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11 July 2002

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FROM: AFIT/PA Security and Policy Review

SUBJECT: Your Requests for Public Release Approval,
"Assuring Respect for the OMB Circular A-76 Competitive Sourcing
Process"

By: Maj Kevin Huyser

CASE Number: AFIT/PA Case Number 020718

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ASSURING RESPECT FOR THE OMB CIRCULAR A-76 COMPETITIVE SOURCING PROCESS

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[T]he potential impact of an A-76 action on the dedicated Government workforce requires the assurance that the A-76 process is fully respected, not only to maintain fairness during the process, but also to assure the appearance of fairness.¹

I. Introduction

Over the past several years, in an attempt to shrink budgets and save tax dollars², the Department of Defense (DoD) has significantly increased its use of competitive sourcing under the policies and procedures of Office of Management and Budget Circular A-76 (Circular A-76)³ and the 1996 Revised Supplemental Handbook (Supplemental Handbook).⁴

¹ DEP'T OF DEFENSE INSPECTOR GEN., REP. NO. D-2001-118, PUBLIC/PRIVATE COMPETITION AT LACKLAND AFB 4 (May 2001) [hereinafter DOD IG REPORT].

² GENERAL ACCOUNTING OFFICE, REP. NO. GAO-01-20, DOD COMPETITIVE SOURCING: RESULTS OF A-76 STUDIES OVER THE PAST 5 YEARS (2000) (determining DoD had completed 286 Circular A-76 competitive sourcing studies between 1995 and June 2000, producing some imprecise level of savings).

³ FEDERAL OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983) [hereinafter CIRCULAR A-76]. While the procedures under Circular A-76 have gained significant attention in recent years, the principles and the policies behind the document have actually been around officially for more than four decades. The guiding principle is that "the Government should not compete with its citizens." *Id.* ¶ 4a. The resulting policy has been for "the Government to rely on commercial sources to supply the products and services the Government needs." *Id.* The policy was promulgated through bulletins published by the OMB's predecessor, the Bureau of the Budget, in 1955, 1957, and 1960 and Circular A-76 was first issued in 1966, with revisions in 1967, 1979, and 1983. *Id.* While the principles and policies behind Circular A-76 have remained relatively constant over the years, the process has been known by various names such as "contracting out," "competing out," "outsourcing," and, incorrectly, as "privitization." For an explanation of the various terms used within DoD, see the Office of Secretary of Defense homepage available at <http://www.emissary.acq.osd.mil/inst/share.nsf>. The Bush Administration apparently prefers "competitive sourcing" in reference to the competition procedures under Circular A-76 and the Supplemental Handbook because of its neutral connotation. See Preeti Vasishtha, *OMB Chief Stresses Competitive Sourcing, Not Outsourcing*, GOV'T COMPUTER NEWS, Aug. 2, 2001 (reporting the Bush Administration's view that in a competitive sourcing situation the government should be indifferent to who wins since the win comes from dollar savings and improved quality) at http://gcn.com/vol11_no1/daily-updates/4783-1.html. For similar reasons, as well as purposes of consistency, this paper will also use the term "competitive sourcing" throughout.

⁴ FEDERAL OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (March 1996) [hereinafter SUPPLEMENTAL HANDBOOK]. The OMB made significant changes in the Supplemental Handbook, providing detailed guidance on how to conduct

Based on statements made during the 2000 Presidential campaign and in the first year of the Bush Administration, such competitions will continue to play a significant role in the near future.⁵ Indeed, according to OMB, “[t]he President envisions a government that has a citizen-based focus, and is results oriented, and, where practicable, market-driven.”⁶ To achieve these ends, OMB has stated the Bush Administration will seek several major reforms to improve the functioning and efficiency of governmental operations, to include an expansion of Circular A-76 competitive sourcing competitions.⁷ Specifically, the Bush Administration set a 2002 goal of completing public-private or direct conversion competitions⁸ on not less than five percent of the full-time equivalent (FTE) employee positions currently posted on the congressionally mandated Federal Activities Inventory

Circular A-76 competitive sourcing studies, and introducing “best value” procurements to the competitive sourcing process, among other modifications. See Major Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48, 51 (1998); Major Gregory E. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F. L. REV. 239, 240 (1997). There have been additional changes to Circular A-76 procedures and requirements made via periodic OMB memorandums, including guidance concerning the implementation of the FAIR Act requirements, interpretation regarding administrative appeals and potential sources of conflicts of interests, and notification of wage rate increases. See, e.g., FEDERAL OFFICE OF MANAGEMENT & BUDGET, CIRCULAR A-76 (REVISED), TRANSMITTAL MEMORANDUM NO. 20 (June 14, 1999) [hereinafter TRANSMITTAL MEMO NO. 20], available at <http://www.whitehouse.gov/OMB/circulars/index-procure.html>.

⁵ FEDERAL OFFICE OF MANAGEMENT & BUDGET, THE PRESIDENT’S MANAGEMENT AGENDA (Aug. 2001) [hereinafter MANAGEMENT AGENDA], available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt/>.

⁶ FEDERAL OFFICE OF MANAGEMENT & BUDGET, OMB MEMORANDUM NO. 01-11 (Feb. 2001) (informing Executive agency heads of the President’s performance goals and management initiatives for the FY2002 Budget).

⁷ *Id.* See also ANGELA B. STYLES, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, STATEMENT BEFORE THE HOUSE SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY (June 2001) (communicating the Bush Administration’s commitment to public-private competition through the use of OMB Circular competitive sourcing procedures), available at <http://www.whitehouse.gov/omb/legislative/testimony/>.

⁸ Conversions of commercial activities involving ten or fewer full-time equivalents (FTEs), or “direct conversions,” may be performed without conducting a “cost comparison” under certain circumstances. See SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch.1, para. D.5. The Supplemental Handbook also provides for “streamlined cost comparison” procedures for activities involving sixty-five or fewer FTEs. *Id.* pt. II, ch. 5.

Reform (FAIR) Act⁹ inventory listing, with the goal increasing by ten percent in 2003.¹⁰

Even in the wake of the events of “September 11” and the resulting proposed increase in the DoD budget,¹¹ the Bush Administration appears committed to the continued and increased use of competitive sourcing procedures, despite criticism.¹²

The criticism, however, is not new. With the increased use of competitive sourcing has come greater scrutiny of Circular A-76 procedures from industry contractors, as well from affected federal employees and their union representatives.¹³ And Congress, which in the

⁹ Pub. L. No. 105-270, 112 Stat. 2382-83 (1998) (codified at 31 U.S.C. § 501 (2000)). Under the FAIR Act, executive agencies must prepare annual inventory lists of activities that are not “inherently governmental functions” and thus subject to competitive sourcing with the private sector. Each agency must submit its inventory list to OMB for review, after which the executive agency must forward it to Congress and make it available to the public for review. The FAIR Act also established an agency-level appeal procedure for “interested parties” to challenge activities included on or omitted from the inventory listing. *Id.*

¹⁰ MANAGEMENT AGENDA, *supra* note 5, at 18. *See also* Ellen Nakashima, *Bush Opens 40,000 Federal Workers’ Jobs To Competition*, WASH. POST, June 8, 2001, at 27 (reporting that the Bush Administration’s order to open up 40,000 federal civilian positions for competition with the private sector was a first step toward the Administration’s goal of making 425,000 government positions eligible for competitive sourcing).

¹¹ Vernon Loeb, *Defense Budget Gets a Friendly Reception*, WASH. POST, Feb. 6, 2002, at A6 (reporting Secretary of Defense Rumsfeld received no opposition from members of the Senate Armed Services Committee to the \$379 billion DoD budget proposal for fiscal year 2003, a fourteen percent increase over the prior year and the largest proposed increase since the Reagan Administration).

¹² *See* Ellen Nakashima, *Defense Balks at Contract Goals*, WASH. POST, Jan. 30, 2002, at A21. In a 26 Dec. 01 memo to OMB, Under Secretary of Defense, E.C. “Pete” Aldrige stated DoD would not meet the Bush Administration’s competitive sourcing goal, as it did not wish to limit itself to the Circular A-76 process in DoD’s efforts to conduct business more efficiently. *Id.* Later DoD backed away from its position and stated it would meet the Bush Administration’s competitive sourcing goal. Jason Peckenpaugh, *Pentagon Will Meet Competitive Sourcing Goal, OMB Says*, GOV’T EXEC. MAGAZINE, Jan. 31, 2002, <http://www.govexec.com/news/index.cfm>. *See also* Jason Peckenpaugh, *Senators Blast Bush Competitive Sourcing Plan*, GOV’T EXEC. MAGAZINE, Mar. 6, 2002 (stating a number of members of the Senate Governmental Affairs Committee criticized the Bush Administration’s competitive sourcing goals), <http://www.govexec.com/news/>.

¹³ *See, e.g.*, Ellen Nakashima, *Pentagon Hires Out More Than In*, WASH. POST, Apr. 3, 2001, at A19; Allen V. Burman, *A-76: The Program Everyone Loves To Hate*, NAT. J. GOV. EXEC., Feb. 2001, <http://www.govexec.com/news/>; William A. Roberts III et. al., *A-76 Cost Comparisons: Overcoming the “Undue Built-in Bias Favoring In-House Performance of Services,”* 30 PUB. CONT. L.J. 585 (2001); Robert H. Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front-Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613 (2001).

past has sought to slow, if not derail, agency competitive sourcing efforts under Circular A-76 policies and procedures,¹⁴ is again questioning the fairness and usefulness of the process.¹⁵ Given the Bush Administration's enthusiastic support for still greater numbers of competitions pursuant to the Circular A-76 procedures, it does not appear the criticism will cease anytime soon or without a fight.¹⁶

A recent Air Force competitive sourcing study at Lackland Air Force Base (AFB), Texas, has again highlighted the complaints of the various interested groups, resulting in the credibility of not only the Air Force's competitive sourcing program being called into question, but also the entire Circular A-76 process.¹⁷ One issue in particular that has arisen from this troubled cost-comparison is the inability of federal employees and/or their union representatives to challenge contract award decisions in competitive sourcing cases beyond the agency administrative appeal process (AAP).¹⁸ Federal employees and union

¹⁴ See Harney, *supra* note 4, at 54 (providing a discussion and summary of Congressional actions in the late 1980s and early 1990s that limited and, in some instances, prohibited DoD competitive sourcing efforts). See also Major Richard K. Ketler, *Federal Employee Challenges to Contracting Out: Is There a Viable Forum?*, 111 *Mil. L.R.* 103, 110-14 (1986).

¹⁵ For example, Congressman Albert Wynn has introduced a bill entitled the Truthfulness, Responsibility and Accountability in Contracting (TRAC) Act that would, among other provisions, place a moratorium on further competitive sourcing studies until accounting mechanisms are in place to track the projected savings. H.R. 721, 107th Cong. (2001). Additionally, Congress has directed GAO to convene a Commercial Activities Panel to review the OMB Circular's competitive sourcing policies and procedures and make recommended changes by May 2002. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, P.L. 106-398, § 832, 114 Stat. 1654 (2000).

¹⁶ See STATEMENT OF ANGELA B. STYLES, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OMB, BEFORE THE HOUSE SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY, June 28, 2001, (emphasizing the Bush Administration's commitment to competitive sourcing and stating its strong opposition to the TRAC Act), available at <<http://www.whitehouse.gov/omb/legislative/testimony/20010629.html>>.

¹⁷ See discussion *infra* Part II.B.

¹⁸ See discussion *infra* Part III.D.

representatives in such cases have failed time and again, for lack of standing, to gain additional administrative review at the General Accounting Office (GAO) or judicial review in the federal court system.¹⁹ Private sector contractors, on the other hand, may participate in the agency's appeal process, and also challenge Circular A-76 decisions at GAO and in the federal courts.²⁰

This article addresses whether ensuring “the A-76 process is fully respected, not only to maintain fairness during the process, but also to assure the appearance of fairness,”²¹ requires “standing” of federal employees and their union representatives to challenge competitive sourcing decisions outside the agency AAP. Beginning with a general overview of the complete Circular A-76 process, as developed by the provisions of Air Force Instruction 38-203 (AFI 38-203), *Commercial Activities Program*, with a more in-depth review of the APP found in AFI 38-203 and the comparable instructions and regulations of the other military departments. Next, the facts in the recent controversial competitive sourcing study at Lackland AFB will be examined to highlight the various criticisms and deficiencies of the competitive sourcing program. This will be followed by a look at the various forums – GAO and federal courts – that have consistently, and again recently, denied standing to federal employees and their union representatives, as well as legislation proposed to remedy this issue. Finally, this article will consider alternative measures to the proposed legislation and changes to improve the AAP.

¹⁹ See discussion *infra* Part III.A-C.

²⁰ See discussion *infra* Part III.A-C.

²¹ See DOD IG REPORT, *supra* note 1, at 4.

II. The Competitive Sourcing Process and Problems

A. Procedural Overview

In 1996, OMB substantially revised Circular A-76 with the issuance of the Supplemental Handbook, providing updated guidance and procedures intended to encourage competitive sourcing studies.²² Within DoD, additional guidance is found within directives²³ and instructions,²⁴ with still greater direction coming DoD's recent issuance of interim guidance for competitive sourcing programs.²⁵ In addition, each of the armed services has further refined the competitive sourcing procedures through the promulgation of department specific regulations and instructions.²⁶ While the procedures differ slightly among the military

²² See SUPPLEMENTAL HANDBOOK, *supra* note 4, at Intro.

²³ See U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989) [hereinafter DoDD 4100.15].

