classified briefing describing Litton's ARWR testing. According to the affidavit, the consultant continued to feed Loral information about the ARWR competition that he obtained from the Air Force Assistant Secretary. Not surprisingly, Litton argued, successfully, that the Air Force should terminate the ARWR award to Loral. *Id.* at 3.

144. *Id.* at 5. In sustaining this protest, the GAO showed little sympathy for the Air Force and reminded agencies to protect the procurement process as sacrosanct:

It may well be, as the Air Force argues, that this information did not give Loral a competitive advantage in the competition. Nevertheless, we do not believe the propriety of an award decision should turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we believe that the integrity of the system would be best served by a termination of the contract.

Id. at 5.

145. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136. In *Madison*, the Air Force used best value contracting procedures. It evaluated technical and price factors to determine which offer or combination of offers gave the Air Force the "best value."

reviewing officials upwardly adjusted the in-house cost estimate during the review process, they denied Madison's appeal. Madison protested to the GAO.

Madison contended that the Air Force personnel who prepared the in-house cost estimate "gamed" the procurement by deliberately omitting some costs from the initial in-house estimate. According to Madison, Air Force personnel omitted these costs so they could review its proposed costs before recalculating the in-house estimate during the appeal process.¹⁴⁶ Madison also alleged that the appeal process favored the MEO. According to Madison, the appeal review team discussed the omitted costs with the Air Force employees who had initially prepared the in-house cost estimate.¹⁴⁷

The GAO ruled that the Air Force did not "game" the OMB Cir. A-76 cost comparison. Significantly, the GAO found that Madison failed to show bad faith and excused the base personnel for mistakenly omitting costs from the in-house estimate. The GAO further noted that the confusing language in the cost comparison and solicitation made it difficult for the Air Force personnel to accurately calculate the in-house cost estimate.¹⁴⁸ Moreover, the GAO ruled that the appeal review team acted properly when it consulted with the personnel who prepared the in-house estimate. The GAO concluded that only those personnel could logically

146. *Id.* at 3-4. Specifically, Madison argued that the Air Force omitted material and supply costs from the original in-house estimate. According to Madison, the Air Force then inserted an unrealistically low figure for the agency material and supply costs only after Madison's prices were revealed during the later appeal. Madison opined the Air Force did this to ensure it kept the functions in-house. *Id.* at 4.

147. *Id.*

148. *Id.* at 5. At the hearing before the GAO, the base independent review officer (IRO) testified that, upon reviewing the initial draft of the in-house cost estimate, she noticed that it omitted material and supply costs. When the IRO quizzed the base employee who prepared the form about these omitted figures, he responded that he understood from reading the RFP and its PWS that most materials and supplies would be government furnished equipment (GFE). Thus, he excluded these costs from the in-house estimate because these items would be GFE regardless of whether the contractor or the base activity performed the work. The IRO also testified that she had difficulty gleaning from the PWS what, if any, materials and supplies should be priced and what were GFE. After reviewing the RFP, the GAO agreed with the IRO that the RFP required "close scrutiny" to understand what materials and supplies were contractor-provided. For example, the GAO observed that the RFP required the contractor to provide materials and supplies for most of the work, but also included a lengthy list of GFE. As a result, the GAO reasoned that the base employees "simply made a mistake and misinterpreted the RFP's requirements. . . ." *Id.* at 5-6.

identify the omitted costs and then properly recalculate the in-house cost estimate.¹⁴⁹ Last, the GAO observed that the base officials significantly increased the in-house cost estimate only after they reviewed Madison's costs, an act inconsistent with agency bias.¹⁵⁰

Although the GAO exonerated the Air Force, this case illustrates some of the pitfalls associated with the OMB Cir. A-76 process. First, it exposes how agency personnel may have ready access to an offeror's cost estimate during discussions.¹⁵¹ After reviewing Madison's cost estimate, the appeal review team adjusted the in-house cost estimate. Although base officials in *Madison* acted in good faith, might agency officials at another time and place be tempted to act otherwise? Moreover, such adjustments on the heels of the private offeror's proposal certainly lead to the appearance of improper gaming, with the agency potentially giving the MEO team an unfair advantage. Additionally, the case underscores the questionable importance of cost in an OMB Cir. A-76 award, even when the agency uses best value procedures.

Finally, keep in mind that two statutes protect a private offeror from technical leveling or transfusion during the OMB Cir. A-76 process. First, the Procurement Integrity Act prohibits DOD officials from disclosing or obtaining contractor bid or proposal information.¹⁵² Additionally, the Trade Secrets Act prohibits agency officials from disclosing the private

149. *Id.* at 6. The GAO also noted that the Air Force was "empowered and obligated" to review the in-house cost estimate after Madison complained about its "unreasonably low costs." *Id.* As the GAO reasoned:

[B]ecause the base personnel, having originally calculated the in-house cost estimate as well as the most efficient organization upon which it was based, were the people most knowledgeable about the agency's support for its proposed costs, the review team logically and reasonably turned to the base activity personnel for justification of the cost estimates and for additional information that would allow the review team to make appropriate adjustments.

Id.

150. *Id.* at 6. In fact, the GAO noted that the Air Force upwardly adjusted the in-house cost estimate by more than \$1.7 million after discussing Madison's allegations with the base personnel. *Id.*

151. The GAO observed that the agency held two rounds of discussions with the private offerors and twice allowed them to revise their proposals. However, the agency did not discuss the MEO or the in-house cost estimate with the MEO personnel. *Id.* at 4. The point: an agency may also communicate with a private offeror in a OMB Cir. A-76 competition.

offeror's proprietary data.¹⁵³ It forbids officials from disclosing "practically any commercial or financial data collected by any federal employee from any source."¹⁵⁴ Within the framework of OMB Cir. A-76, these statutes shield the private offeror's cost and proprietary data from the MEO. If the SSA determines that the MEO fails to meet the same level of performance as the private offeror, agency officials cannot reveal to the MEO

152. Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 93-400, § 27, 102 Stat. 4063, *as amended by* The Clinger-Cohen Act, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996) (codified as amended at 41 U.S.C.A. § 423 (West 1998)). *See* FAR, *supra* note 13, at 3.104 (implementing the Procurement Integrity Act). The Procurement Integrity Act prohibits the following persons from knowingly disclosing contractor bid or proposal information or source selection information before contract award:

[A]ny person who--

(i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a federal agency procurement; and

(ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

FAR, *supra* note 13, at 3.104-4(a)(2).

