Analysis&Perspective

The A-76 Commercial Activities Panel Report: Irreconcilable Differences Meet Mission Impossible

BY DAVID Z. BODENHEIMER

In his fabled journey to return home from the Trojan War, Odysseus was given the unenviable task of threading his vessel between the deadly whirlpools of Charybdis and the sailor-devouring, six-headed monster Scylla. No one had ever made this passage unscathed, and Odysseus' crew fared no better.

In Section 832 of the defense authorization act for fiscal year 2001 (Pub. L. No. 106-398), Congress launched the General Accounting Office (''GAO'') upon a similarly ill-fated mission to analyze and make recommendations regarding the commercial activities program and Office of Management and Budget (''OMB'') Circular No. A-76:

> (a) *GAO-Convened Panel*
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> The Comptroller General shall convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the Federal Government from Government personnel to a Federal contractor . . . .
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> (f) *Report*
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> Not later than May 1, 2002, the Comptroller General shall submit the report of the panel on the results of the study to Congress, including recommended changes with respect to implementation of policies and enactment of legislation.[1]

[1] Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 832, Stat. 1654A-221 (2000) (hereinafter the FY 2001 defense authorization act).

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This mission was rendered virtually hopeless, however, by the statutorily mandated composition of the panel. The Comptroller General (the head of GAO) assembled the panel with representatives from government (4), industry (4), government employee unions (2), and academia (2) in an effort to ensure that all views were heard. Such diversity of representation resulted in a panel with diametrically opposed interests and viewpoints regarding the commercial activities program and OMB Circular A-76. Such built-in disharmony assured gridlock, forcing the panel to steer around the most controversial changes, to water down most of the guiding principles and recommendations, and to sidestep the specifics essential for substantive revisions to the commercial activities process. By placing a premium on consensus, the panel surrendered any hope of producing concrete, workable solutions to the sourcing dilemma.

The GAO Panel Report

Consistent with Section 832's requirement to ''convene a panel of experts,'' Comptroller General David Walker pulled together an extraordinarily talented, experienced and diverse team:[2]

- Edward ''Pete'' Aldridge (Under Secretary of Defense for Acquisition, Technology, and Logistics)
- Frank Camm (Senior Analyst, RAND Corp.)
- Mark Filteau (President, Johnson Controls World Services Inc.)
- Stephen Goldsmith (Senior Vice President, Affiliated Computer Services)
- Bobby Harnage (National President, AFGE, AFL-CIO)
- Kay Coles James (Director, Office of Personnel Management)
- Colleen Kelley (National President, National Treasury Employees Union)
- Sean O'Keefe (Administrator, NASA)
- The Honorable David Pryor (Director, Institute of Politics, Harvard)
- Stan Soloway (President, Professional Services Council)
- Angela Styles (Administrator, Office of Federal Procurement Policy)
- Robert Tobias (Distinguished Adjunct Professor, American University)

After considerable deliberation and public hearings between May 2001 and March 2002, the panel issued its final report on April 30, 2002 (77 FCR 512, 514). The re-

[2] Commercial Activities Panel Final Report, ''Improving the Sourcing Decisions of the Government'' Appendix J (April 2002) (hereinafter referred to as the ''Report'').

port contains very helpful background and data on the status of the commercial activities program, the A-76 process, and the current issues and criticism of the program.

Predictably, the panel first hit choppy waters when it moved from describing what the commercial activities program currently *is* to what the program *should be*. The report's difficulties become apparent in two general areas: (1) the ''Sourcing Principles''; and (2) the recommendations for revising the commercial activities program.

The 10 Sourcing Principles

The panel unanimously adopted a set of 10 principles—''Sourcing Principles''—for guiding any decision on whether a commercial activity should be contracted out or performed in-house.[3]

However, the panel achieved this consensus only by steering around the hard issues and submerging the panel members' conflicting positions under broad generalizations. Some of these principles, such as ''Support agency missions, goals, and objectives,'' are simply too bland and too generic to offer any real substantive guidance. Others suffer from omissions or hidden ambiguities that likely will resurface to shipwreck attempts to apply these principles for implementing changes to the commercial activities program. Five of the more likely problem areas are discussed below.

Inherently Governmental Functions

The third Sourcing Principle states: ''Recognize that inherently governmental and certain other functions should be performed by federal workers.''[4] While few would argue with this principle in the abstract, previous battles in this arena foretell conflict not about whether the government should perform such functions, but about the definition of what constitutes an ''inherently governmental function.''

The report does not define ''inherently governmental function,'' but instead refers to an obscure, 10-year-old OMB directive that ''provides a framework for defining work that is clearly 'inherently governmental.' ''[5] The panel hardly needed to reach back a decade for a definition of an ''inherently governmental function'' when the Federal Activities Inventory Reform Act of 1998 (''FAIR'') statutorily defined the term and the Federal Acquisition Regulation (''FAR'') implemented it.[6]

Furthermore, the report's suggestion that anything ''clearly'' defines ''inherently governmental function'' ignores the recent and well documented history of definitional wars over what separates a commercial activity from an inherently governmental function. In August 2000, GAO reported continuing difficulties in distinguishing between such functions:

> [O]ur analysis suggests that the military services and Defense agencies did not always consistently categorize similar activities, in part because of the lack of clear guidance on how to identify which activities are inherently governmental, commercial and exempt from competition, and commercial and eligible for competition.[7]