²⁴ See U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES (9 Sep. 1985) [hereinafter DoDI 4100.33].

²⁵ U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE STRATEGIC AND COMPETITIVE SOURCING PROGRAMS INTERIM GUIDANCE (April 3, 2000)[hereinafter DOD INTERIM GUIDANCE]. The DoD Interim Guidance resulted from the work of a DoD Integrated Process Team created "to achieve a fair and consistent approach" among competitive sourcing programs across DoD. *Id.* at 1. Attached to the memo are several separate topic papers, including one entitled "Administrative Appeal Process After Performing an A-76 Cost Comparison." *Id.* at 3. Effective upon issuance, the DoD Interim Guidance directs that DoDD 4100.15 and DoDI 4100.33 be updated within 90 days to reflect the new guidance. *Id.* Based on a visit to the Office of Secretary of Defense homepage at <http://emissary.acq.osd.mil/INST/Share.nsf/LibraryComponent> on 23 March 2002, neither publication has been updated.

²⁶ U.S. DEP'T OF AIR FORCE, INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM (1 Aug. 2000) [hereinafter AFI 38-203]; U.S. DEP'T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct 97) [hereinafter AR 5-20]; U.S. DEP'T OF ARMY, PAM. 5-20, COMMERCIAL ACTIVITIES STUDY GUIDE (31 Jul 98) [hereinafter DA PAM. 5-20]; U.S. DEP'T OF NAVY, INSTR. 4860.7C, NAVY COMMERCIAL ACTIVITIES PROGRAM (7 June 1997) [hereinafter OPNAVINST 4860.7C]; U.S. MARINE CORPS, MARINE CORPS ORDER 4860.3D, COMMERCIAL ACTIVITIES PROGRAM (14 Jan 92) [hereinafter MCO 4860.3D]. As MCO 4860.3D predates the Supplemental Handbook, it has been supplemented by numerous interim guidance memos, messages and policy letters.

departments, the following discussion of AFI 38-203 generally describes the competitive sourcing process under Circular A-76 and Supplemental Handbook.

1. Decisional Steps in the Competitive Sourcing Process

When speaking of Circular A-76 procedures, one often thinks only of the actual cost comparison between the in-house and private contractor proposals for performing the function or activity under study. The process, however, is more involved including several requirements prior to beginning the actual cost comparison. Describing the process from beginning to end, AFI 38-203 segments the process into four steps – determination of Inherently Governmental/Commercial Activity (IGCA) functions, maintenance of the IGCA Inventory, review of the IGCA Inventory, and competitive sourcing using either the cost comparison or direct conversion processes.²⁷

Under the first step of the process, the Air Force must determine whether an activity is “inherently governmental” or commercial in nature.²⁸ An “inherently governmental” activity is defined as one “that is so intimately related to the public interest as to mandate performance by Government employees.”²⁹ A “commercial activity,” on the other hand, is defined as “a product or recurring service obtainable (or obtained) from a commercial

²⁷ AFI 38-203, *supra* note 26, ¶ 1.7.

²⁸ *Id.* ¶ 2.1.

²⁹ *Id.* ¶ 2.3; *see also* SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 1, para. B.1. Congress codified the definition of “inherently governmental function” with the passage of the FAIR Act of 1998. Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2383 (1998) (codified at 31 U.S.C. § 501 (2000)).

source.”³⁰ A high level decision, in the Air Force, the final determination on whether an activity is “inherently governmental” is made by the Air Force Office of the Assistant Secretary for Manpower, Reserve Affairs, Installations and Environment,³¹ though this determination is subject to review and modification by DoD and OMB.³² Activities determined “inherently governmental” are not subject to contract performance or the provisions of Circular A-76 and the Supplemental Handbook.³³ Conversely, it is agency policy to compete commercial activities with the private sector to determine if it is cost-effective to continue to perform the function in-house.³⁴

The second step requires maintaining the IGCA inventory, which documents all inherently governmental activities, commercial activities, as well as contracted activities.³⁵ The importance of the inventory has taken on increased significance following Congress’ passage of the FAIR Act, which codified the definition of “inherently governmental” activities and the requirement to complete and maintain an inventory listing of all activities not “inherently governmental,” thus appropriate for competitive sourcing study.³⁶

³⁰ AFI 38-203, *supra* note 26, ¶ 2.4.1; CIRCULAR A-76, *supra* note 3, para. 6a.

³¹ AFI 38-203, *supra* note 26, ¶ 2.2.

³² *Id.* ¶ 2.3.2.

³³ AFI 38-203, *supra* note 26, ¶ 2.1 and ¶ 2.3.2; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 1, para. B.1.

³⁴ AFI 38-203, *supra* note 26, ¶ 2.4.2.1; CIRCULAR A-76, *supra* note 4, para. 5a.

³⁵ *Id.* ¶ 3.1. *See also* SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 1, para. F.

³⁶ Pub. L. No. 105-270, 112 Stat. 2382-83 (1998) (codified at 31 U.S.C. § 501(2000)). The OMB provided additional guidance to executive agencies concerning the implementation of the statutory requirements found in

Related to the second step, the third step provides for periodic review of the IGCA.³⁷ The purpose of this review is to ensure the continued in-house performance is justified, to identify additional potential activities for competition with the private sector, and to validate the contract manpower equivalents on existing contracts.³⁸ Reflecting the general policy of Circular A-76, while Air Force commands are required to review 100% of all in-house activities at least once every five years, the commands are “encouraged to continuously review the requirement for in-house performance of in-house activities to ensure cost effective and efficient operation of [Air Force commercial activities (CAs)].”³⁹ Doing so, the AFI 38-203 continues, “will ensure in-house CAs that can be competed continue to be competitive with the private sector.”⁴⁰ In accordance with the requirements of the FAIR Act, agencies must also review and update annually the detailed inventory of all commercial activities performed by its civilian employees in-house.⁴¹

While Congress has placed greater emphasis on the “pre-cost comparison” review of agency activities and resulting inventory with the passage of the FAIR Act,⁴² the vast

the FAIR Act. See TRANSMITTAL MEMO NO. 20, *supra* note 4; FED. OFFICE OF MANAGEMENT & BUDGET CIR. A-76 TRANSMITTAL MEMORANDUM NO. 22, August 31, 2000 [hereinafter TRANSMITTAL MEMO NO. 22].

³⁷ AFI 38-203, *supra* note 26, ¶ 4.1

³⁸ *Id.* “Contract manpower equivalents” refers to the in-house manpower requirements that would be needed to perform the contracted work in-house at the same level of performance required under the existing contract with the private sector. *Id.* app. 1.

³⁹ *Id.* ¶ 4.3.2.1.3.

⁴⁰ *Id.*

⁴¹ TRANSMITTAL MEMO NO. 20, *supra* note 4, para. F.

⁴² This emphasis includes a requirement for an agency-level administrative appeal process, whereby “interested parties” can challenge the inclusion and/or omission of activities from the inventory listing. Congress included federal employees and their union representatives in the definition of “interested parties” for purposes of

majority of complaints about the Circular A-76 process strike at the actual cost comparison procedures⁴³ – the fourth step in the competitive sourcing process.

As the Supplemental Handbook states, in general there are six major components to the standard cost comparison process:

(1) the development of a Performance Work Statement (PWS) and Quality Assurance Plan (QASP); (2) the performance of a management study to determine the Government's Most Efficient Organization (MEO); (3) the development of an in-house Government cost estimate; (4) issuance of the Request for Proposal (RFP) or Invitation for Bid (IFB); (5) the comparison of the in-house bid against a proposed contract or ISSA Price, and (6) the Administrative Appeal Process, which is designed to assure that all costs entered on the Cost Comparison Form (CCF) are fair, accurate and calculated in accordance with Part II of this Supplement.⁴⁴

Each component is important to the process, with deficiencies in any one area contributing to criticism and complaints of the agency's final cost comparison decision. For example, developing a sufficiently comprehensive PWS⁴⁵ is important to ensure the requiring activity receives what it needs and that all costs associated with that need are included and

challenging the inventory listings in the agency-level administrative appeal process. Pub. L. No. 105-270, § 3, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501(2000)). It is unsettled, however, whether they could pursue their inventory list challenge in federal court, if unsatisfied with the administrative appeal decision. *See infra* note 186 and accompanying text. On the other hand, it is well established that the FAIR Act does not provide a means for federal employees and union to gain standing at either GAO or the federal courts to challenge an agency's compliance with and decision pursuant to the actual "cost comparison" procedures. *See* discussion *infra* Part III

⁴³ *See* discussion *infra* Part III.

⁴⁴ SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. A.3.

⁴⁵ The PWS "serves as the scope of work and is the basis for all costs" to be determined and compared with the private sector bid or offer. SUPPLEMENTAL HANDBOOK, *supra* note 4, app. I.

considered by the study.⁴⁶ Another critically important element in the process is the development of a sound and supportable Management as it outlines the MEO⁴⁷ and how it will achieve the results required by the PWS.⁴⁸ Ultimately the MEO determines the basis for the Government's in-house cost estimate later compared against the selected private sector bid or offer.⁴⁹

While sealed bid or negotiated procurement procedures may be used to solicit offers from the private sector, the use of cost/technical trade-off techniques in negotiated procurements⁵⁰ involves additional considerations and requirements to ensure the MEO is based on the same scope of work and performance levels as that provided by the private sector offer selected for the cost comparison competition.⁵¹ In such procurements, the Government is required to

⁴⁶ AFI 38-203, *supra* note 26, ¶ 9.2.1.

⁴⁷ The MEO "is the product of the Management Plan and is based upon the Performance Work Statement" and "is the basis for all Government costs entered on the Cost Comparison form." SUPPLEMENTAL HANDBOOK, *supra* note 4, app. I. The MEO does not, however, participate in the solicitation process and therefore the MEO is not considered a "bid" or "offer" eligible for "award," as those terms are defined and used in government procurement law. *See* discussion *infra* Part III.

⁴⁸ AFI 38-203, *supra* note 26, ¶ 11.3.3 (stating the object of the Management Plan is to find "new, creative, and innovative ways" to perform the work required by the PWS); SUPPLEMENTAL HANDBOOK, *supra* note 4, app. I.

⁴⁹ AFI 38-203, *supra* note 26, ¶ 11.2.4.

⁵⁰ *Id.* ¶ 10.3.2; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. H.3. For guidance on "sealed bid" procedures, see GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 14 (June 1997) [hereinafter FAR]. Guidance regarding contracting by "negotiation," including rules related to "cost/technical trade-off" methodology can be found in FAR Part 15. *Id.* at pt. 15. *See also* Harney, *supra* note 4 (providing an in-depth discussion of the competitive sourcing procedures and, more specifically, the incorporation of "best value" procurement procedures into the process).

⁵¹ AFI 38-203, *supra* note 26, ¶ 10.3.3; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. H.3.a.

submit to the Contracting Officer, and eventually the Independent Review Officer (IRO), the Technical Performance Plan (TPP) required by the solicitation.⁵²

The IRO has the important responsibility of certifying the accuracy of the Government in-house estimate and, in the case of a negotiated procurement utilizing cost/technical trade-off principles, reviewing the Government technical performance plan (TPP) to ensure it satisfies the PWS requirements.⁵³ Though the Supplemental Handbook specifies, “[t]he IRO should be a qualified person from an impartial activity that is organizationally independent of the commercial activity being studied and the activity preparing the cost comparison,”⁵⁴ AFI 38-203 provided no further guidance on the qualifications or organizational independence requirements of the IRO, until a recent Interim Change to AFI 38-203 required training for IROs, as well as other key participants in the process.⁵⁵

⁵² AFI 38-203, *supra* note 26, ¶ 10.3.3 and ¶ 16.3; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. H.3.a.

⁵³ SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. I; AFI 38-203, *supra* note 26, Ch. 10. As discussed *infra* Part II.B, an insufficient review by the IRO can result in later difficulties for the Source Selection Authority and call into question the fairness of the cost comparison.

⁵⁴ SUPPLEMENTAL HANDBOOK, *supra* note at 4, pt. I, ch. 3, para. I.1.

⁵⁵ U.S. DEP’T OF AIR FORCE, INSTR. 38-203, IC 01-1, COMMERCIAL ACTIVITIES PROGRAM, at ¶ 1.8.5.15 (19 Jul. 2001)[hereinafter INTERIM CHANGE 01-1]. The other armed forces, by way of contrast, require the independent review to be conducted by the agency’s audit services in cases involving a significant number of civilian positions. *See e.g.*, AR 5-20, *supra* note 26, para. 1-4 (stating the Auditor General will perform the independent review in cases involving sixty-five or more civilian FTE’s, and in all other cases, when requested, based on the availability of resources); OPNAVINST 4860.7C, *supra* note 26, pt. I, ch. 1, para. A.4.a(7) (requiring the Naval Audit Service serve as the IRO in all cases involving forty-one or more civilian FTE positions); Policy Letter, Commandant of the Marine Corps, Independent Review Officers (IRO) for A-76 Studies (21 Sep 1999) (stating the Naval Audit Service will serve as the IRO in all cases involving fifty-one or more civilian employees), *available at* <http://www.hqmc.mil/LRWeb.nsf/>.