"Contractor bid or proposal information" includes cost or pricing data; indirect costs or labor rates; and information the offeror has marked as proprietary. *Id.* at 3.104-3. "Source selection information" includes bid prices; proposed costs or prices in a negotiated procurement; source selection plans; technical evaluation plans; technical evaluation of proposals; cost or price evaluation or proposals; competitive range determinations; rankings of bids, proposals, or competitors; reports or evaluations or source selection panels, boards, or advisory councils; or other information marked as source selection sensitive if disclosure would jeopardize the integrity of the competitive process. *Id.* at 3.104-3. An agency official who either discloses or obtains this information faces five years confinement and a civil penalty up to \$50,000. 41 U.S.C.A. § 423(a)-(b).

153. 18 U.S.C.A. § 1905 (West 1998). The Trade Secrets Act states, in part:

Whoever, being an officer or employee of the United States or of any department of agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets . . . of any person, firm, partnership, corporation, or association . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id.

team the private offeror's "bid or proposal information" or its "commercial or financial data." Instead, agency officials may lead the MEO team only into deficient areas and inquire about alternative approaches, all without disclosing cost, past performance, or unique technical data from the private offeror.

What guidance do these cases and statutes offer agency officials to avoid technical leveling and technical transfusion? Suppose that in our hypothetical BOS solicitation the private offeror proposed an innovative way to automate the supply system. Suppose, as well, that the government MEO proposed a slower, less efficient method. The SSA concluded that the MEO did not meet the same performance levels as the private, best value offeror and allowed them to adjust their offer. Under these circumstances, what could base officials tell the MEO team? Using sound judgment, they can only identify general deficiencies, if any, in the MEO's proposal. They may, for example, inquire into whether the MEO considered alternate approaches. However, base officials could not suggest specific solutions. Otherwise, they risk improperly cloaking the MEO with a competitive advantage, responding to charges of "gaming" the study, and tainting the overall OMB Cir. A-76 process.

One wonders, though, if the potential for "gaming" the OMB Cir. A-76 process poses a real threat or is merely a "paper tiger." Arguably, the threat exists for several reasons. First, the process draws in agency officials who must play on both sides of the court. Such conduct may lead to charges of bias. For example, the SSA selects the private offeror and decides if the MEO can meet the same performance standards. As the senior base official, the SSA may also command, supervise, or rate members of the MEO. Aware of this rather incestuous relationship, it should come as no surprise when a contractor cries "foul" and argues that the SSA favored the MEO by leaking vital data that allowed it to adjust its offer and win the competition. Whether real or imagined, this scenario certainly creates an appearance of bias, possibly generating a protest to the GAO.

Second, some have cited possible union affiliations as creating legal disputes in an OMB Cir. A-76 study.¹⁵⁵ Unions play a major role in the

154. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987). See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining a "trade secret" as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort").

155. See Lang, *supra* note 60, at 251.

cost comparison. They strive to protect employees possibly affected by the study.¹⁵⁶ In fact, Congress requires the DOD initially to notify such employees of the cost comparison in certain cases¹⁵⁷ and then update the employees and their unions monthly.¹⁵⁸ Nonetheless, poor union-management relations could easily generate a protest. Disgruntled employees could claim, rightly or wrongly, that the agency did not fairly assess its ability to meet the PWS, but instead favored the private offeror.

The agency can, however, neutralize these “threats.” Selecting and training the right persons to participate for the agency is crucial. First, the agency should select the best persons available to work on the cost comparison study team from start to finish. Additionally, the agency should minimize personnel turnover during the study to ensure it completes the cost comparison on time. This ensures continuity and reduces unnecessary delay. Second, the agency must train the persons it selects to conduct the cost comparison. Team members must understand and adhere to the rules and policies of OMB Cir. A-76. They must also appreciate the legal ramifications if they fail to follow the rules, namely, administrative appeals and GAO protests. Thus, the agency should use its functional experts to train the entire team on the process. For example, the manpower experts can train members on the overall OMB Cir. A-76 process. Contracting personnel can train on the solicitation, best value, and selection process. Civilian personnel specialists can train on critical union-employee issues, such as the right of first refusal for displaced employees.¹⁵⁹ Last, the legal advisor must advise and train personnel on the pitfalls awaiting the agency if it fails to follow the rules.¹⁶⁰

156. For example, the American Federation of Government Employees (AFGE) has authored a training guide for local union leaders to use when educating their members about OMB Cir. A-76, and their rights and responsibilities during a cost study. *See* NATIONAL OMB CIR. A-76 CONFERENCE, AFGE FIELD SERVICES DEPARTMENT, THE AFGE ACTIVIST’S PERSONAL CONSULTANT TO A-76 POLICY IMPLEMENTATION: A SELF-PACED GUIDE TO A-76 POLICY AND PROCEDURES (ESI International, Apr. 1998) (on file with the author). In this guide, the AFGE walks its members through the A-76 process from start to finish. Using learning objectives and quizzes, the AFGE follows the adage “knowledge is power” to inform its members about the outsourcing procedures so they will more fully participate in the cost study at the installation level.

157. 10 U.S.C.A. § 2461, *amended by* Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998). This statute requires the DOD to notify Congress if the OMB Cir. A-76 cost study will affect 50 or more civilian employees. Prior to the 1999 amendment, Congress required notice if the cost study affected 20 or more employees.

158. 10 U.S.C.A. § 2467.

Finally, the agency must keep the union and employees informed throughout the entire process. Although the unions do not have approval authority over agency actions, the agency can help them “buy in” to the final result, whether for the MEO or for the private offeror. Thus, the agency may include the unions in the PWS and the MEO development.¹⁶¹ At the same time, the agency must attempt to reduce the adverse impact on employees if the private offeror “beats” the MEO.¹⁶² To the extent practicable, an agency must advise employees of their right of first refusal for employment with the winning offeror.

