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## Competition

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### A Revival of Public-Private Competitions Under Trump?



BY JOHN R. PRAIRIE AND CARA L. LASLEY

**D**uring his campaign, President Donald Trump repeatedly said that his administration will run the government like a business. His campaign was centered on this idea in large part, and the policies he has pursued since taking office have been consistent with this ideology. From a federal hiring freeze to large proposed budget cuts at some agencies, President Trump has made no secret of his desire to shrink the federal government. Although there has been a moratorium on public-private competitions for several years, Trump's election has renewed speculation of a return to A-76 competitions as a way to bring more private-sector

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#### Overview of Public-Private Competitions

The idea of public-private competitions started in 1966 under the Lyndon Johnson administration as a statement of federal policy in Office of Management and Budget (OMB) Circular A-76. The government should conduct competitions between public agencies and the private sector to determine who should perform commercial activities for the federal government, the circular states. A-76 differentiates between commercial activities and inherently governmental activities: commercial activities should be competed, while inherently governmental activities should not.

Inherently governmental activities cannot be outsourced because they are intimately related to the public interest. The term "inherently governmental function" is defined by statute and policy. The Federal Activities Inventory Reform (FAIR) Act defines an inherently governmental function as one "that is so intimately related to the public interest as to require performance by federal government employees." OMB Circular A-76 defines an inherently government function

similarly; an inherently governmental activity is “an activity that is so intimately related to the public interest as to mandate performance by government personnel.”

In September 2011, the Office of Federal Procurement Policy (OFPP) issued a policy letter providing guidance on how agencies should determine what kinds of work should be performed by government employees rather than private contractors. The OFPP policy letter retains the definition of inherently governmental function included in the FAIR Act and provides a list of examples. Inherently governmental functions include, among others, supporting budget preparation activities, providing support for development of policies, and conducting market research or drafting statements of work in support of an acquisition, according to the OFPP policy letter. The letter requires agencies to evaluate the nature of the work and the level of discretion associated with the performance of the work in determining whether the work is inherently governmental.

OMB Circular A-76 was last revised in 2003. The revised circular requires agencies to: (i) identify all activities performed by government personnel as either commercial or inherently governmental; and (ii) perform inherently governmental activities with government personnel. The circular also requires agencies to submit an annual inventory of activities deemed inherently governmental.

The revised circular details how public-private competitions are to be conducted. It contemplates two types of competitions: streamlined competitions and standard competitions. If there are 65 or fewer full-time employees involved, the agency has the option to conduct a streamlined competition — under which the government does not have to solicit the work. The agency simply determines the cost of outsourcing the work and compares it with the cost of keeping the work in-house. If performance by the government will cost less, government personnel will perform the work. Standard competitions, on the other hand, are more like typical government contract procurements. Agencies can use multiple procedures to conduct a standard competition, including sealed bidding, low-price technically acceptable, phased evaluation process and trade-off. Regardless of the chosen procedure, the government first develops a performance work statement (PWS) that details the required work. Then, the government creates a management plan to determine the government’s most efficient organization (MEO), which reflects the government’s in-house plan and cost to perform the commercial activity. Finally, the government compares its MEO and contractors’ bids to determine who can perform most efficiently.

If companies or agencies disagree with the results of the competition, both have the ability to file a protest at the Government Accountability Office (GAO). The GAO’s rules allow a losing contractor to protest, as it would be an actual offeror whose direct economic interest would be affected. The GAO’s rules also provide for a protest of an A-76 competition — or the decision to convert a governmental function without a competition — by an agency official or a person designated by a majority of employees performing the affected function.

### **Current Status of Public-Private Competitions**

There is a moratorium on A-76 competitions across the federal government. The Defense Department (DOD) in 2008 suspended ongoing public-private com-

petitions; the DOD has continually extended the moratorium since then. In 2009, Congress prohibited the initiation of any new public-private competitions throughout the rest of the federal government. No new public-private competitions have been held since 2009.

There was an attempt to end the moratorium last year. The Senate’s version of the National Defense Authorization Act (NDAA) for fiscal 2017 included language repealing the moratorium, but that language was removed from the final version. Ending the moratorium would require congressional approval.

Public-private competitions have always been a politically charged issue. Proponents say competition increases efficiencies and lowers costs. Public-private competitions resulted in \$7.2 billion in savings from 2003 to 2007, an OFPP annual report in May 2008 found. Proponents further argue that public-private competitions do not necessarily result in federal job loss, as the existing government workforce has won around 70 percent of the competitions.

Opponents of public-private competition dispute that the competitions save money and argue that this results in the loss of federal jobs. They also argue that savings reported by OFPP are not accurate because they overstate overhead costs of the in-house estimate. Opponents believe insourcing saves money and improves services because federal employees were more flexible and able to accommodate increases in demand.

### **Trump’s Potential Impact**

President Trump has been an advocate for privatization and reducing the size of the federal government. Although he has not specifically addressed the topic of public-private competitions, Trump has spoken in favor of privatizing several industries, such as the federal prison system, health services for veterans and public infrastructure. Ending the moratorium on public-private competitions would be in line with his other privatization policies.

Perhaps a signal that public-private competitions will be revived under his administration, Trump’s pick to lead the OMB, Mick Mulvaney, has long advocated for A-76 competitions. Mulvaney served as chair of the House Subcommittee on Contracting and Workforce. Mulvaney strongly criticized the Obama administration’s insourcing efforts in a 2011 hearing.

“Insourcing was initially sold as a way to save the Department of Defense as much as 40 percent,” Mulvaney said. “President Obama claimed that it would save as much as \$40 billion a year. However, after years of implementing this policy, the Department of Defense has admitted that they have not achieved significant cost savings.

“Continuing the policy of insourcing commercial functions without demonstrable cost savings increases the size and the cost of the federal government and moves us in exactly the wrong direction,” he added.

Mulvaney expressed an interest in reviving A-76 competitions as recently as July 2016, in a hearing on contracting fairness. Mulvaney will have the ability, as OMB director, to help shape the administration’s policies concerning public-private competitions. Under Mulvaney’s leadership, OFPP could revise OMB Circular A-76 to narrow the scope of inherently governmental functions that must be performed by government personnel and change the way A-76 competitions are conducted to favor private industry.

The current political climate seems ripe for a push to return to public-private competitions. Contractors and government employees alike should pay close attention

to such efforts, as they have the potential to rebalance the activities performed by the government in favor of the private sector.