The Source Selection Authority's (SSA) evaluation of the Management Plan and TPP is another important step in the process that can produce later criticism and protests if performed incorrectly.⁵⁶ When evaluating the Management Plan and TPP, the SSA must compare the MEO's level of technical performance with that of the selected contract offer to ensure the MEO offers the same level of performance.⁵⁷ If the MEO level of performance is not equivalent with the selected contract offer, the SSA must direct the Government to revise the MEO level of performance.⁵⁸

Following the IRO review and the SSA evaluation, the costs of the Government MEO and the selected private contractor offer are compared and a tentative "winner" is announced.⁵⁹ This announcement then triggers the AAP, the final step in the competitive sourcing process.⁶⁰

2. Administrative Appeal Process

The purpose of the APP is to provide "reasonable assurances" the cost comparison decision was in accordance with the procedures and requirements of Circular A-76 and the

⁵⁶ See discussion *infra* Part II.B.

⁵⁷ AFI 38-203, *supra* note 26, ¶ 10.3.4; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. H.3.d.

⁵⁸ AFI 38-203, *supra* note 26, ¶ 10.3.6; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. H.3.e.

⁵⁹ See AFI 38-203, *supra* note 26, ch. 17 (detailing separate procedures for sealed bid and negotiated procurement methods); SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. J.

⁶⁰ *Id.*

Supplemental Handbook.⁶¹ Based on the AAP guidance set forth in the Supplemental Handbook,⁶² each of the armed services has established an AAP to ensure cost comparisons are conducted fairly, equitably, and according to applicable policies. Not surprisingly, each military department approaches the AAP slightly differently.

a. Air Force Administrative Appeal Process

Consistent with the Supplemental Handbook, AFI 38-203 defines “eligible appellants” for the AAP as those civilian employees and/or their union representatives “directly affected” by a tentative cost comparison decision, as well as the competing contractor.⁶³ While the definition of “eligible appellant” is broadly defined, the issues that may be raised on appeal are limited. Appeals are limited to challenges specifically identifying errors on line items of the cost comparison form, instances of the agency’s denial of information, and to particular incidents of agency noncompliance with the policies and procedures of Circular A-76 and AFI 38-203.⁶⁴ Therefore, as similarly stated in the Supplemental Handbook and reiterated in

⁶¹ See SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.

⁶² The Department of Defense requires each service to establish an administrative appeals procedure to resolve challenges by directly affected parties relating to a tentative cost comparison. DODI 4100.33, *supra* note 24, para. 5.7.1. See also FAR, *supra* note 50, § 7.307 (June 1997) [hereinafter FAR]. DODI 4100.33 has been supplemented recently with more specific direction as to the functioning of the AAP. DOD INTERIM GUIDANCE, *supra* note 25, attach. 5.

⁶³ AFI 38-203, *supra* note 26, ¶ 18.2. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.2. The DoD Interim Guidance appears even more generous toward the private sector, providing a “non-selected contractor is permitted to appeal in case the contractor originally selected to compete against the in-house offer is reversed via a GAO protest.” DOD INTERIM GUIDANCE, *supra* note 4, attach. 5, para. 1.

⁶⁴ AFI 38-203, *supra* note 26, ¶ 18.3.2.

the DoD's Interim Guidance,⁶⁵ the AAP does not apply to questions concerning: (1) the selection of one contract offeror over another, (2) the award to one contract offeror instead of another, (3) Government management decisions involving the MEO, or (4) the policies and procedures contained in Circular A-76 and the Supplemental Handbook.⁶⁶

Previously, AFI 38-203, as well as the Supplemental Handbook, required an appellant to demonstrate that the challenged items, individually or aggregately, would result in a reversal of the tentative cost comparison decision.⁶⁷ But because this requirement conflicted with the Supplemental Handbook provision prohibiting sequential administrative appeals, and to ensure all relevant challenges to the cost comparison were brought forward in a timely manner, OMB rescinded Part I, Chapter 3, paragraph K.1.e.⁶⁸

Additionally, to emphasize the point that all "interested parties"⁶⁹ should review the tentative cost comparison decision and supporting documentation to identify potential errors in the calculations and/or process, OMB revised Part I, Chapter 3, Paragraph K.1.a of the Supplemental Handbook, to require "all interested parties, including the tentative winner of a

⁶⁵ See SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.6; DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 6.

⁶⁶ AFI 38-203, *supra* note 26, ¶ 18.3.3; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.6; DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 6.

⁶⁷ AFI 38-203, *supra* note 26, ¶ 18.3.1; SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.1.e.

⁶⁸ TRANSMITTAL MEMO NO. 22, *supra* note 36, para. 3; INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.3.1.

⁶⁹ The Supplemental Handbook does not use the term "interested parties" but rather "eligible appellant" when referring to those who may challenge tentative cost comparison decisions. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.1.a. By using "interested party" instead, OMB implicitly, as well as explicitly, emphasizes its point that all affected parties, to include the tentative "winner," should review the cost comparison decision and supporting documentation.

cost comparison decision....” to submit appeals “within the initial administrative appeal period.”⁷⁰ Interestingly, while the recent Interim Change to AFI 38-203 apparently deletes the requirement for an appellant to demonstrate the challenged item would result in a reversal of the tentative cost comparison decision,⁷¹ it does not contain language addressing the change to Part I, Chapter 3, Paragraph K.1.a, encouraging all “interested parties” to review the cost comparison decision and supporting documentation for errors, even if they are the “tentative winner.”

To be considered “timely” for AAP purposes, an eligible appellant must submit their challenge in writing to the contracting officer before the end of the Public Review Period.⁷² Consistent with the Supplemental Handbook, AFI 38-203 states this period begins on the date all “supporting documentation” is made publicly available and ends 20 calendar days thereafter, though this period can be extended to 30 calendar days if the cost comparison is particularly complex when approved by the major command (MAJCOM) manpower office.⁷³

In an effort to ensure an independent and objective review,⁷⁴ the appointed AAP Authority must be at least two organizational levels above the official that certified the MEO

⁷⁰ TRANSMITTAL MEMO NO. 22, *supra* note 36, para. XX.

⁷¹ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.3.1. While the Interim Change does not specifically mention that the former language at paragraph 18.3.1 of AFI 38-203 is deleted and replaced with the new language, it can be assumed based on the “Summary of Revisions” that states the Interim Change makes modifications to AFI 38-203 “to ensure compliance with OMB Transmittal Number 22.” AFI 38-203, *supra* note 26, at i.

⁷² AFI 38-203, *supra* note 26, ¶ 18.2.12.

⁷³ *Id.*

⁷⁴ *Id.* ¶ 18.2.3.

or independent of the activity that is the subject of the cost comparison review.⁷⁵

Additionally, per the recent Interim Change to AFI 38-203, to further remove any suggestion of an actual or apparent conflict of interest, the AAP Authority must now be one organizational level higher or senior in rank to the individual that served as the SSA.⁷⁶

In another modification to improve the AAP, the Interim Change to AFI 38-203 clarifies that the AAP Authority appoints members of the AAP Review Team to ensure “various experts appropriately and adequately address the appealed items.”⁷⁷ At a minimum, the AAP Review Team must include individual representatives from “contracting, legal, functional, manpower, and financial” offices, unless after receipt of the appeal the AAP Authority determines not all areas of expertise are needed.⁷⁸ Moreover, the Interim Change highlights the responsibility of installation commanders to ensure individual participants in a cost comparison receive required A-76 training.⁷⁹

⁷⁵ *Id.* ¶ 18.2.9.

⁷⁶ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.2.9. The same language is used in the DoD Interim Guidance, though additional conflict of interest matters are also addressed. DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 4.

⁷⁷ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.2.11.

⁷⁸ *Id.* ¶ 18.2.11.2.

⁷⁹ *Id.* ¶ 1.8.5.15. The required training applies to individuals that will participate on the PWS team, MEO team, IRO team, Government Management Plan Team, AAP Team, etc., and the training is to take place prior to that component of the process. *Id.* The actual curriculum and extent of this training is apparently still under development based on information posted on the Air Force Management and Improvement homepage at <https://www.afmia.randolph.af.mil/xpms/cs/Training/index.html> when last visited on 11 Feb. 02.

After receipt of the appeal, the AAP team must provide a final decision within thirty days of the end of the Public Review Period,⁸⁰ however, exceptions and extensions may be granted in complex cases “to allow proper and prudent review.”⁸¹ Additionally, a significant change now exists in cost comparisons involving 300 or more positions. In such cases, the AAP Review Team’s draft appeal findings are provided to “interested parties.”⁸² The “interested parties” are given five working days after release of the draft to review and comment on the proposed findings.⁸³ This provision obviously could prolong the AAP, making necessary the time extensions “to allow proper and prudent review.”⁸⁴

Consistent with the Supplemental Handbook, DoD guidance, and the regulations and instructions of the service branches, AFI 38-203 states the AAP Authority’s decision is

⁸⁰ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.2.6.

⁸¹ *Id.* ¶ 18.2.6. As with the Public Review Period, it is the command manpower office that approves these extensions. In the event the AAP will exceed 60 days, notification to the Air Force Manpower Office is also required. *Id.*

⁸² *Id.* ¶ 18.4.14.1. As with OMB’s use of the term “interested party” in Transmittal Memo No. 22, the Interim Change to AFI 38-203 does not define the term nor use it elsewhere. Presumably, the term has the same meaning as “eligible appellants.” AFI 38-203, *supra* note 26, ¶ 18.2.1.

⁸³ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.4.14.1.

⁸⁴ AFI 38-203, *supra* note 26, ¶ 18.2.6. For cost comparisons involving fewer than 300 positions, the Interim Change to AFI 38-203 is less clear as to whom the AAP Review Team’s draft appeal findings may be provided. Paragraph 18.4.14.2 states, “The AAP Authority provides draft appeal findings on cost comparisons below the 300-position threshold upon AF/XPM [Air Force Manpower Office] request.” This language does not specify whether this means the draft findings are provided only to the Air Force Manpower Office upon request, or whether the draft findings are to be provided to an “interested party” upon the request of the Air Force Manpower Office. The next paragraph requires the AAP Review team to review any comments received, make recommendations and forward the findings to the AAP Authority, who is to make a final decision based on the information provided by the Review Team. *Id.* ¶ 18.4.15.

final.⁸⁵ Similarly, AFI 38-203 makes clear the AAP does not authorize an appeal outside the agency or otherwise grant a right of judicial review.⁸⁶

b. Army Administrative Appeal Process

Unlike the Supplemental Handbook and AFI 38-203, both which originally used the term “eligible appellant”⁸⁷ in reference to those that could submit a challenge under the AAP, Department of the Army Pamphlet 5-20 (DA Pamphlet 5-20), *Commercial Activities Commercial Activities Guide* actually uses the term “interested party” to describe those who may review cost comparison documentation during the public review period and submit an appeal if warranted.⁸⁸ The Army includes in its definition of “interested party” all “employees of the activity under study, unions and other employees organizations representing affected federal employees, and contractors who responded to the solicitation.”⁸⁹

⁸⁵ *Id.* ¶18.2.7. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.7; DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 7; DA PAM. 5-20, *supra* note 26, para. 7-6.c(6)(c); OPNAVINST 4860.7C, *supra* note 26, ch. 3, para. K.1.g. The Marine Corps has adopted the language found in the DoD Interim Guidance. Message, 080239Z May 00, Commandant of the Marine Corps, subject: A-76 Policy Update FY00-2 – Implementation of New Department of Defense Interim Guidance for Strategic Sourcing and Competitive Sourcing Interim Guidance [hereinafter Competitive Sourcing Message], *available at* <http://www.hqmc.mil/LRWeb.nsf/>.

⁸⁶ AFI 38-203, *supra* note 26, ¶18.3.2. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.7; DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 7; DA PAM. 5-20, *supra* note 26, para. 7-6.c(6)(c); OPNAVINST 4860.7C, *supra* note 26, ch. 3, para. K.1.g.; Competitive Sourcing Message, *supra* note 85, para. 3.E.

⁸⁷ SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.2; AFI 38-203, *supra* note 26, ¶18.2. By way of Transmittal Memo No. 22 and the Interim Change to AFI 38-203, the term “interested party” is now incorporated into the Supplemental Handbook and AFI 38-203, respectively. INTERIM CHANGE 01-1, *supra* note 55, at “Summary of Revisions.”

⁸⁸ DA PAM. 5-20, *supra* note 26, paras. 7-5.a - 7-5.c.

⁸⁹ *Id.* para. 7-5.c.

While DA Pamphlet 5-20 also limits appealable matters to those addressing specific costing errors on the cost comparison form and/or noncompliance with Circular A-76 procedures,⁹⁰ the Army guide does not contain the rescinded language of Part I, Chapter 3, Paragraph K.1.e. in the Supplemental Handbook, which formerly required an eligible appellant to demonstrate the challenged item(s), individually or aggregately, would result in the reversal of the tentative cost comparison decision.⁹¹ Moreover, DA Pamphlet 5-20 anticipated Transmittal Memorandum 22's revised language to Part I, Chapter 3, Paragraph K.1.a of the Supplemental Handbook, allowing any interested party to submit an administrative appeal if they believed an error had been committed.⁹²

Additionally, under DA Pamphlet 5-20 there appears to be an expanded scope of review of appeals. The Supplemental Handbook and AFI 38-203 both provide AAP Authority review for items formally challenged by an appellant.⁹³ In the Army, the AAB is required not only to review the issues raised in an appeal, but also "all of the documentation supporting the in-house cost estimate and the initial decision."⁹⁴ Based on this language, the AAB isn't simply looking at identified, alleged errors but all the documentation supporting the Government's initial decision, which gives at least the appearance the Army wants to

⁹⁰ *Id.* para. 7-6.b.

⁹¹ *See* TRANSMITTAL MEMO NO. 22, *supra* note 36.