159. FAR, *supra* note 13, at 7.305(c) (requiring that the contracting officer insert a clause outlining an employee’s right of first refusal in all solicitations which may result in a conversion from in-house to contract performance). The clause, found at FAR 53.207-3, reads in part:

(a) The [c]ontractor shall give the [g]overnment employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-[g]overnment employment conflict of interest standards.

The right of first refusal applies to permanent employees who are otherwise qualified for the positions the winning contractor offers.

160. The OMB Cir. A-76 process offers the legal advisor plenty of chances to practice preventive law. For example, the legal advisor should present a standards of conduct briefing to the CCST members early in the process. The attorney also should be the “voice of reason” as the agency develops the various plans, such as the PWS, the QASP, and the management plan. The contracting process and union/management dynamics may further challenge the attorney. The attorney should keep everyone focused on the A-76 “big picture” and help the CCST understand the dangers of ignoring the A-76 “rules of the road.” *See* Part V, *infra*. Using his or her legal “radar,” the attorney can preempt a host of legal issues while guiding the CCST through the entire A-76 ordeal.

161. For example, at White Sands Missile Range, New Mexico (“America’s Range”), installation officials have brought union stewards into the PWS process; by necessity, the stewards also work on the MEO. Moreover, the Commanding General at White Sands Missile Range has regular meetings with the workforce. As a result, White Sands has so far averted any legal challenges to its OMB Cir. A-76 studies. Telephone Interview with Lieutenant Colonel Karl M. Ellcessor III, Office of the Staff Judge Advocate, White Sands Missile Range, New Mexico (Nov. 11, 1998).

162. For example, the Army guidance suggests establishing a telephone hot line for employees to ask questions and to give input on the study, publishing articles, issuing a special weekly newsletter addressing employee concerns, using suggestion boxes, and developing employee questionnaires to gather ideas and comments about the study. *See* DA PAM 5-20, *supra* note 64, para. 2-9. Moreover, electronic mail and the internet are natural via-ducts the agency may use to quickly and frequently dialog with the workforce.

Even if an agency studiously abides by the “rules of the road” for an OMB Cir. A-76 study, someone may disagree with the result. Whether a bidder, employee, or union, these parties have available discrete avenues of legal recourse to dispute the cost comparison outcome.

V. The Recourse: Legal Challenges to the OMB Cir. A-76 Award Process¹⁶³

Using best value contracting in our hypothetical BOS competition, base officials applied both cost and non-cost criteria, including past performance, to select the private offeror proposing the best value to the government. Base officials then communicated with the government MEO before awarding the contract because it failed to meet the same performance level as the private offeror. After resubmitting its offer, the MEO team proposed a lower cost, beating out the best value offeror. What legal recourse is available to the unsuccessful offeror, other private offerors, or affected employees now faced with the prospect of losing their jobs? An agency’s decision, though treated with deference on review, is still subject to challenge. The following opinions depict some of the legal issues that may arise during an OMB Cir. A-76 study.

A. The Recourse: GAO Protests

The GAO generally views beyond the scope of its review an agency’s decision to perform commercial activities in-house rather than outsource a function.¹⁶⁴ The GAO, however, will consider OMB Cir. A-76 cases challenging the cost comparison in two broad areas. First, the GAO will review procedural issues, such as whether the protester exhausted administrative remedies, is an interested party, and met its burden of proof. Second, the GAO will review substantive issues, such as whether the agency displayed bias and conducted a fair cost comparison.

163. Several publications provide a comprehensive summary of OMB Cir. A-76 decisions. See Agnes Dover, *Increased Emphasis on Outsourcing Puts Spotlight On Defending and Challenging Public-Private Competitions*, 40 THE GOV’T CONT. NO. 9, 3 (Mar. 4, 1998); Lang, *supra* note 60, at 251-55; MICHAEL R. CHARNES, NATIONAL OMB CIR. A-76 CONFERENCE, COURT ACTIONS RELATING TO OMB CIR. A-76 DETERMINATIONS (ESI International, Apr. 1998) (on file with the author); U.S. DEP’T OF ARMY, MATERIEL COMMAND, U.S. DEP’T OF ARMY, AVIATION AND TROOP COMMAND, WHITE PAPER, MATERIEL MANAGEMENT: OUTSOURCING AND PRIVATIZATION (9 May 1997) (on file with the author).

164. See generally Dover, *supra* note 163.

1. *Procedural Issues*

Before seeking GAO review, protesters must exhaust agency appeal procedures outlined in the Supplement to OMB Cir. A-76. To preserve its right to protest to the GAO, the protester must first raise all known issues in the agency forum.¹⁶⁵ The Supplement limits the range of eligible parties who can administratively challenge the cost comparison. For example, the contractor selected for the study and affected federal employees can appeal to the agency. Conversely, contractors not selected for the cost comparison cannot challenge that decision through the administrative appeal route. Within thirty days, the appeal authority renders a decision on the appeal, allowing the disappointed party to timely file its protest to the GAO.¹⁶⁶

The GAO opens the door to a broader range of protesters than does the administrative appeal process. Upon exhausting administrative remedies, an interested party may protest to the GAO. According to the GAO, an interested party encompasses bidders or offerors with a direct economic interest in the OMB Cir. A-76 award.¹⁶⁷ Thus, the GAO will hear protests from the private entity selected for the OMB Cir. A-76 cost comparison, as well as disappointed contractors not selected to participate.¹⁶⁸ The GAO

165. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K. *See, e.g.*, Trans-Reg'l Mfg., Inc., B-245399, Nov. 25, 1991, 91-2 CPD ¶ 492 (dismissing the protest when the protester failed to raise the issue to the agency in administrative appeal); Prof'l Services Unified, Inc., B-257360.2, July 21, 1994, 94 CPD ¶ 39 (dismissing as premature the protest over cost comparison); Big Picture Co., B-209380, Nov. 8, 1982, 82-2 CPD ¶ 417 (dismissing the protest because the agency appeal was pending).

166. 4 C.F.R. § 21.2 (1998). *See, e.g.*, Inter-Con Sec. Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187 (dismissing the protest as untimely when the protester who challenged the OMB Cir. A-76 solicitation waited until after the agency announced cost comparison results to raise alleged improprieties); Northrop Worldwide Aircraft Services, Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (dismissing the appeal that was filed 10 days after the agency decision).