⁹² DA PAM. 5-20, *supra* note 26, para. 7-5.c and para. 7-5.f.

⁹³ SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.5; AFI 38-203, *supra* note 26, ¶ 18.2.7.

⁹⁴ DA PAM. 5-20, *supra* note 26, at para. 7-6.c(4). The Army's scope of review is also more expansive in that the AAP also applies to direct conversions, though the only grounds for challenge is failure to comply with Circular A-76. *Id.* para. 7-16. *Cf.* AFI 38-203, *supra* note 26, ¶ 18.2.3 (stating the AAP does not apply to direct conversions).

ensure any and all errors are corrected before a final decision on the cost comparison is made.⁹⁵

While DA Pamphlet 5-20 has a larger scope of review of tentative cost comparison decisions, the timing for the AAB final decision cannot be extended. The Army explicitly requires the AAB provide a final written decision within 30 days of receipt of the appeal.⁹⁶ There is no mention of an exception for complex cases to allow for “proper and prudent review.”⁹⁷

Another interesting, and arguably positive, contribution of DA Pamphlet 5-20 is its manner of appointing members to the Administrative Appeals Board (AAB). In the Army, it is the major command (MACOM) that appoints, on formal orders, the members of the AAB.⁹⁸ Additionally, the AAB can sit for one specific cost-comparison or be a standing panel considering all cost comparisons during a specified period of time.⁹⁹ Arguably the latter option provides additional continuity and expertise in frequently complex Circular A-76 cases.

⁹⁵ The Army is currently revising Army Regulation 5-20 and DA Pamphlet 5-20. The draft revisions propose adopting language similar to the DoD Interim Guidance and the Interim Change to AFI 38-203. For example, the scope of review for the AAB is limited to issues raised by eligible appellants and specifically prohibits correction of errors found by the AAB. “Draft” Army Regulation 5-20 (Aug. 3, 2001) and “Draft” DA Pamphlet 5-20 (Jan. 26, 2001) are available at <http://www.hqda.army.mil/acisimweb/ca/ar520> and <http://www.hqda.army.mil/acisimweb/ca/pam520>.

⁹⁶ DA PAM. 5-20, *supra* note 26, para. 7-6.c(5).

⁹⁷ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.2.6.

⁹⁸ *Id.* para. 7-6.c.

⁹⁹ *Id.*

Like the Air Force, the Army training and experience requirements for individual AAB members do not appear overly rigorous. The DA Pamphlet simply provides that AAB individuals must have “some knowledge or experience in CA [commercial activities] program requirements and costing procedures, contracting, or management.”¹⁰⁰ It is more explicit, however, in its requirements for membership to ensure the impartiality of its AAB members and avoid even the appearance of conflicts.¹⁰¹ And there are additional criteria for the AAB chairperson, which are even more strict than the new Air Force requirements for the AAP Authority.¹⁰²

c. Navy Administrative Appeal Process

Navy Instruction 4860.7C (OPNAVINST 4860.7C), *Navy Commercial Activities (CA) Program* also possesses unique differences in its AAP. For example, OPNAVINST 4860.7C does not specifically address who may submit an appeal; it simply provides

¹⁰⁰ *Id.* para. 7-6.c(1).

¹⁰¹ *Id.* para. 7-6.c(2). The DA Pamphlet lists specific categories of individuals ineligible to serve as members of an AAB to include:

- (a) Anyone who took part in the cost study under appeal.
- (b) Anyone directly associated with the function in the cost study under appeal.
- (c) Anyone working in the activity or anyone having spouses, children, parents, siblings, or household members working in the activity in the cost study under appeal.
- (d) Anyone working for the command or organization having direct jurisdiction or control over the activity in the cost study under appeal.

¹⁰² Under DA Pamphlet 5-20, paragraph 7-6.c(3)(a-c) the chairperson must “[b]e from an organization that neither supports or receives support from the activity in the cost study under appeal; [b]e from another installation or command or from the MACOM; [b]e of the same or higher rank or grade as the official who approved the initial decision.” While the Air Force now requires the AAP Authority to be of the same or higher rank/grade than the SSA and to be from an organization independent from the activity under study or at least two organizational levels above the MEO certifier, as provided in the Supplemental Handbook, the Army standard is more stringent as someone independent from the installation must serve as the AAB chairperson.

“appellants” must submit in writing their appeals to the contracting officer, without further defining “appellants.”¹⁰³ At other places in the document, the Navy does refer to “directly affected parties” and “interested parties,” but again does not further define either term.¹⁰⁴

While the Air Force and Army make reference to the “public review period,” OPNAVINST 4860.7C refers to that 20 day period of time from the date the cost comparison supporting documentation is available for public review to the date the appeal is due, as the “actual appeal period.”¹⁰⁵ More significantly, in the Navy, within 2 working days of the end of the actual appeal period, the contracting officer must provide copies of timely appeals received to all “directly affected parties.”¹⁰⁶ These affected parties are then given 3 working days from the end of the appeal period to comment on the objections and challenges raised by other parties and provide supporting documentation.¹⁰⁷ By providing such information to all of the directly affected parties and promptly receiving back inputs so early in the process, the Navy AAO can more easily focus on the merits of the disputed issues.

Regarding the qualifications and appointment of the Administrative Appeal Officer (AAO), OPNAVINST 4860.7C provides little guidance beyond that found in the

¹⁰³ OPNAVINST 4860.7C, *supra* note 26, pt. I, ch. 3, para. K.1.d.

¹⁰⁴ *Id.* pt. I, ch. 3, para. K.1.e.

¹⁰⁵ *Id.* pt. 1, ch. 3, para. K.1.c. The Navy also permits receipt of an appeal up to 30 calendar days after the public availability of the cost comparison supporting documentation in cases deemed complex by the contracting officer. *Id.*

¹⁰⁶ *Id.* pt. I, ch. 3, para. K1.e.

¹⁰⁷ *Id.* See William A. Roberts III, et al., *supra* note 13, at 585 (praising the Navy method of sharing appeals information and obtaining inputs of all interested parties, and recommending the other DoD services adopt the same practice).

Supplemental Handbook. For example, concerning the qualifications of the AAO, the OPNAVINSTR simply states the criteria of the Supplemental Handbook¹⁰⁸ must be met and adds that if the individual is military, they must be of the same or higher rank than the individual who approved the Management Plan.¹⁰⁹ The guidance provided is not as helpful as that found in DA Pamphlet 5-20, with its emphasis on trying to avoid even the appearance of a conflict of interest,¹¹⁰ or even the recent Interim Change to AFI 38-203,¹¹¹ which draws no distinction between a civilian or military serving as the AAP Authority. Moreover, unlike both AFI 38-203 and DA Pamphlet 5-20, OPNAVINSTR 4860.7C makes no mention of the need for any specialized knowledge or expertise to serve as the AAO, and appears to consider having just one individual conduct the appeal, instead of the participation of a “team” or “board” of individuals.¹¹²

As in the current DA Pamphlet 5-20, OPNAVINSTR 4860.7C contemplates the possibility of a more expanded scope of review than under the Supplemental Handbook, the DoD Interim Guidance, and AFI 38-203. The OPNAVINSTR states the AAO will independently and objectively review appealed items in accordance with the guidance in the Supplemental Handbook and Navy instruction.¹¹³ It goes on to add that, while it is not the

¹⁰⁸ SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.3 (requiring the Appeal Authority be independent of the activity under study or at least two organizational levels above the individual who certified the Management Plan/MEO).

¹⁰⁹ OPNAVINSTR 4860.7C, *supra* note 26, pt. I, ch. 3, para. K.1.b.

¹¹⁰ DA PAM. 5-20, *supra* note 26, para. 7-6.c(3)(a-c).

¹¹¹ INTERIM CHANGE 01-1, *supra* note 55, ¶ 18.2.9.

¹¹² *Cf. id.* ¶ 18.2.11; DA PAM. 5-20, *supra* note 26, para. 7-6.c(1).

¹¹³ OPNAVINSTR 4860.7C, *supra* note 26, pt. I, ch. 3, para. K.1.f.

AAO's "responsibility to re-audit the entire cost comparison or to question the assumptions underlying the cost of each item not under appeal," if an individual discovers a procedural or computational error not the subject of an appeal, that individual is to note the error and any correction in the final appeal decision.¹¹⁴ Like DA Pamphlet 5-20, the OPNAVINST's language at least gives the appearance the Navy is concerned about identifying and correcting all errors discovered.¹¹⁵

d. Marine Corps Administrative Appeal Process

Citing the same Secretary of the Navy Instruction¹¹⁶ in its table of authorities as does OPNAVINST 4860.7C, Marine Corps Order 4860.3D (MCO 4860.3D), *Commercial Activities (CA) Program* pre-dates the Supplemental Handbook by more than four years.¹¹⁷ Not surprisingly, MCO 4860.3D is rather succinct in its discussion of the AAP that then existed.¹¹⁸ As of May 2000, the Marine Corps has implemented the DoD Interim Guidance, pending revision of MCO 4860.3D.¹¹⁹ Summarizing the implemented changes, the Marine Corps policy message specifically references the new AAP guidance to include the rules on eligible appellants, members of the appeal authority, submission and processing timelines,

¹¹⁴ *Id.*

¹¹⁵ Cf. DoD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 5(b) (stating "[t]he AAP Authority shall only review items specifically identified in an appeal; therefore, the AAP Authority may not make any changes to the cost comparison form unless identified in an appeal").

¹¹⁶ U.S. DEP'T OF NAVY, INSTR. 4860.44F, COMMERCIAL ACTIVITIES (Sep. 29, 1989).

¹¹⁷ See MCO 4860.3D, *supra* note 26.

¹¹⁸ *Id.* para. 17a-f.

¹¹⁹ Competitive Sourcing Message, *supra* note 85, para. 2.

appeal criteria, and the finality of appeal decisions.¹²⁰ Whether additional AAP changes will follow in the revision of MCO 4860.3D remains to be seen.

B. Problems in the Competitive Sourcing Process – Lackland AFB Case Study

While Circular A-76, the Supplemental Handbook, and the specific agency instructions and regulations provide significant guidance for conducting competitive sourcing studies under Circular A-76, the process is complex and problems frequently arise calling into question the fairness of the process and the accuracy of the decision. To best understand the potential problems an agency may encounter when conducting a competitive sourcing study, and the limitations of the APP, it is instructive to consider a real world example. The recent Lackland AFB cost comparison case highlights the difficulties and controversy Circular A-76 can generate. It also suggests changes should be made in the process – a necessity if the Bush Administrations is to continue its push for still greater numbers of such studies.

The case began on January 26, 1999, when the Air Force formally announced and initiated a Circular A-76 competitive sourcing study at Lackland AFB, Texas.¹²¹ A large and complex project, the study included nineteen base operating support (BOS) functions.¹²² The

¹²⁰ *Id.* para. 2.

¹²¹ Sig Christenson, *Studies Set For Lackland, Randolph Air Force Bases*, SAN ANTONIO EXPRESS-NEWS, Jan. 26, 1999, at 1B; DOD IG REPORT, *supra* note 1, at 1. Because of the difficulties and publicity encountered during the Lackland AFB competitive sourcing study, the DoD Inspector General investigated the process at the request of the Texas Congressional delegation. *See infra* notes 156-58 and accompanying text.

¹²² DOD IG REPORT, *supra* note 1, at 1. The Lackland AFB BOS functions involved in the cost comparison included: Maintenance and Operations, Environmental Management, Energy Management and Utilities, Community Services, Publications and Forms Management, Emergency Management, Engineering Services, Custodial, Transportation, Human Resources Management, Housing Maintenance, Communications and

number of personnel involved in this wide range of support functions totaled approximately 1,500 FTE appropriated fund, military, and non-appropriated fund personnel positions.¹²³

The Competitive Outsourcing Office at Lackland AFB was responsible for marshalling the study and was assisted in the development of the PWS and MEO by a consultant, Science Applications International Corporation, with general oversight provided by the Air Education and Training Command (AETC) A-76 program office, an office within the AETC Director of Plans and Policies.¹²⁴ After the completion of the PWS, a separate MEO study team began its work in May 1999 on the Government's MEO proposal.¹²⁵

In August 1999, AETC issued solicitation F41689-99-R-0031, a request for proposals (RFP), for the BOS and airfield support functions at Lackland AFB.¹²⁶ Under the terms of the RFP, offerors could submit separate proposals for the performance of the BOS and the

Information Technology, Supply Services, and Resource Management. *Am. Fed'n Gov't Employees, Local 1367 v. United States*, 2001 U.S. Dist. LEXIS 4044, at *6 n.7 (W.D. Tx. Mar. 6, 2001); DOD IG REPORT, *supra* note 1, app. D. The airfield support function was later separated out and designated a small business set-aside. Previously, the Air Force had determined all of the BOS and airfield support functions were not "inherently governmental activities. *See Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *7 n.8-9.

¹²³ DOD IG REPORT, *supra* note 1, at 1. The total number of personnel for each category included 1,001 appropriated fund civilian employees, 438 military members, and 43 nonappropriated fund employees. In the original announcement on January 26, 1999, the Air Force apparently indicated a total of 1,672 DoD positions would be evaluated under the study, however, the Air Force later removed 190 positions from the competition. *Id.* at 1 n.2.