167. *See, e.g.*, Wildcard Assoc., B-235000, July 24, 1989, 89-2 CPD ¶ 74 (finding the protester in line for an OMB Cir. A-76 award because the federal employees who owned the firm stated that they would retire before receiving the award, thus avoiding the FAR limits on awarding contracts to employees). *But see* American Overseas Marine Corp; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (finding the protester not in line for the OMB Cir. A-76 award); Joseph B. Evans, B-218047.2, Mar. 11, 1985, 85-1 CPD ¶ 296 (finding that a federal employee was not an interested party to protest OMB Cir. A-76 award of base services); Sidney R. Jenkins, B-217045, Nov. 27, 1984, 84-2 CPD ¶ 581 (finding that a federal employee was not an interested party to protest OMB Cir. A-76 award of water plant operations).

168. *See, e.g.*, ITT Fed. Serv. Corp., B-253740.2, Jan. 24, 1994, 94-1 CPD ¶ 30 (considering but eventually denying a protest that was filed by a contractor who was not selected for the cost study).

will not, however, hear protests from either unions or federal employees displaced by the OMB Cir. A-76 award, finding neither an interested party.¹⁶⁹

Once properly before the GAO, the protester bears the burden of exposing deficiencies in the agency's OMB Cir. A-76 cost comparison. The GAO generally defers to agency discretion in an A-76 study. Thus, a protester challenging the agency's actions must show that the agency failed to follow proper procedures, which materially affected the cost comparison.¹⁷⁰ The heart of an OMB Cir. A-76 study—the cost comparison—generates a host of substantive issues for GAO review.

169. *See, e.g.*, Hawaii Fed. Lodge No. 1998, Int'l Ass'n of Machinists & Aerospace Workers, B-214123, Feb. 7, 1984, 84-1 CPD ¶ 109 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award for housekeeping services); NAGE, Local R5-87, B-212735.2, Dec. 29, 1983, 84-1 CPD 37 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award of pest control services); Local 1662, AFGE, B-197210.2, Apr. 7, 1980, 80-1 CPD ¶ 255 (finding that an employee union was not an interested party to protest an OMB Cir. A-76 award of avionics maintenance services). Congress, however, has opened the door for unions to voice complaints early in the cost study process. In the DOD Authorization Act for FY 1999, Congress amended 10 U.S.C.A. § 2461, which requires the DOD to submit a detailed report to Congress before considering a function for a cost study. Among other items, the report must identify the function and its location, the number of civilian employees potentially affected, and the expected length and cost of the analysis. The DOD must also certify the following:

A proposed performance of the commercial or industrial type function by persons who are not civilian employees of the Department of Defense is not a result of a decision by an official of a military department or Defense Agency to impose predetermined constraints on such employees in terms of man years, end strengths, full-time equivalent positions, or maximum number of employees.

10 U.S.C.A. 2461(b)(1)(E), *amended by* Pub. L. No. 105-261, § 342, 112 Stat. 1920, 1974 (1998).

The statute goes on to state that “any individual or entity at a facility” being considered for “change” to contractor performance may object to the command's actions for failure to provide the Congressional notice and reports, to include the certification. The individual or entity has 90 days to object from when it know or should have known that the function was under study for possible “change” to contractor performance. The term “any individual or entity” seems to allow unions to challenge a DOD decision to target a function for a cost study.

170. *See, e.g.*, United Media Corp., B-259425.2, June 22, 1995, 95-1 CPD ¶ 289 (stating that the GAO would recommend corrective action only if the agency failed to follow the procedures that materially affected the outcome of the cost comparison); Ameriko Maint. Co., B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191 (finding no basis upon which to question the judgment of the agency evaluators).

2. Substantive Issues

Substantively, the GAO may review an OMB Cir. A-76 cost comparison on several grounds. Among the more common grounds, the GAO will review a cost comparison to ensure the agency followed the “ground rules” and conducted a fair cost comparison,¹⁷¹ and to determine if the agency acted in good faith during the process.¹⁷² As noted above, the protester must demonstrate that the agency prejudiced the process before the GAO will recommend corrective action.

Two cases illustrate how the GAO resolved issues centering on the fairness of the cost comparison and agency bias. In the first case, *Crown Healthcare Laundry Services*,¹⁷³ the GAO addressed the agency’s “ground rules” for conducting the OMB Cir. A-76 study. In *Crown*, the Air Force conducted an OMB Cir. A-76 competition for laundry services at Keesler Air Force Base, Mississippi. Because of an interagency agreement, the Department of Veteran’s Affairs (VA) submitted cost information to the Air Force for providing laundry services. The Air Force used the VA’s cost estimate to generate the MEO and the in-house estimate. The VA offered a lower cost estimate, and the Air Force kept the laundry services in-house.¹⁷⁴

Crown challenged the award, alleging the Air Force prepared a flawed cost comparison. According to Crown, the VA based its cost estimate on performing less work than described in the PWS upon which Crown based its bid.¹⁷⁵ The GAO disagreed and denied Crown’s protest. At the outset of its decision, the GAO noted that it only reviews OMB Cir. A-76 awards to ensure that the bidders and the agency competed on the same scope of work, and to ensure that the agency followed the A-76 “ground rules.”¹⁷⁶ After reviewing the facts, the GAO ruled that the Air Force had indeed followed the A-76 ground rules and Crown suffered no competitive prejudice.

171. See, e.g., *United Media Corp.*, B-259425.2, June 22, 1995, 95-1 CPD ¶ 289 (finding that the Air Force properly conducted an OMB Cir. A-76 cost comparison); *Tecom, Inc.*, B-253740.3, July 7, 1994, 94-2 CPD ¶ 11 (finding that the Army properly conducted an OMB Cir. A-76 cost comparison). See also *Crown Healthcare Laundry Services, Inc.*, B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

172. *Madison Services, Inc.*, B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

173. B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

174. The VA provided its cost estimate to the Air Force along with an interagency sharing agreement stating that it would provide laundry services for Keesler Air Force Base. *Id.* at 1.