¹²⁴ *Id.* at 2. AETC, headquartered at Randolph AFB, Texas, had contracted with SAIC to provide "concept planning support" to Air Force bases within its command and to assist in the development of PRDs [performance requirements documents; also known as performance work statements (PWS)] and the Government MEO organizations for planned Circular A-76 competitions at other AETC bases. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2-3; *Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *6.

airfield support operations, with the latter being a small business set-aside.¹²⁷ The RPF further provided that the BOS functions were to be a cost plus-incentive-fee contract and the airfield support functions a firm-fixed price contract.¹²⁸ If the competitive sourcing study resulted in award to the contractor, the performance period would be a total of 5 years and 9 months, which included a 90-day start-up phase, a six-month base period, and five one-year options.¹²⁹

The solicitation identified the procurement as a “best value” procurement and provided additional guidance on how the cost comparison between the contractor proposal and the Government’s MEO and in-house estimate would be conducted.¹³⁰ To ensure there was an “apples-to-apples” comparison, the solicitation instructed the Source Selection Evaluation Team (SSET) to determine whether the MEO proposal represented a comparable level of performance to the selected contractor proposal.¹³¹ Based on this review, the Source Selection Authority (SSA) could direct the MEO to adjust its TPP or Management Plan, or both, if found to be deficient.¹³² When conducting the cost comparison between the contractor and MEO, the total proposed price of the airfield support contractor would be

¹²⁷ DOD IG REPORT, *supra* note 1, at 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 3, 13-14.

¹³¹ *Id.* at 14.

¹³² *Id.* This “leveling” is required by the Supplemental Handbook and the service regulations. *See* SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch.3, para. H.3. *See also supra* notes 50-58 and accompanying text.

added to the total price of the BOS contractor, if separate firms, and the resulting sum compared against the MEO for all the services.¹³³

Highlighting the size and scope of the functions under study was the fact nearly sixty private firms toured Lackland AFB during a site-visit in September 1999.¹³⁴ This interest and the complexity of the functions involved resulted in a number of information requests and amendments. More specifically, between 11 August 1999 and 22 November 1999, the contracting officer received over 600 requests about the RFP and the PWS from private offerors, as well as the MEO study team.¹³⁵ Ultimately, on 24 November 1999, the due date for submission of proposals under the RFP,¹³⁶ the Air Force received a total of seven offers.¹³⁷

In May 2000, the SSET met and the SSA determined Lackland 21st Century Services Consolidated's (L21 Consolidated) proposal represented the "best value" among private offerors for the BOS at Lackland AFB. Additionally, the SSA determined the Phoenix Management Incorporated (Phoenix Mgmt.) proposal was the "best value" for the separate air field support functions.¹³⁸ On 19 May 2000 the SSET began to review the MEO's TPP

¹³³ DOD IG REPORT, *supra* note 1, at 14.

¹³⁴ David Hendricks, *Bids For Managing Lackland AFB Are In*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2000, at 1D.

¹³⁵ DOD IG REPORT, *supra* note 1, at 6.

¹³⁶ *Id.* at 11.

¹³⁷ *Am. Fed'n Gov't Employees, Local 1367 v. United States*, 2001 U.S. Dist. LEXIS 4044, at *6 (W.D. Tx. Mar. 6, 2001).

¹³⁸ *Id.* at *8; DOD IG REPORT, *supra* note 1, at 3.

and management plan to determine if the MEO provided a comparable level of performance and quality to the contractor proposals.¹³⁹ Between 26 May and 11 July 2000, the SSET issued several evaluation notices and held numerous discussions with the MEO study team, with the major issue of contention being the ability of the MEO to perform the requirements of the PWS based on its proposed staffing levels.¹⁴⁰

After much debate between the SSET and MEO study team, the SSA ultimately directed the MEO adjust the TPP and Management Plan by increasing the number of FTE positions.¹⁴¹ On 27 July 2000, the MEO study team filed a protest with the GAO seeking to challenge the SSA's directed FTE position adjustments, but the protest was withdrawn based on earlier GAO decisions denying standing to federal employees.¹⁴² On 15 August 2000, the

¹³⁹ DOD IG REPORT, *supra* note 1, at 15. Citing a lack of training, experience, and time, the DoD IG criticized the Independent Review Officer (IRO) review for failing to adequately address the sufficiency of the MEO prior to MEO certification and submission, which resulted in additional work for the SSET during the evaluation phase. Apparently there were an insufficient number of qualified employees to handle the various key positions and related responsibilities in such a large and complex Circular A-76 competitive sourcing. *Id.* at 15-16. While concerned with organizational conflicts of interest, the FAR does recognize that in certain circumstances there simply are insufficient numbers of individuals at the installation level with the requisite level of expertise. Generally, personnel who have knowledge of the figures in the Government cost estimate shall not participate in the offer-evaluation process unless the contract file is properly documented to show that no other qualified personnel were available. FAR, *supra* note 50, § 7.304(d).

¹⁴⁰ DOD IG REPORT, *supra* note 1, at 15-16. The DoD IG noted that the SSET did not compare the MEO level of performance to that of the contractor proposals, as stated in the RFP, in determining the level of MEO staffing. Rather, the comparison was based on historical workload information from the PWS. *Id.* at 16.

¹⁴¹ DOD IG REPORT, *supra* note 1, at 17. The DoD IG does not quantify the number of FTE positions that were added by the MEO as all source selection and contractor proprietary information has been omitted from the publicly released report. Ultimately, the DoD IG found a number of the added FTE positions directed by the SSA were unjustified, resulting in added cost to the MEO cost estimate. *Id.*

¹⁴² *Id.* For a discussion of GAO decisions on standing of federal employees to bring protests challenging competitive sourcing decisions see *infra* Part III.A.

MEO study team leader signed the cost comparison form certifying that all costs were properly presented and justified.¹⁴³

After the cost comparison of the combined cost proposals from L21 Consolidated and Phoenix Mgmt. showed the contractors could perform the functions for approximately \$2.4 million less than the MEO's cost estimate, AETC announced on 17 August 2000 the tentative determination of contract award to the two contractors.¹⁴⁴ In accordance with the AAP provisions and timeline in AFI 38-203, nine Lackland AFB employees who had participated on the MEO study team challenged numerous items related to MEO costing, as well as the SSA's directed increase in the number of FTE positions and the contractor's proposed costs, by filing an appeal with the AAP Authority on 15 September 2000.¹⁴⁵

Previously, in April 2000, the AETC Commander had appointed the AETC Director of Plans and Programs as the AAP Authority for the Lackland AFB cost comparison

¹⁴³ DOD IG REPORT, *supra* note 1, at 18. As the DoD IG pointed out, this certification did not comply with the Supplemental Handbook or the DoD Interim Guidance because the team leader was not organizationally independent of the function under study. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. K.3.; DOD INTERIM GUIDANCE, *supra* note 25, attach. 5, para. 4. The individual who certified prior versions of the cost comparison form, refused to sign because of his disagreement with the SSA's directed increase of FTE positions. The MEO study team leader signed the form in order to meet the submission deadline. DOD IG REPORT, *supra* note 1, at 18.

¹⁴⁴ *Am. Fed'n Gov't Employees, Local 1367 v. United States*, 2001 U.S. Dist. LEXIS 4044, at *8 (W.D. Tx. Mar. 6, 2001); DOD IG REPORT, *supra* note 1, at 3. The combined proposals of L21 Consolidated and Phoenix Mgmt., following adjustments for contract administration and one-time conversion costs, totaled \$336.4 million. The MEO's cost estimate totaled \$338.8, factoring in the minimum \$10 million conversion reduction required by the Supplemental Handbook, pt. I, ch. 4, para. A.1, to ensure the Government does not convert to contractor performance for marginal cost savings. DOD IG REPORT, *supra* note 1, at 3.

¹⁴⁵ *Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *10; DOD IG REPORT, *supra* note 1, at 3, 21.

competition and all future Circular A-76 studies at bases within AETC.¹⁴⁶ Later in September 2000, the AAP Authority appointed three civilians from AETC to serve on the AAP Review Team.¹⁴⁷ Also participating on the review team, as advisors were the contracting officer responsible for the Lackland A-76 solicitation and an AETC Program Office individual that had been involved in the oversight of the Lackland AFB competition.¹⁴⁸

Following the Review Team's deliberations and review, the APP Authority sustained two issues challenged by the employees, which required a recalculation of the cost comparison figures.¹⁴⁹ On 24 October 2000, the AAP Authority announced that after the recalculation the MEO cost estimate was approximately \$657,000 less than the contractors' combined

¹⁴⁶ DOD IG REPORT, *supra* note 1, at 21. Recall that the AETC A-76 program office, an office that fell under the responsibility of the Director of Plans and Programs, had been charged with monitoring the progress of the Lackland AFB cost comparison study. See *supra* note 124 and accompanying text. Moreover, noted the DoD IG, the AAP Authority (a brigadier general) was subordinate to the appointed SSA (a lieutenant general) creating an apparent conflict of interest and the AAP Authority should have been from another major command and senior in rank to the SSA. DOD IG REPORT, *supra* note 1, at 21.

¹⁴⁷ *Id.* In the DoD IG's opinion, the staffing of the AAP Review Team (three members) was insufficient for this complex review and stated the team members were inadequately trained and operating under unrealistic time constraints. *Id.*

¹⁴⁸ *Id.* The DoD IG team found the participation of these individuals "compromised the appearance of independence and impartiality of the administrative appeal process." *Id.* at 22. Moreover, the DoD IG stated their participation was inconsistent with the DoD Interim Guidance that provided that anyone with previous involvement in the A-76 cost comparison under review are ineligible to serve on an administrative appeal board. *Id.* As the DoD IG notes, the Interim Guidance does not address "advisors," which the individuals in question here served as. They crossed the line here, according to the DoD IG, by actively participating in review team meetings.

¹⁴⁹ DOD IG REPORT, *supra* note 1, at 21.

proposal, therefore the initial tentative decision was reversed in favor of in-house performance.¹⁵⁰

Not surprisingly, L21 Consolidated filed a protest with the GAO on 6 November 2000, and supplemented it on 13 November 2000, raising six allegations of impropriety in the Air Force's decision declaring the MEO winner of the cost comparison.¹⁵¹ The contracting officer's statement, responding to the protest allegations, concluded one of L21 Consolidated's six allegations had merit.¹⁵² Additionally, on 28 November 2000, the Deputy Assistant Secretary of the Air Force (Contracting) recommended AETC decrease the contractors' proposed target fee by 35% based on guidance in AFI 38-203.¹⁵³ As a result, in a letter to GAO on 13 December 2000, the Air Force explained that based on its review of the protest allegations, adjustments to the cost comparison would be made resulting in "a decision favoring performance of the workload by contract."¹⁵⁴ Given the Air Force's stated corrective action, GAO dismissed L21 Consolidated's protests as "academic."¹⁵⁵

¹⁵⁰ *Id.* at 3; *Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *11.

¹⁵¹ DOD IG REPORT, *supra* note 1, at 3, 23; *Lackland 21st Century Servs. Consolidated – Protests and Costs*, B-285938.6, 2001 U.S. Comp. Gen. LEXIS 108 (July 13, 2001). Phoenix Management also apparently filed a protest with GAO in the interim, however, there is not a reported GAO opinion. *See Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *13.

¹⁵² DOD IG REPORT, *supra* note 1, at 23. The contracting officer determined the AAP Review Team and Authority erroneously reduced the MEO by seven FTE positions. The contracting officer's finding was supported by an AETC requested external review, whereby Air Force organizations independent of AETC reviewed the protest allegations and provided conclusions. *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Lackland 21st Century Servs. Consolidated – Protests and Costs*, 2001 U.S. Comp. Gen. LEXIS 108 at *3. Based on the review of the protest allegations and resulting adjustments, the revised cost comparison demonstrated the total MEO cost estimate was \$337.9 million and the contractor proposals were a combined

By this time the Texas Congressional delegation began to voice its concerns over the reliability of the Air Force's decision and, in a 15 December 2000 letter to the Secretary of the Air Force, requested a delay in award of the contracts to L21 Consolidated and Phoenix Mgmt. until the completion of a DoD Inspector General (IG) investigation.¹⁵⁶ On 20 December 2000, the Deputy Secretary of Defense requested the DoD IG review the Lackland AFB Circular A-76 competition, noting that "the potential impact of an A-76 action on the dedicated Government workforce requires the assurance that the A-76 process is fully respected, not only to maintain fairness during the process, but also to assure the appearance of fairness."¹⁵⁷

On a different front, following the Air Force's second reversal in favor of the private contractors, the nine MEO employees and the American Federation of Governmental Employees, Local 1367, the bargaining unit representative for federal employees at Lackland AFB, filed a motion for a temporary restraining order (TRO) in the U.S. District Court of Western Texas, seeking injunctive relief to enjoin the Air Force from awarding the contracts, alleging the Air Force violated applicable regulations when the AAP Authority reversed his

total of \$329.2 million, including adjustments for contract administration and one-time conversion costs. DOD IG REPORT, *supra* note 1, at 3.

¹⁵⁵ *Lackland 21st Century Servs. Consolidated – Protests and Costs*, 2001 U.S. Comp. Gen. LEXIS 108 at *4. Under FAR § 33.102(b)(1), the GAO encourages agencies to take corrective action with respect to a protest in the event the agency determines the challenge has merit. Additionally, under the Air Force Federal Acquisition Regulations (AFFAR) § 33.102, the guidance is even stronger, requiring the contracting officer to "immediately contact the protester to make sure the basis of the protest is fully understood, thoroughly consider its merits, and take appropriate action." *Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *17.

¹⁵⁶ DOD IG REPORT, *supra* note 1, at 4; Sig Christenson, *Lackland Draws Pentagon Eye; Lawmakers Ask for Delay in Signing of Contract*, SAN ANTONIO EXPRESS-NEWS, Dec. 19, 2000, at 1B.