The GAO concluded that the PWS allowed offerors to use their experience to estimate the contract workload, even if they reached different results when preparing their cost estimates. According to the GAO, both Crown and the VA exercised “independent business judgment” to arrive at “different logical conclusions of doing the work.”¹⁷⁷ For example, the GAO observed that the Air Force reasonably chose the VA as the in-house estimate because it reasonably determined that the VA could provide the laundry services as described in the PWS at its estimated cost. Moreover, the GAO noted that the PWS fully described the laundry requirements, yet both the VA and Crown estimated the number of workers needed to accomplish laundry pick-up and delivery differently. Likewise, both “experienced offerors” used similar methods to estimate the weight of the workload, but reached different results. From these facts, the GAO opined that the Air Force conducted a fair cost comparison.¹⁷⁸

In the second case, the GAO addressed alleged agency bias. In *Madison Services, Inc.*,¹⁷⁹ the Air Force kept base operating services in-house after conducting a cost comparison. Madison alleged base officials acted

175. The PWS required the launderer to “receive, account for, launder and return” all items. *Id.* at 4. According to Crown, the “account for” language in the PWS required whoever performed the laundry service to count each laundry article at the time of pickup from and delivery to Keesler AFB. Crown stated that its bid prices included the costs of two delivery trucks, two drivers, and four other employees who would help count the items. By contrast, Crown alleged that the VA based its estimated costs on one truck and one driver from a private company, which would make it impossible for the VA to always make timely pickups and deliveries and also count the laundry items. The Air Force countered that the PWS did not require counting laundry items at the pickup and delivery points. Rather, government clerks would count the laundry at each point. *Id.*

176. *Id.* at 2 (citing *DynCorp*, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543). In *DynCorp*, the Air Force converted aircraft maintenance services at Laughlin Air Force Base to in-house civilian employees rather than outsourcing the services. The protester alleged that the Air Force failed to include certain costs in its bid. The GAO sustained the protest, ruling that the Air Force failed to include in its offer such costs as recruiting, relocating, and training new employees. The Air Force, however, required that the protester include these costs in its bid. According to the GAO, both the offeror and the government must compete on the same scope of work in an OMB Cir. A-76 competition. *DynCorp*, 89-1 CPD ¶ 543 at 4.

177. *Crown*, 96-1 CPD ¶ 207 at 5. Crown further alleged that the Air Force improperly added contract administration costs to Crown’s bid, but failed to add those same costs to the VA’s bid. The GAO disagreed and ruled that the Air Force properly added these costs to Crown’s bid and the VA reasonably estimated its own costs. The GAO noted that Crown’s bid was still higher than the VA’s, even without the contract administration costs. In addition, the Air Force added to the cost estimate the salaries for government employees performing quality assurance and administrative tasks.

178. *Crown*, 96-1 CPD ¶ 207 at 5.

179. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

in bad faith and “gamed” the process to favor the MEO. As discussed previously,¹⁸⁰ Madison argued (during the agency appeal process) that the Air Force omitted certain costs from the in-house estimate so that they could insert a figure that was lower than Madison’s during the agency appeal process.

Stating that agency officials presumably act in good faith, the GAO found that Madison failed to show that the Air Force officials had a “specific, malicious intent” to harm Madison.¹⁸¹ In fact, the GAO agreed that the Air Force had erred by erroneously omitting the disputed costs from the in-house cost estimate. Additionally, the GAO concluded that the Air Force properly corrected this mistake during the appeal process to ensure accuracy. Finding no evidence of bias to motivate the appeal review team, the GAO denied Madison’s protest.

Thus, a disappointed bidder in an OMB Cir. A-76 competition can succeed before the GAO only after exhausting administrative remedies and meeting its burden of proof. To seek recourse in the federal courts, however, a disappointed bidder first must dodge several obstacles.

B. The Recourse: Federal Court

OMB Cir. A-76 does not authorize “an appeal outside the agency or judicial review” nor does it authorize “sequential appeals.”¹⁸² Even so, disappointed bidders still attempt to seek judicial review, with mixed results. Mostly, aggrieved protesters (now plaintiffs) seek to challenge OMB Cir. A-76 decisions in federal court under the Administrative Procedures Act (APA).¹⁸³ The APA states that a person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” is entitled to judicial review except for two circumstances: a statute precludes judicial review or the agency action is discretionary.¹⁸⁴

The courts have generally ruled that an agency exercises discretion when deciding to outsource a function.¹⁸⁵ For example, in 1979, the Third Circuit in *Local 2855, AFGE v. United States*¹⁸⁶ upheld the Army’s deci-

180. See *supra* note 145 and accompanying text.

181. *Madison Services*, 97-2 CPD ¶ 136 at 2.

182. SUPPLEMENT, *supra* note 11, pt. 1, ch. 3, § K, para. 7.

183. Administrative Procedures Act, 5 U.S.C.A. §§ 701-706 (West 1998).

184. 5 U.S.C.A. §§ 701-702.

sion to outsource terminal services in Bayonne, New Jersey. The court found that the “type of decision made by the Army here is necessarily a matter of judgment and managerial discretion” and not subject to judicial review.¹⁸⁷ Moreover, the court reasoned that neither OMB Cir. A-76 nor its implementing regulations offered a “fixed standard” to adjudicate the plaintiffs’ challenges to the Army’s cost comparison.¹⁸⁸ Finding no law to apply, the Third Circuit ruled for the Army.

Some courts dismiss challenges to OMB Cir. A-76 on discretionary grounds; other courts dismiss for lack of standing. Under the APA, a plaintiff acquires standing from injury stemming from an “agency action within the meaning of a relevant statute.”¹⁸⁹ Courts tend to view OMB Cir. A-76 more as a managerial tool and internal operating procedure, rather than as a statute conferring any legal right.¹⁹⁰ Thus, plaintiffs must “bootstrap” their claim to another statute that does, in fact, confer a legal right. Plaintiffs must then show standing in one of two ways: their claim falls within the statute’s “zone of interest” or the agency action injured the plaintiff.¹⁹¹

Two cases illustrate how plaintiffs have successfully challenged OMB Cir. A-76 cost comparisons. In both cases, the plaintiffs convinced the court that the agency’s decision was not only discretionary, but they also established standing. In the first case, *CC Distributors v. United*

185. See *Department of the Treasury, Internal Revenue Service v. FLRA*, 494 U.S. 922 (1990) (holding that the FLRA had discretion to determine if OMB Cir. A-76 was an “applicable law” under Title VII of the Civil Service Reform Act); *Local 2017, AFGE v. Brown*, 680 F.2d 722 (11th Cir. 1982) (holding that outsourcing decisions are “inherently unsuitable” for judicial review); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979) (holding that the Army exercised agency discretion when it opted to contract out services under OMB Cir. A-76); *Local 1668, AFGE v. Dunn*, 561 F.2d 1310 (9th Cir. 1977) (holding that the Air Force exercised discretion when it decided to conduct a cost comparison study under OMB Cir. A-76).