¹⁵⁷ DOD IG REPORT, *supra* note 1, at 4. The DoD IG's objective in conducting the audit was "to determine whether the Air Force fairly and impartially conducted the public/private competition at Lackland." *Id.*

24 October 2000 decision to keep the work in-house.¹⁵⁸ The district court granted the TRO, which expired on 6 January 2001, however dismissed the suit on 7 March 2001 determining the employees and union lacked standing to challenge the Air Force's competitive sourcing decision.¹⁵⁹

Dismissal of the district court suit did not end matters, however. In May 2001, the DoD IG issued its long-awaited report of investigation into the Lackland AFB cost comparison study.¹⁶⁰ The DoD IG concluded the competition "did not achieve supportable results" and "lacked credibility," finding the IRO and source selection evaluations of the MEO flawed and citing the AAP for failing to reasonably assess the merits of the appeal issues raised by the affected employees.¹⁶¹ While the DoD IG required no specific course of corrective action by the Air Force, it provided options which included: canceling the solicitation and reinitiating the competition; modifying the solicitation and PWS and requesting revised

¹⁵⁸ *Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *20; *Lackland 21st Century Servs. Consolidated – Protests and Costs*, 2001 U.S. Comp. Gen. LEXIS 108 at *4; Sig Christenson & Maro Robbins, *Lackland Pact Signing Delayed Pending Reviews; Air Force Handed Restraining Order by Federal Judge*, SAN ANTONIO EXPRESS-NEWS, Dec. 21, 2000, at 1A.

¹⁵⁹ *Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *20. For a discussion of the lack of standing of federal employees and unions to challenge Circular A-76 competitive study decisions in federal courts, see *infra* Part III.B-C.

¹⁶⁰ DOD IG REPORT, *supra* note 1. Previously, the Air Force had informed DoD that the Air Force would refrain from awarding the contracts until the completion of the DoD IG review. See *Lackland 21st Century Servs. Consolidated – Protests and Costs*, 2001 U.S. Comp. Gen. LEXIS 108 at *5 n. 4. Demonstrating the frustration level of the contractors involved in this case, on 11 May 2000, L21 Consolidated filed a second protest with GAO, claiming the Air Force had improperly delayed taking the corrective action it had promised at the time of its original protest in December 2000 and alleging the Air Force had abdicated its decision-making responsibilities in the face of congressional and other pressure. *Id.* at *12. Denying the protest, GAO found it reasonable for the Air Force to wait until completion of the DoD IG review before proceeding, given the complexity of the issues involved and the potential disruption that could follow a decision to outsource a number of civilian positions. *Id.*

¹⁶¹ DOD IG REPORT, *supra* note 1, at i; Sig Christenson, *Probe Says Contract Was Handled Badly*, SAN ANTONIO EXPRESS-NEWS, May 15, 2001, at 1B.

proposals; directing the SSA to review again the directed increase of FTE positions to the MEO and appoint a new AAP Authority; or directing a new AAP Authority and Review Team to examine the appeal issues raised.¹⁶²

In response to the DoD IG's report, AETC prepared a rebuttal and, on 28 June 2001, the Air Force requested the Air Force Audit Agency (AFAA) review the cost comparison decision.¹⁶³ Following its limited review, the AFAA concluded and informed the Air Force that "the Air Force would be at risk to award a workload to the MEO or the best value offeror because of unresolved issues that could materially affect the cost comparison outcome."¹⁶⁴ Based on this information, the Air Force reversed course once again and announced on 27 August 2001 that the solicitation was cancelled and the cost comparison study would be reinitiated.¹⁶⁵ Ten days later, L21 Consolidated filed yet another protest with the GAO, arguing the Air Force lacked a reasonable basis for canceling the solicitation.¹⁶⁶ The GAO dismissed the protest finding it reasonable for the Air Force to seek additional review from its own audit agency given the prior history of the competition and determining the Air Force

¹⁶² DOD IG REPORT, *supra* note 1, at i-ii.

¹⁶³ Lackland 21st Century Servs. Consolidated, B-285938.7, B-285938.8, 2001 U.S. Comp. Gen. LEXIS 175, at *6 (Dec. 4, 2001).

¹⁶⁴ *Id.* (quoting the AFAA report). Under the Army, Navy, and Marine Corps regulations, a review by the service audit agency would have been required given the number of FTE positions involved in this study. *See supra* note 55 and accompanying text.

¹⁶⁵ *Lackland 21st Century Servs. Consolidated*, 2001 U.S. Comp. Gen. LEXIS 175 at *6. Sig Christenson, *Lackland Contract Back to Square 1*, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 2001, at 1A.

¹⁶⁶ *Lackland 21st Century Servs. Consolidate*, 2001 U.S. Comp. Gen. LEXIS 175 at *2. More specifically, L21 Consolidated challenged the procedural propriety of the AFAA review, claiming it was neither authorized nor appropriate in the Circular A-76 process and that the AFAA review was too limited in time and scope. *Id.*

reasonably concluded several problems with the solicitation contributed to a flawed private-sector competition.¹⁶⁷

While the ultimate decision in the Lackland AFB competitive sourcing case resulted in the Air Force canceling the solicitation, ensuring the continued federal employment of more than 1000 civilian employees at least for the short term, it took a small “act of Congress”¹⁶⁸ to get an “independent”¹⁶⁹ review of the issues in the case. Many have argued that to sufficiently protect federal employees at risk of losing their jobs due to competitive sourcing studies and to ensure taxpayers will indeed receive savings when converting commercial activities from in-house to contract performance, it is necessary to grant federal employees and/or their union representatives standing at GAO or in the federal courts to challenge Circular A-76 competitive sourcing decisions.¹⁷⁰ Indeed, in the midst of the controversy surrounding the Lackland AFB cost comparison, Rep. Charles Gonzalez of Texas introduced legislation in the House of Representatives that would deem recognized labor unions representing DoD employees “interested party” for purposes of protesting Circular A-76 decisions at GAO and in the federal courts.¹⁷¹ Whether a formal “act of Congress” is

¹⁶⁷ *Id.*

¹⁶⁸ While obviously not a formal act of Congress, the DoD IG did conduct its review at the request of the Texas Congressional delegation. DoD IG REPORT, *supra* note 1, at 4

¹⁶⁹ As both the DoD IG and the AFAA fall under the direction of DoD, technically neither are “independent” organizations from AETC and Lackland AFB.

¹⁷⁰ *See, e.g.,* Shriver, *supra* note 13; Charles Tiefer & Jennifer Ferragut, *Letting Federal Unions Protest Improper Contracting-Out*, 10 CORNELL J.L. & PUB. POL. 581 (2001); Jayna Richardson, Comment, *Outsourcing & OMB Circular A-76: Sixth Circuit Opens the Door to Federal Employee Challenges of Agency Determinations*, 28 PUB. CONT. L.J. 203 (1999).

¹⁷¹ *See* discussion *infra* at Part III.D.

necessary and whether it would be beneficial to the Circular A-76 competitive sourcing process, requires a brief inquiry of the current state of the law with respect to standing for federal employees and their union representatives.

III. Standing of Federal Employees/Unions

Standing to challenge Circular A-76 competitive sourcing decisions has eluded federal employees and their union representatives for many years. Be it at GAO, in the Court of Federal Claims (COFC), or in the federal district courts, federal employees and the unions representing them have repeatedly had their Circular A-76 challenges dismissed for lack of standing. While some argue the GAO and the courts have simply read and applied relevant statutes too narrowly in unjustifiably denying employees and unions standing to challenge Circular A-76 competitive sourcing decisions,¹⁷² a review of the cases shows their decisions and rationales are supportable by the language and legislative history of relevant statutory law.

A. Standing to Protest at GAO

The GAO has continued to consider a reasonable number of protests each year from contractors challenging Circular A-76 competitive sourcing decisions favoring in-house performance. In a long line of cases, the GAO has stated that when agencies use Circular A-76 competitive sourcing procedures, and, as a result, the federal procurement system in

¹⁷² See e.g., Shriver, *supra* note 13; Tiefer & Ferragut, *supra* note 170; and Richardson, *supra* note 170.

determining whether to outsource or perform in-house a commercial activity, it will consider a private-sector offeror's "protest alleging that the agency has not complied with the applicable procedures in its selection process or has conducted an evaluation that is inconsistent with the solicitation criteria or it is otherwise unreasonable."¹⁷³

But the GAO has just as consistently declined to consider federal employee and union protests challenging agency cost comparison decisions under Circular A-76.¹⁷⁴ Most recently, in June 2000, the GAO once again declined to consider the protest of affected federal employees and their union representatives challenging an agency competitive sourcing decision. In *American Federation of Government Employees, Local 987*, the protestors sought to challenge the Defense Logistic Agency's (DLA) decision, pursuant to Circular A-76, to award a contract to the successful private-sector offeror. Finding the protestors were not "interested parties" as defined under the Competition in Contracting Act of 1984 (CICA)¹⁷⁵ and thus lacked standing, GAO dismissed the protest.¹⁷⁶

The GAO explained that under CICA, as implemented by GAO's Bid Protest Regulations,¹⁷⁷ "interested party" is defined as "an actual or prospective bidder or offeror

¹⁷³ See e.g., *Trajen, Inc.*, B-284310, B-284310.2, 2000 U.S. Comp. Gen. LEXIS 44 at *5 (Mar. 28, 2000).

¹⁷⁴ See, e.g., *Fed. Employees Metal Trades Council, Save Our Jobs Committee*, B-218113, Feb. 6, 1985, 85-1 CPD ¶ 151; *Nat'l Fed'n Fed. Employees*, B-225335.2, Feb. 5, 1987, 87-1 CPD ¶ 124; *In re Roach*, B-227553.2, July 17, 1987, 87-2 CPD ¶ 59.

¹⁷⁵ 31 U.S.C. §§ 3551-3556 (2000); Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 10, 31, and 41 U.S.C.).

¹⁷⁶ B-282984.2, 2000 U.S. Comp. Gen. LEXIS 83 (June 7, 2000).

¹⁷⁷ 4 C.F.R. Pt. 21 (1996).

whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”¹⁷⁸ Turning to the Federal Acquisitions Regulations (FAR) and its definitions of “offer”¹⁷⁹ and “contract,”¹⁸⁰ GAO concluded that, since the MEO management plan is not submitted in response to a solicitation and that no contract is awarded if the agency determines it is more cost effective to perform the work in-house, “no individual or entity associated with the proposed performance of the required services in-house can be considered an actual or prospective ‘offeror,’ and accordingly...cannot be considered ‘interested parties’ under CICA and our Bid Protest Regulations.”¹⁸¹

The GAO also noted that even prior to the passage of CICA it had routinely dismissed federal civilian employee and union protests challenging agency decisions under Circular A-76.¹⁸² Moreover, the GAO said, there was “a lack of identity between” the interests of federal employees and unions “and the interest of the entity competing under the procurement,” just like individual employees of disappointed bidders/offerors and unions

¹⁷⁸ *Am. Fed’n Gov’t Employees, Local 987*, 2000 U.S. Comp. Gen. LEXIS 83 at *6-7.

¹⁷⁹ FAR, *supra* note 50, § 2.101 (defining “offer” as “a response to a solicitation that, if accepted, would bind the offeror to perform the resulting contract”).

¹⁸⁰ *Id.* (defining “contract” as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them”).

¹⁸¹ *Am. Fed’n Gov’t Employees, Local, 987*, 2000 U.S. Comp. Gen. LEXIS 83 at *8-9.

¹⁸² *Id.* See, e.g., *Taxpayers Generally and Federal Employees of Fort Eustis, Virginia*, B-210188, 1983 U.S. Comp. Gen. LEXIS 1798 (Jan. 17, 1983). In this pre-CICA protest, GAO stated it has “repeatedly declined to render decisions concerning the propriety of an agency’s determination under A-76 to contract out instead of performing work in-house. These determinations are regarded as beyond the scope of our bid protest decision function because the provisions are matters of executive branch policy which do not create legal rights or responsibilities.” *Id.* at *1.

representing employees of private sector contractors, who had consistently been found not to be “interested parties” for purposes of filing protests with the GAO.¹⁸³

The GAO also found unpersuasive the protestors’ contention that because the FAIR Act “equates agency employees and their representatives to ‘actual or prospective offerors,’” the GAO should “find that displaced employees and their unions have standing to protest contracting out decisions.”¹⁸⁴ After reviewing the FAIR Act’s legislative history and the express language of the statute, the GAO concluded nothing suggested the Act’s use of the term “‘interested party’ was intended to extend beyond the context in which it appears, so as to alter the definition of that term as set forth in CICA.”¹⁸⁵

While GAO reads strictly CICA’s definition of “interested party,” when one also considers the purpose of CICA is to promote competition among contractors in the procurement of government goods and services,¹⁸⁶ GAO’s interpretation is indeed consistent with the language and intent of Congress. GAO correctly concluded no statutory basis

¹⁸³ *Am. Fed’n Gov’t Employees, Local 987*, 2000 U.S. Comp. Gen. LEXIS 83 at *12.

¹⁸⁴ *Id.* at *15.

¹⁸⁵ *Id.* at *16. The GAO also questioned whether unions and federal employees as “interested parties” under the FAIR Act could even challenge the mandated inventory lists outside the Act’s agency administrative appeals process. *Id.* at *15 n.4 (citing S. REP. NO. 105-269, at 9 (1998)). The Office of Management and Budget, under the Clinton Administration at least, seemed to hold a similar position regard review outside the agency administrative appeal process provided by Congress under the Act. See TRANSMITTAL MEMO NO. 20, *supra* note 4, app. ¶4. Cf. *Am. Fed’n Gov’t Employees, Local 1482 v. United States*, 46 Fed. Cl. 586, 598 n. 22 (Ct. Fed. Cl. 2000) (citing the pre-FAIR case of *Nat’l Air Traffic Controllers Assoc. v. Pena*, 944 F. Supp. 1337, at 1345 (N.D. Ohio 1996), which held federal employees had standing to challenge an agency’s initial decision to compete “inherently governmental,” air traffic control positions).

¹⁸⁶ In its report in support of CICA, the Committee on Government Operations cited the government’s failure to use competitive procedures in the procurement of goods and services, to the detriment of private contractors, small and large. H.R. REP. NO. 98-1157, at 2 (1984).

existed for granting standing to the federal employees and their unions. But as GAO noted in its decision, and as others have suggested GAO doing in Circular A-76 cases,¹⁸⁷ it can consider non-statutory based protests pursuant to 4 C.F.R. §21.13, when the agency agrees in writing.¹⁸⁸ The DLA did not make such a request, however, in *American Federation of Government Employees, Local 987*.¹⁸⁹

B. Standing to Protest in the Court of Federal Claims

As with challenges at GAO, attempts by affected federal employees and their union representatives to challenge Circular A-76 competitive sourcing decisions in the COFC have also been denied. Any glimmer of hope for a change in these prospects appears dim following a recent Court of Appeals for the Federal Circuit (CAFC) decision affirming, though on different grounds, that affected federal employees and their unions lack standing to make their challenge in the COFC.

In *American Federation of Government Employees, Local 1482*, affected employees and their unions sought to challenge another DLA decision to award, pursuant to an A-76 cost comparison study, a contract to a private-sector offeror.¹⁹⁰ The court dismissed the suit for

¹⁸⁷ Tiefer & Ferragut, *supra* note 170, at 601.

¹⁸⁸ *Am. Fed'n. Gov't Employees, Local 987*, 2000 U.S. Comp. Gen. LEXIS 83 at *12 n. 2. Certain provisions of 4 C.F.R. Pt. 21 do not apply to nonstatutory protests; specifically, section 21.8(d) dealing with recommendations for the payment of costs and the "CICA stay" provisions. 4 C.F.R. § 21.13(b) (1996).

¹⁸⁹ *Am. Fed'n Gov't Employees, Local 987*, 2000 U.S. Comp. Gen. LEXIS 83 at *12 n. 2

¹⁹⁰ 46 Fed. Cl. 586 (2000). The union and employees, as well as the contractor, submitted appeals to the AAP Authority. Though the AAP Authority sustained a number of the employees' challenged items and re-calculated the costs based on the effects of these corrections, the AAP Authority still determined tentative

lack of standing finding the protestors were not “interested parties” under the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA).¹⁹¹

As the ADRA does not define “interested party,” the court first addressed the issue of whether Congress intended to apply the Administrative Procedures Act (APA)¹⁹² standing requirement or that of the more restrictive CICA and GAO standard.¹⁹³ Reviewing the language of the ADRA, its purpose, and the legislative history, the court determined COFC’s jurisdiction under the ADRA was the same as that of the federal district courts and therefore

award to the contractor represented an adequate cost savings to the Government. *Id.* at 590. At COFC the protestors sought to challenge the Government’s alleged noncompliance with the cost comparison requirements of 10 U.S.C. § 2462(b), the FAIR Act, and Circular A-76. *See id.* at 590.

¹⁹¹ *See id.* at 591. Codified at 28 U.S.C. § 1491(b)(1), the ADRA amendment to the Tucker Act granted the Court of Federal Claims jurisdiction over both pre- and post-award bid protests, as existed in the federal district courts. *Id.* For a brief explanation of the otherwise long and complicated history of judicial review in government procurement decisions, see *Impreza Constructioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331-34 (Fed. Cir., 2001). More in-depth descriptions and discussions can be found at Jennifer Gartner, Comment, *The Meaning of “Interested Party” Under 28 U.S.C. § 1491*, 29 PUB. CONT. L.J. 739 (2000) and Frederick W. Claybrook, Jr., THE INITIAL EXPERIENCE OF THE COURT OF FEDERAL CLAIMS IN APPLYING THE ADMINISTRATIVE PROCEDURE ACT IN BID PROTEST ACTIONS – LESSONS LEARNED ALL OVER AGAIN, 29 PUB. CONT. L.J. 1 (1999).

¹⁹² 5 U.S.C. § 702. Under the APA, Congress granted standing to parties “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute....” *Id.* The D.C. Court of Appeals interpreted this provision to extend standing to “disappointed bidders” in Government procurement actions. *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 869-870. This view, commonly referred to as the “*Scanwell* doctrine,” was uniformly adopted by the remaining federal circuits and was recognized by Congress in the legislative history to the Federal Courts Improvement Act of 1982. *See Nat’l Fed. of Fed. Employees v. Cheney*, 883 F.2d 1038, 1052 (D.C. Cir. 1989). While the court’s language in *Scanwell* was broadly phrased, in later cases the courts made clear that “disappointed bidder” status only applied only to those bidders who were within the “‘zone of active consideration’ for the bids award.” *Id.* (citing *National Maritime*, 824 F.2d 1228, 1237-38 n.12 (D.C. Cir. 1987); *see also* Michael F. Mason, *Bid Protests and the U.S. District Courts – Why Congress Should Not Allow the Sun to Set on an Effective Relationship*, 26 PUB. CONT. L.J. 567, 574 (1997).

¹⁹³ *Am. Fed’n Gov’t Employees, Local 1482*, 46 Fed. Cl. 586, 592.

anyone who would have had standing under the APA in district court was an “interested party” under the ADRA.¹⁹⁴

The court then turned to the three-pronged standing test established under the APA.¹⁹⁵ While suggesting the protestors’ alleged injuries could be fairly traced to a procurement decision, the court determined the employees and union did not fall within the “zone of interests” of the FAIR Act or 10 U.S.C. 2462¹⁹⁶ and therefore were not “interested parties” under the ADRA.¹⁹⁷ Though finding section 3(b) of FAIR included federal employees and unions in its definition of “interested parties” who can challenge inclusions and/or omissions of particular commercial activities on, or omitted from, a list under section 2(a), the court determined Congress, under section 2(d)-(e), excluded for such purposes an agency’s decision to actually contract-out to a private-sector source.¹⁹⁸ The court went on to say that “[i]f Congress intended to provide ‘interested party’ standing to challenge cost comparisons

¹⁹⁴ *Id.* at 595.

¹⁹⁵ *Id.* The court stated the APA required, as established by case law, a showing the plaintiffs: (1) suffered sufficient “injury in fact;” (2) that the injury is “fairly traceable” to the agency’s action and “likely to be redressed by a favorable decision;” and (3) that their interests are “arguably within the zone of interests to be protected or regulated by the statute...in question.” *Id.* The first two elements comprise the Constitutional requirements of Article III for an actual “case or controversy” and the third element is a prudential standing requirement. *See Nat’l Fed’n Fed. Employees v. Cheney*, 883 F.2d 1038, 1041-42 (D.C. Cir. 1989).

¹⁹⁶ In an effort to remedy an “undue built-in ‘bias’ favoring in-house performance of services” in competitive sourcing studies, Congress, in the 1987 DoD Authorization Act required DoD to obtain certain supplies and services from the private sector if a “realistic and fair” cost comparison analysis indicated that a private source could provide the supply or service at a lower cost. *See Cheney*, 883 F.2d at 1050. Reviewing the legislative history of the Act, the court determined the phrase “realistic and fair” was included “to protect the integrity of the contracting out process by resolving ‘handicaps’ against government contractors....” *Id.*

¹⁹⁷ *Am. Fed’n Gov’t Employees, Local 1482*, 46 Fed. Cl. at 597.

¹⁹⁸ *Id.* at 597-98.

pursuant to a public-private competition under section 2(e), Congress would not have expressly limited such standing to challenges to the list.”¹⁹⁹

Reviewing the legislative history of the ADRA, the court found Congress’ purpose in enacting the law was to encourage the federal government to rely upon the private sector, to the “maximum extent feasible,” to provide commercial activities and functions.²⁰⁰ Moreover, if required to conduct a public-private cost comparison, agencies were to assure that “all costs...are considered and that the costs considered are realistic and fair” to guarantee the “best value to the American taxpayer,” not the continued employment of federal workers.²⁰¹ Finally, COFC also recognized that courts have uniformly rejected arguments of federal workers and their unions that their interests in maintaining their jobs fell within the “zone of interests” of 10 U.S.C. 2642(b), which contains “identical” cost comparison language to that found in section (2)(e) of the FAIR.²⁰²

¹⁹⁹ *Id.* at 598. In further support of its reasoning that Congress intended to apply “interested party” only to challenges of the commercial activities “list,” the court noted Congress’ awareness and recognition of Circular A-76, and the AAP rights it affords “interested parties,” when it enacted the FAIR. *Id.* at 598 n.23 (quoting Sen. Thomas, 144 CONG. REC. at S9104).

²⁰⁰ *Id.* at 597.

²⁰¹ *Id.* at 597, 599 (quoting Sen. Thomas, 144 CONG. REC. at S9104).

²⁰² *Id.* at 599 (citing *Am. Fed’n Gov’t Employees, Local 2119 v. Cohen*, 171 F.3d 460, 470-71, 473 (7th Cir. 1999)). In *Am. Fed’n Gov’t Employees, Local 2119*, the Seventh Circuit held the interests of the displaced federal arsenal workers fell outside the “zone of interests” of both 10 U.S.C. 2462(b) and 10 U.S.C. §2304, relying upon the analysis and rationale in *Nat’l Fed’n of Fed. Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989). The Court did find, however, the arsenal workers’ interests fell within the “zone of interests” of the Arsenal Act, 10 U.S.C. 4532 (1994). Unlike the other statutes relied upon by the arsenal’s workers, the Arsenal Act, the court determined, had the purpose of “preserving the government’s in-house military production capabilities” and finding the “link between maintaining a ready workforce and preserving federal jobs unmistakable.” *Am. Fed’n Gov’t Employees, Local 2119*, 171 F.3d at 473-74.

Reviewing *de novo* the COFC decision, CAFC affirmed the lower court's dismissal of protestors challenge for lack of standing under the ADRA, but did so on alternate, and ultimately, more stringent grounds.²⁰³ Similar to the lower court, CAFC surveyed the legislative history of the ADRA to determine Congress' intended meaning of the undefined term "interested party." It concluded Congress intended to confer upon COFC the same "*Scanwell* jurisdiction" to hear post-award protests previously exercised and considered by the federal district courts, the majority of such cases being brought by plaintiffs that were "disappointed bidders."²⁰⁴ Guided by the principle that waivers of sovereign immunity are to be construed narrowly, the court first recognized that although Congress used the APA's standard of review in another section of the ADRA, it did not adopt the APA's broader standing provision, using instead the term "interested party" to define standing.²⁰⁵ Further, the court reasoned, Congress used this same term under CICA, suggesting Congress intended the same standing requirements to apply under the ADRA.²⁰⁶ The court, therefore, defined the term "interested party" strictly in accordance with CICA and dismissed the suit since the employees and their union were not "actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract."²⁰⁷

²⁰³ *Am. Fed'n Gov't Employees v. United States*, 258 F.3d 1294, 1299 (Fed. Cir. 2001), *cert. den.*, 2002 U.S. LEXIS 529 (U.S. Jan. 22, 2002) (No. 01-664).

²⁰⁴ *Id.* at 1300-01.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1302.

²⁰⁷ *Id.*

The result of the CAFC decision is that the same strict, CICA “interested party” standard applicable at GAO will also apply at COFC. It should provide uniformity in the two bid protest forums, however, such uniformity in the case of federal employees and unions seeking to challenge Circular A-76 decisions means they will have to look elsewhere for relief.