186. 602 F.2d 574 (3d Cir. 1979).

187. *Id.* at 583.

188. *Id.* at 582-83. In reaching its decision, the court noted that OMB Cir. A-76 and the parallel Army regulation allowed the Army to consider “nonquantifiable and non-cost-related factors” in deciding against continued in-house performance. In the court’s opinion, “[t]he statutory and regulatory provisions do not provide rules or specifications that would permit a court to adjudicate plaintiffs’ disagreements with the formulas, factors, and cost projections relied upon by the Army.” *Id.* at 582.

189. 5 U.S.C.A. § 702.

190. See *Local 2855, AFGE*, 602 F.2d at 582-83 (quoting *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 38 (3d Cir. 1976)).

191. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

States,¹⁹² the Air Force converted supply stores from contractor to in-house performance.¹⁹³ CC Distributors challenged the Air Force, arguing that the agency failed to conduct a cost comparison under OMB Cir. A-76 before converting back to an in-house supply system. The district court, however, dismissed the complaint for two reasons: because CC Distributors lacked standing and because the Air Force exercised its discretion properly.¹⁹⁴

On appeal, the District of Columbia Circuit reversed. The court held that the contractors had standing to sue under the APA because the National Defense Authorization Act for FY 1987 and the DOD regulations required cost comparisons for obtaining services or supplies. Thus, before reverting back to an in-house supply function, the Air Force had to determine whether a commercial source was unavailable, or perform a cost comparison.¹⁹⁵ The court found the Air Force deprived CC Distributors of an opportunity to compete for the supply function, creating an injury sufficient to acquire standing.¹⁹⁶ Moreover, the court relied on the 1987 Defense Authorization Act and the DOD regulations to find that the Air Force lacked any discretion to decide whether to conduct a cost compari-

192. 883 F.2d 146 (D.C. Cir. 1989).

193. The Air Force established the Contractor Operated Civil Engineer Supply Stores (COCESS) program in the 1970s with the hope that privately operated stores could supply materials for Air Force engineers more efficiently than the government's internal supply system. Under the COCESS program, the individual Air Force base prepared a list of "pre-priced" materials it expected to use. The Air Force incorporated these items into the COCESS contract for that base, which required the contractor to supply those items at the contract price. Conversely, the contract did not identify "non-priced" materials because of uncertainty about whether the base would need those items. Thus, the contractor would negotiate the terms for those items as the need for them arose. In 1988, the DOD opted not to renew contracts for "non-priced" materials, and decided to bring this part of the COCESS program in-house. *Id.* at 147.

194. *Id.* at 149.

195. *Id.* at 152-53.

196. *Id.* at 151. The court opined that "requiring the Air Force to conduct recompetitions and cost comparison studies regarding COCESS is likely to afford plaintiffs just that opportunity [to compete] the loss of which constitutes their injury [and] given plaintiffs' demonstrated capacity to compete for and to obtain such contracts in the past . . . this opportunity would not be illusory." *Id.*

son.¹⁹⁷ Consequently, the court remanded the case to the district court for further proceedings.¹⁹⁸

In the second case, the Sixth Circuit Court of Appeals in *Diebold v. United States*¹⁹⁹ wrestled with whether OMB Cir. A-76 conferred standing under the “zone of interest” prong. In *Diebold*, a group of civilian employees challenged the Army’s decision to privatize food service operations at Fort Campbell, Kentucky. The district court dismissed the complaint, finding it did not have jurisdiction under the APA because the Army’s decision was “committed to agency discretion.”²⁰⁰

The Sixth Circuit reversed, finding that the employees had standing under the APA. The court concluded that the Army’s decision to contract out the food service function was not discretionary. Rather, certain statutes and policies required the Army to make this decision. The court reasoned that the employees’ zone of interests fell within the 1979 Office of Federal Procurement Policy Act Amendments (OFPPAA),²⁰¹ which established the Office of Federal Procurement Policy (OFPP). According to the court, the OFPPAA articulated the broad procurement policy of the United States: to promote economy, efficiency, and effectiveness.²⁰² The court further noted that the OFPP streamlined the federal procurement process in several ways, including outsourcing.

The court further noted that Congress addressed for the DOD the issue of contracting out supplies and services in 10 U.S.C.A. § 2462. In that statute, Congress mandated contracting out when the private sector can provide the services or supplies at a lower cost than the DOD cost.²⁰³ The court stated that this statute required “measurable, objective comparison of costs” and did not allow the Secretary of Defense to contract out as

197. *Id.* at 153, 156. The court had little trouble concluding that the DOD regulations governing cost studies (and implementing OMB Cir. A-76) incorporated standards subject to judicial review. For example, the court observed that the regulations required a “more economical,” “satisfactory,” and “available” commercial source; and a cost comparison. *Id.* at 153 (citing 32 C.F.R. § 169.4 (1989)).

198. *Id.* at 156.

199. 947 F.2d 787 (6th Cir. 1991).

200. *Id.* at 789. A federal court may review an agency action under the APA unless the action is “committed to agency discretion by law.” 5 U.S.C.A. § 701(a)(2) (West 1998). An agency act is “committed to agency discretion” absent any law or other standards to measure the decision. *Diebold*, 947 F.2d at 789.

201. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648 (codified as amended at 41 U.S.C.A. §§ 401-430 (West 1998)).

202. *Diebold*, 947 F.2d at 793.

a matter of discretion.²⁰⁴ The court concluded that this statute also provided standards against which it could evaluate the agency's action.²⁰⁵

Finally, the Sixth Circuit found that OMB Cir. A-76 carries the "force of law" requiring agencies to pursue economy and efficiency in federal procurements.²⁰⁶ The court noted that the 1983 version of OMB Cir. A-76, unlike its predecessors, offers more specific guidelines for agencies to follow. For example, it requires a cost comparison, mandates at least a ten-percent cost savings, and erases agency discretion about when and if a cost comparison is required.²⁰⁷ Finding OMB Cir. A-76 "part of the law" to apply, the court concluded that OMB Cir. A-76 achieved the status of a mandatory regulation rather than mere internal operating procedures.²⁰⁸ The Sixth Circuit reversed and remanded the case to the district court for further proceedings.²⁰⁹

203. *Id.* at 794. 10 U.S.C. § 2462 states, in part:

Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the [DOD] . . . from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower . . . than the cost at which the Department can provide the same supply or service.

204. *Diebold*, 947 F.2d at 797. The court conceded that 10 U.S.C.A. § 2462 did not apply to functions the Secretary of Defense finds that government personnel must perform: "Here we find discretionary language: the Secretary may 'determine' that some functions cannot be performed by contract. Apart from this standardless determination, Congress has required a mandatory cost-benefit analysis." *Id.*

205. *Id.*

206. *Id.* at 801.

207. *Id.*

208. *Id.* The court proffered two interesting reasons why OMB Cir. A-76 is cloaked with the force of law. First, it noted that the circular responds to a "specific statutory command to pursue economy and efficiency in federal agency procurement" (via 10 U.S.C.A. § 2462) and thus carries the "force of law." *Id.* The court went on to say that OMB A-76 reaches the status of "enforceable regulations" at the point when the process encompasses the procurement process. *Id.* Consequently, the Sixth Circuit had no problem finding standards against which to measure an agency's actions:

Thus, evidence that an agency did not follow Circular A-76 cost calculation directives, that it did not include all costs made necessary by contracting out, and that the agency will not save the ten percent required to justify the contracting-out decision could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract-out commercial activities if contracting-out will cost less than in-house production—the law to be applied.

Id. at 801-2.

C. The Recourse: Lessons for the Future

Current case law offers several lessons to those involved in the OMB Cir. A-76 process. First, the GAO offers easier access to qualified protesters seeking recourse, provided they first exhaust the agency's administrative appeal remedies. Moreover, the GAO generally defers to agency discretion on a cost study and instead targets only specific areas for review. For example, *Crown Healthcare and Laundry Services* reaffirms that the GAO only reviews OMB Cir. A-76 awards if the agency failed to follow the cost comparison procedures or conducted a faulty or misleading cost comparison.²¹⁰ *Madison Services, Inc.* further reaffirms the presumption that the agency acts in good faith, making it difficult for protesters to prove agency bias or bad faith.²¹¹

In federal courts, however, future plaintiffs may enjoy more success challenging OMB Cir. A-76 awards. This trend, as illustrated by the *Diebold* and *CC Distributors* cases, bears watching. As the DOD continues to push outsourcing, more employees and contractors will likely turn to the federal courts for full judicial review. A tactical decision, plaintiffs will have to weigh the time, expense, and probable success when deciding whether to challenge in federal court an OMB Cir. A-76 award.

Aside from these lessons, at least one recent case has heightened the mystery surrounding best value and OMB Cir. A-76. In *Pemco Aeroplex Inc.*, the GAO upheld the Air Force's decision to cancel a RFP for depot maintenance and bring the work in-house.²¹² Significantly, the GAO reasoned that the Air Force did not violate a statutory requirement to permit private companies to provide goods and services unless the government can provide them at a lower cost.

This protest has a tortuous history. In July 1996, the Air Force issued a solicitation for depot maintenance for C-130 aircraft. It awarded the con-

209. *Id.* at 811. See *National Air Traffic Controllers Ass'n v. Pena*, No. 95-3016, 78 F.3d 585, 1996 WL 102421, at *6 (6th Cir. (Ohio) Mar. 7, 1996) (reversing the district court's ruling that the plaintiffs lacked standing, and affirming its holding in *Diebold v. United States* that it may review agency decisions to privatize government services). On remand, the district court applied OMB Cir. A-76 as law to find that the plaintiffs had standing to sue in federal court. The court ruled that the plaintiffs had an interest in their federal jobs. Once they lost those jobs, they gained standing in federal court. *National Air Traffic Controllers Ass'n v. Pena*, 944 F.Supp. 1337 (N.D. Ohio 1996).

210. B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

211. B-277614, Nov. 3, 1997, 97-2 CPD ¶ 136.

212. B-275587.10, B-275587.11, B-275587.12, June 29, 1998, 98-2 CPD ¶ 1.

tract to Aero in April 1997; Pemco protested. In response, the Air Force admitted that it failed to properly evaluate the offerors' past performance, and agreed to revise the RFP. The GAO dismissed Pemco's protest in May 1997.²¹³ However, the Air Force concluded that it could not complete the corrective action until October 1997. As a result, it terminated Aero's contract and tasked Warner Robins AFB to temporarily perform the depot work. In June 1997, the Air Force advised offerors that it was reevaluating the depot work to "determine the best approach to ensure readiness and sustainability of the C-130 weapon system." Finally, on 3 March 1998, the Air Force announced that it was canceling the RFP, concluding that keeping the work in-house was the "most cost effective means" of performing the work.²¹⁴ Both Pemco and Aero protested, arguing that (1) the Air Force improperly canceled the RFP; and (2) the Air Force violated 10 U.S.C. § 2462, which requires a "reasonable and fair cost comparison" before acquiring goods or services from the private sector.²¹⁵

The GAO denied the protest. Initially, the GAO agreed with the protesters that 10 U.S.C. § 2462 applied when the Air Force decided to bring work in-house. However, the GAO found the "except as otherwise provided by law" proviso of 10 U.S.C. § 2462 triggered 10 U.S.C. § 2466(a), which prohibited the Air Force from contracting out more than fifty percent of depot maintenance.²¹⁶ The GAO concluded that the Air Force properly canceled the solicitation to comply with this statutory cap. The GAO further agreed with the Air Force that it teetered on the brink of exceeding the fifty-percent cap despite the C-130 solicitation. Thus, the GAO reasoned that the Air Force properly exercised its discretion when it canceled the solicitation to stay within the statutory limits.²¹⁷

Though not strictly a "best value" case, *Pemco* highlights, albeit briefly, the tension between the "low cost" language of 10 U.S.C. § 2462 and the current trend of using "best value" or non-cost factors in cost comparisons. Not faced with this issue, the GAO relied on the controlling language in 10 U.S.C. § 2466(a) to rule for the Air Force. Nonetheless, by what it *did not* say, the GAO exposed the "best value" versus low cost dichotomy. The DOD uses OMB Cir. A-76 to conduct cost comparison studies. Though ultimately a cost-driven process, OMB Cir. A-76 permits the DOD to use best value and non-cost factors. Slapped on top of OMB

213. Pemco filed for reconsideration, which the GAO denied. Pemco Aeroplex, Inc.—Recon. and Costs, B-275587.5, B-275587.6, Oct. 14, 1997, 97-2 CPD ¶ 102.