C. Standing to Protest in Federal District Court

As at GAO and the COFC, federal employees and unions seeking to challenge Circular A-76 decisions have found little success in the federal district courts. For several years the seminal case regarding the standing of federal employees and their union representatives to challenge Circular A-76 competitive sourcing decisions has been *National Federation of Federal Employees v. Cheney*.²⁰⁸

In *Cheney*, the Army, following a Circular A-76 competition for logistic support services at Ft. Sill, Oklahoma, tentatively announced award to the private contractor. In dismissing the union’s suit challenging the Army’s decision, the D.C. Circuit held the interests (i.e.,

²⁰⁸ 883 F.2d 1038 (D.C. Cir. 1989). Some have argued unions and federal employees may have standing to challenge Circular A-76 decisions in the Sixth Circuit. *See e.g.*, Tiefer & Ferragut, *supra* note 170, at 589; Richardson, *supra* note 170, at 219; and Lang, *supra* note 4, at 254-55. The argument is based on a Sixth Circuit decision that Circular A-76 provided sufficient legal standards under the APA to provide for judicial review. *Diebold v. United States*, 947 F.2d 787, 810 (6th Cir. 1991). The *Diebold* case marked a departure from a line of cases that had dismissed employee challenges to Circular A-76 competitions on grounds the APA did not provide jurisdiction because the outsourcing decision fell within the “committed to agency discretion” exception of the APA. *See e.g.*, *Am. Fed’n Gov’t Employees, Local 2855 v. United States*, 602 F.2d 574, 583 (3rd Cir. 1979). But since the *Diebold* decision dealt only with the issue of subject matter jurisdiction, the Sixth Circuit remanded the case so the district court could address unresolved issues, specifically the issue of standing. *Diebold*, 947 F.2d at 811 n. 16.

preservation of jobs, benefits, and wages)²⁰⁹ of the union, and the federal employees it represented, were not only outside the “zone of interests”, but in fact “antithetical to” and “inconsistent with,” the statutes supporting Circular A-76,²¹⁰ as well as the prior legislative equivalent of 10 U.S.C. 2462(b).²¹¹

The court also found the union and employees did not qualify as “disappointed bidders” under the *Scanwell* doctrine, arguing, similar to GAO and CAFC, that since the union and employees did not bid on a contract, they “never placed themselves in the special relationship by which the government can bind them to the bid...[making] it impossible for them to be within the zone of active consideration.”²¹² Further, to the extent the union and federal

²⁰⁹ While Circular A-76 studies may involve the elimination of FTE positions, whether outsourced or retained in-house by implementing the MEO, the individuals in the eliminated positions are afforded some protection. For example, if the activity is outsourced, the Contractor must give the affected employees a “right-of-first-refusal” for employment openings under the contract in positions for which the employees are qualified. SUPPLEMENTAL HANDBOOK, *supra* note 4, pt. I, ch. 3, para. G.4; FAR, *supra* note 50, § 7.305 and § 52.207-3. Additionally, many affected employees are able to transfer to other positions within the agency or to other federal organizations. See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: EFFECTS OF A-76 STUDIES ON FEDERAL EMPLOYEES’ EMPLOYMENT, PAY, AND BENEFITS VARY, REPORT NO. GAO-01-388 (MAR. 16, 2001) (reporting about half of the federal employees in the three Circular A-76 studies analyzed by GAO remained in the federal service with similar pay and benefits).

²¹⁰ *Cheney*, 883 F.2d at 1043-50. The court first reviewed the language and legislative history of the Budget and Accounting Act of 1921, as amended at 31 U.S.C § 101, and concluded that when Congress established the Act it sought to reform the federal government’s budgeting process, and though realizing the reformation could result in the loss of some federal jobs, it still did not provide terminated federal employees with remedial rights. *Id.* at 1046-47. Similarly, the court surveyed the language and legislative history of the Office of Federal Procurement Policy Act Amendments of 1979, as amended at 41 U.S.C. §§ 401-420. The court pointed to language in the Committee Reports endorsing the Executive branch policy to rely on the private sector to ensure economy and efficiency. *Id.* at 1049 (citing S. REP. NO. 96-104 at 4 (1979) and H.R. REP. NO. 96-146 (1983)).

²¹¹ *Cheney*, 883 F.2d at 1050.

²¹² *Id.* at 1053-54.

employees' interest was to ensure governmental efficiency, the court found this interest was no greater than that of the generalized public.²¹³

Relying heavily upon the analysis and rationale in *Cheney*, the district court in *American Federation of Government Employees, Local 1367*²¹⁴ similarly dismissed the suit of the federal employees and union challenging the Lackland AFB Circular A-76 competitive sourcing study, as their interests did not fall within the "zone of interests" of the statutes relied upon by OMB in issuing Circular A-76.²¹⁵ Additionally, the court struck down the union and employees' argument that the Air Force violated provisions of the National Defense Authorization Act for FY2000; requiring the DoD agency conducting the competitive sourcing study to consult monthly with the affected federal employees during the development and preparation of the PWS and MEO.²¹⁶ Finding no evidence the Air Force had violated the statute's consultation requirements, the court summarily dismissed this argument.²¹⁷

While the *Cheney* rationale, and its acceptance in other federal jurisdictions, provides little hope for federal employees and unions to make Circular A-76 challenges in federal

²¹³ *Id.* at 1054.

²¹⁴ 2001 U.S. Dist. LEXIS 4044 (W.D. Tx. Mar. 6, 2001). For a discussion of the underlying facts of the case, see *supra* Part II.B. For additional recent federal court rulings following the *Cheney* holding and rationale, see *Am. Fed'n Gov't Employees, Local 2119 v. Cohen*, 171 F.3d 460, 470 (7th Cir. 1999); *Am. Fed'n Gov't Employees v. Babbitt*, 143 F. Supp. 2d. 927 (S.D. Ohio 2001); and *Am. Fed'n Gov't Employees, Local 1482 v. United States*, 46 Fed. Cl. 586 (Ct. Fed. Cl. 2000).

²¹⁵ *Am. Fed'n Gov't Employees, Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *30-37.

²¹⁶ *Id.* at *37-38 (citing 10 U.S.C. § 2467(b)(1)(A) (2000)).

²¹⁷ *Id.* at *39.

district court, the fact Congress failed to extend the bid protest jurisdiction of the federal district courts under the ADRA of 1996 makes the picture even more bleak. With the passage of the ADRA, Congress included a “sunset” provision terminating the jurisdiction of the federal district courts over 28 U.S.C. § 1491(b) bid protest actions effective 1 January 2001, unless Congress took action to extend the applicability of such jurisdiction.²¹⁸ Since Congress took no action by the deadline, the federal district courts arguably no longer exercise jurisdiction over or have the authority to review any “disappointed bidder” cases.²¹⁹

D. Proposed Legislation Granting “Interested Party” Status to Unions

During the waning days of the Lackland AFB competitive sourcing study, Rep. Charles Gonzalez proposed legislation to provide some federal employees standing to challenge Circular A-76 cost comparison decisions at GAO and the COFC.²²⁰ The proposed amendment to 10 U.S.C. § 2467 would deem a union representing DoD employees an “interested party” under CICA²²¹ and the ADRA²²² for “purposes of any action or determination” under Circular A-76, including “all the rights provided to such an interested party in connection with such an action or determination.”²²³ The proposed legislation is

²¹⁸ Pub. L. No. 104-320, § 12(d), 110 Stat. 3870 (1996).

²¹⁹ See Shriver, *supra* note 13, at 628 n.103.

²²⁰ H.R. 2227, 107th Cong. (2001).

²²¹ 31 U.S.C. §§ 3551-3556 (2000).

²²² 28 U.S.C. § 1491(b) (2000). Because of the “sunset” provision on the bid protest jurisdiction of the federal district courts, the proposed legislation would only grant standing to recognized unions in the COFC. See *supra* note 218 and accompanying text.

²²³ H.R. 2227, 107th Cong. (2001).

limited in that it only applies to labor unions of DoD employees, therefore, even under the proposed legislation non-DoD, federal employees and federal employees not part of the bargaining unit would not be covered. Calling the current Circular A-76 procedures “patently unfair” toward all federal employees, however, Rep. Gonzalez described the proposed legislation as “the first step toward leveling the playing field.”²²⁴

IV. Changes to Assure Respect for the Circular A-76 Process

As the Lackland AFB case highlights, problems in Circular A-76 competitive sourcing procedures generate added scrutiny, slow down an already lengthy process, and detrimentally effect the credibility of the program. With the Bush Administration pushing for still greater numbers of competitive sourcing studies, changes must be made to assure the A-76 process is respected. Some argue legislation granting standing to affected federal employees, and/or their union representatives, to challenge Circular A-76 decisions at GAO and the COFC is necessary to ensure the cost comparison process is realistic and fair. But less drastic and time consuming changes can, and should, be made by the Bush Administration and DoD.

A. Amend Circular A-76 and DoD Regulations to Permit Nonstatutory Protests at GAO

As permitted by the GAO Bid Protest Regulations, the GAO may consider non-statutory protests if requested by the agency.²²⁵ The Office of Management & Budget should amend

²²⁴ *Congressman Seeks to Improve DoD Workers' A-76 Rights*, FED. HUMAN RESOURCES WEEK, July 2, 2001, available at LEXIS, News Library, News Group File.

²²⁵ 4 C.F.R. 21.13(a) (1996); Tiefer & Ferragut, *supra* note 170, at 601.

the Supplemental Handbook to allow Executive agencies to request GAO consider the non-statutory challenges to competitive sourcing decisions brought by affected federal employees and, if represented, their unions. Specifically, OMB should amend the AAP provisions at Part I, Chapter 3, Paragraph K.7 to read, “The procedure does not authorize *judicial review* or an appeal outside the agency, *except on a non-statutory basis at the General Accounting Office (GAO) requested by the agency in accordance with applicable agency regulations*, nor does it authorize sequential appeals.” The Department of Defense could then change its governing regulations to set forth the limited circumstances when a military department could make such a request to GAO. For example, the applicable DoD and service regulations could limit such requests to competitive sourcing cases involving cost/technical trade-off procurement methods,²²⁶ with more than sixty-five FTE civilian positions under study.²²⁷ Additional conditions could be put in place, such as requiring the agency to also request GAO to invoke its “express options” under the Bid Protest Regulation in order to ensure a quicker resolution of the protest.²²⁸

By making such changes, OMB and DoD could immediately impact the fairness, and the appearance of fairness, for the Circular A-76 process. While contractors may argue permitting such additional, third-party review will be overly burdensome, it is much

²²⁶ See *supra* notes 50-58 and accompanying text.

²²⁷ See *supra* note 8.

²²⁸ See 4 C.F.R. § 21.10(a-b) (1996). In cases where GAO invokes the express option, a decision is required within sixty-five days of the filing of the protest. *Id.* at § 21.9(b). Even under its regular processing timeline, GAO must issue its decision within 100 days after the protest is filed. *Id.* at § 21.9(a). In FY 2001, GAO issued its decisions on average in seventy-nine days. *GAO Protest Docket Down 6 Percent, Sustain Rate 22 Percent in FY 2001*, BNA FED. CONT. REP. (Oct. 16, 2001).

preferable to, and less time-consuming, than congressional and agency requests for additional IG investigations and audits, as Lackland 21 Consolidated and Phoenix Mgmt. experienced in the Lackland AFB competitive sourcing study.²²⁹ Additionally, by taking the initiative, the Bush Administration may placate the calls for more drastic changes in the halls of Congress.²³⁰

B. Amend the Administrative Appeal Process

In addition to permitting limited non-statutory access to GAO for federal employees and unions to challenge Circular A-76 competitive sourcing decision, changes should be made to the AAP. While the DoD Interim Guidance sought to improve the AAP, several provisions should be amended to assure the A-76 process is fully respected.

Initially, DoD should amend its Interim Guidance to actually encourage the AAP Authority to review and correct any mistaken item discovered during the review, regardless of whether formally challenged by an interested party.²³¹ It should be the AAP Authority's goal to seek out and correct all identifiable errors regardless of whether raised by an interested party. While the AAP Authority should not be required to re-audit the cost comparison, it should nevertheless note and correct any errors, as provided under

²²⁹ See discussion *supra* Part II.B.

²³⁰ See discussion *supra* Part III.D.

²³¹ See *supra* notes 113-15 and accompanying text.

OPNAVINST 4860.7C,²³² if for no other reason than to create the appearance that the agency is concerned with properly conducting the study.

Additionally, as the Lackland AFB competitive sourcing study evidenced, experienced auditors should be involved in the process, either as IRO's or as part of the AAP Team. The Department of Defense should consider adopting procedures like those in the Army, Navy, and Marines, which call for the service audit agency to serve as the IRO in large competitive sourcing studies.²³³ Alternatively, DoD should consider requiring the utilization of the service audit agencies during the AAP, rather like the AFAA's unintended involvement in the Lackland AFB case.²³⁴ In all competitive sourcing cases, but especially larger ones involving cost/technical trade-off negotiated procurements, experienced auditors that are familiar with the Circular A-76 process are invaluable.

A final change to the AAP would require release of appeal information to all interested parties earlier in the process. Language similar to OPNAVINST 4860.7C, requiring the contracting officer to provide a copy of all appeals to other interested parties and receive inputs in response,²³⁵ should be adopted. Additionally, provision should be made, as in AFI 38-203, for release of draft appeal decisions to interested parties for review and comment, though such drafts should be provided in all competitive sourcing studies involving

²³² See *supra* note 113-14 and accompanying text.

²³³ See *supra* note 55 and accompanying text.

²³⁴ See discussion *supra* Part II.B.

²³⁵ See discussion *supra* Part II.A.2.c.

cost/technical trade-off methods with more than sixty-five FTES.²³⁶ Providing such information should improve the timing of a final decision, and, perhaps, increase the chances of resolution in the AAP. And if a limited protest right at GAO is granted to affected employees and their unions, AAP language like in OPNAVINST 4860.7C and AFI 38-203 and may increase the likelihood GAO invokes the “express option” procedures, resulting in a “quick” decision being rendered.

V. Conclusion

The Bush Administration’s current competitive sourcing goals are ambitious to say the least. To achieve these goals the Circular A-76 competitive sourcing process, which has come under increasing criticism, will need changes. As the recent cost comparison case at Lackland AFB illustrates, improvements are a must if the Circular A-76 process is to be a relevant and fair management tool for improving the efficiency, responsiveness, and customer satisfaction in governmental operations. In furtherance of its competitive sourcing goals, the Bush Administration should initiative steps now to assure respect for the fairness, and the appearance of fairness, in the Circular A-76 process. With the prospect of congressional action implementing more radical changes, OMB should amend Circular A-76 and allow federal employees and their union representatives the limited right of pursuing nonstatutory protests at GAO in certain larger and complex competitive sourcing cases. Additionally, by strengthening the AAP, DoD and the military departments may speed the resolution of disputes and make unnecessary additional review at GAO.

²³⁶ See discussion *supra* Part II.A.2.a.