214. *Pemco Aeroplex, Inc.*, 98-2 CPD ¶ 1 at 2.

215. *Id.*

216. *Id.* at 6.

Cir. A-76 is 10 U.S.C. § 2462, which requires the DOD to purchase a supply or service from the private sector only if it can provide them at a cost lower than provided by the DOD.

Certainly, it is premature to predict how *Pemco* will affect the best value procurement method in an OMB Cir. A-76 cost study, if indeed it will have an impact. It does, however, seem to crack the door open a little wider for a disappointed bidder to challenge a cost study where the DOD used the best value procurement method. Whatever the outcome, in whatever forum, this and other cases offer crucial lessons as the DOD and the private sector participate in this “quiet revolution.”

VI. Conclusion

After fighting General Lee for seven grueling days in 1862, a frustrated General George B. McClellan sent a plaintive telegraph from the battlefield to President Lincoln: “I have seen too many dead and wounded comrades to feel otherwise that the [g]overnment has not sustained the Army. If you do not do so now the game is lost.”²¹⁸

During the Civil War, President Lincoln and generals such as McClellan had to find ways to maintain combat readiness, sometimes with scarce resources. Over a century later, things have not changed much. Leaders are still looking for ways to maintain readiness with dwindling budgets. Only this time, the current acquisition and fiscal revolution is quietly reshaping how the DOD does business. Fueled by the policy and process of outsourcing and OMB Cir. A-76, the DOD is searching for unexplored ways to cut costs and still serve the warfighter.

217. *Id.* at 9. The GAO also agreed with three specific reasons the Air Force offered to explain why 10 U.S.C. § 2466(a) required it to cancel the RFP. First, the Air Force noted the statute requires agencies to carefully balance the funds used for depot maintenance workloads, whether performed in-house or contracted out to the private sector. According to the Air Force, shifting funds from public depot maintenance to private contractors could cause it to exceed the statutory cap. Second, the Air Force stated agencies lose valuable “headroom” or available funds for contracting out depot maintenance every time it makes such a decision. Thus, the Air Force (and other DOD agencies) loses some financial flexibility for future, and perhaps more appropriate, decisions to contract out depot maintenance. Finally, the Air Force observed that Congress amended 10 U.S.C. § 2466 to define “depot-level maintenance and repair” as including “interim contractor support or contractor logistics support.” The private sector traditionally has performed the latter work, which altered the workload balance for purposes of 10 U.S.C. § 2466(a). *Id.* at 8.

218. STEPHEN B. OATES, WITH MALICE TOWARDS NONE: THE LIFE OF ABRAHAM LINCOLN 304 (1977) (quoting McClellan’s Report, June 28, 1862, OR, ser. I, vol. XI, pt. 1, 61).

Though a cost-driven process, OMB Cir. A-76 permits the DOD and other agencies to use “best value.” This makes good business sense. After all, best value theoretically gives the DOD “more bang for its buck.” With best value, the DOD establishes evaluation factors, requires the MEO to submit a technical proposal, and then selects the private offer that is most advantageous to the DOD. Are best value and OMB Cir. A-76 compatible? One hopes that these procedures are a perfect match—for the good of the DOD, the warfighter, and the taxpayer. Ultimately, however, this issue raises more questions than it answers. Significantly, do OMB Cir. A-76 and best value work at cross-purposes—one to save money, the other to promote quality? In the end, mixing best value into the OMB Cir. A-76 recipe may only produce best value on a budget.

In the long run, only time will tell if weaving best value methods into cost studies is good for the DOD. Best value contracting merged with OMB Cir. A-76 is a growing and evolving process. Both DOD personnel and private contractors are experiencing the good and the bad of this merger. On the one hand, best value allows the DOD to move beyond cost to consider other factors as part of the cost study. On the other hand, neither OMB Cir. A-76 nor its Supplement offer any clear guidance on how an agency can or should glean the most benefit from the best value method. Despite this lack of guidance, however, the marriage between best value and OMB Cir. A-76 seems to offer the DOD a vehicle for buying better quality services and products to meet its needs.

Importantly, the DOD can help its own cause when using “best value” in cost comparison studies. In fact, by passing the FAIR, Congress can now hold the DOD’s “feet to the fire” when it classifies functions as either inherently governmental or commercial. Subject to congressional scrutiny, the DOD now has a greater impetus to produce a sound list of non-inherently governmental functions. Second, the DOD agencies must develop a thorough PWS. The heart of the cost study, the PWS can make or break the outcome. A solid PWS should encourage innovative and creative performance methods from both the private sector and the MEO team. In the end, the DOD should garner a cost savings. This is not a pipe dream. From the OFPP Pilot Project study, we know that PBSC methods frequently inspired innovative techniques that cut costs. Last, but certainly not least, the DOD agencies must keep the lines of communication open between management and the workforce at every step along the OMB Cir. A-76 trail. By educating, informing, and training all personnel about the OMB Cir. A-76 process, the DOD stands a better chance of getting the best value for all.

Throughout, this article has explored the policy, process, and recourse of OMB Cir. A-76. Using a hypothetical BOS competition as a backdrop, this article has examined the tension and issues associated with mixing best value in a cost driven process. Despite this tension, and in the face of these issues, the DOD will continue to march forward in its quest to out-source and downsize.

The quiet revolution has started. Now, we anxiously await the outcome.