The efforts of agencies to segregate commercial activities from inherently governmental functions drew criticism from all quarters. The FAIR Act specifically authorized industry and government employees to submit a ''challenge of an omission of a particular activity from, or an inclusion of a particular activity on'' the agencies' inventory lists of commercial activities.[8] In 1999 alone, industry and federal employees filed 332 challenges and 96 appeals to the categorization of agency activities under the FAIR Act, but agencies denied 94 percent of the challenges and 97 percent of the appeals.[9] Industry characterized the process of categorizing agency activities under the FAIR Act as ''anything but fair,''[10] while a federal labor union blasted it as ''a waste of time.''[11] Meanwhile, GAO reported that the ''clarity and understandability'' of the agency FAIR lists of activities was ''limited.''[12]

In its report, the panel does not even acknowledge this controversy, much less offer any substantive guidance as to how to resolve the continuing quandary about what is or is not an inherently governmental function. By retreating to a 1992 ''OMB Directive,'' the panel left the battle lines exactly as it found them, ceding the task to others to sort out commercial activities from governmental functions.

'High-Performing' Government Organizations

The fourth Sourcing Principle encourages the government to ''Create incentives and processes to foster high-performing, efficient and effective organizations throughout the federal government.'' ''High-performing'' compared to what? One problem with this platitude is that it offers no objective baseline – such as historical measures, interagency comparisons, or public-private competitions – to winnow out the high-performers from the also-rans. The report introduces the concept of a ''high-performing organization'' or ''HPO''[13] but lacks a sufficient definition or description to identify what organizations would, or could, qualify as an HPO.

In any event, these ''high-performing, efficient and effective organizations'' have the familiar ring of re-

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[3] Report at 6-10, 33-36, 46-48. For reasons not explained, these 10 Sourcing Principles are repeated verbatim in three separate sections of the report.

[4] *Id.* at 34, 46.

[5] *Id.* Although the report actually refers to ''OMB Directive 92-1,'' the panel presumably intended to identify Office of Federal Procurement Policy (''OFPP'') Letter 92-1, ''Inherently Governmental Functions'' (Sept. 23, 1992).

[6] Federal Activities Inventory Reform Act of 1998, Pub. L. 105-270, § 5(2), 112 Stat. 2382, 2384, 31 U.S.C. § 501 note; FAR § 2.101.

[7] GAO, ''DOD Competitive Sourcing: More Consistency Needed in Identifying Commercial Activities'' 4 (Aug. 11, 2000) (GAO/NSIAD-00-198).

[8] Pub. L. No. 105-270, § 3(a).

[9] GAO, ''Competitive Contracting: Agencies Upheld Few Challenges and Appeals Under the FAIR Act'' 2 (Sept. 29, 2000) (GAO/GGD/NSIAD-00-244). Within the Department of Defense (''DOD''), industry and federal employees fared slightly worse, with 96 percent of challenges and 100 percent of the appeals denied. GAO, ''DOD Competitive Sourcing: More Consistency Needed in Identifying Commercial Activities'' 26 (Aug. 11, 2000) (GAO/NSIAD-00-198).

[10] ''Business Groups Denounce Agencies' Rejections of Challenges to FAIR Lists of Activities for Lack of Specificity as 'Anything but Fair,' '' 72 FCR 615 (BNA) (Dec. 6, 1999).

[11] ''AFGE Says Focus on FAIR Lists Is Misplaced, Urges That Focus Be Shifted to Fixing 'Flawed' Contracting Process,'' 74 FCR 317 (BNA) (Oct. 10, 2000).

[12] GAO, ''Competitive Contracting: The Understandability of FAIR Act Inventories Was Limited'' 8 (April 14, 2000) (GAO/GGD-00-68); ''Agencies' FAIR Inventories Lacked Clarity, Understandability, GAO Says,'' 73 FCR 495 (BNA) (May 2, 2000).

[13] Report at 82-84.

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cycled policy. For example, Executive Order 12552 (Feb. 25, 1986)[14] and OMB Bulletin No. 86-8 (Feb. 28, 1986) introduced the ''Productivity Improvement Program for the Federal Government'' that was then extended to the entire Executive branch by Executive Order 12637 in 1988.[15] The executive order described the Productivity Improvement Program as ''a government-wide program to improve the quality, timeliness, and efficiency of services provided by the Federal Government'' with the objective of improving average productivity by 3 percent annually.[16] In its report, the panel offers no hint as to how the Sourcing Principle for ''high-performing'' organizations will be better than–or even different from–prior efforts, like the Productivity Improvement Program, to boost the efficiency and effectiveness of federal agencies.

With respect to the ''HPOs,'' the report recommends that ''authorized HPOs would be exempt from competitive sourcing studies for a designated period of time.''[17] Aside from the questionable value of further balkanizing commercial activities into even more subsets (HPO commercial activities, exempt commercial activities, and non-exempt commercial activities), this recommendation runs counter to the fundamental policy of conducting competitions for commercial activities, as established by both Executive Order[18] and OMB Circular A-76.[19]

By recommending even a temporary exemption from competition, the panel makes a misjudgment common to those who would seek to avoid or lessen competition–they pre-judge the competition and thereby underestimate the competitive benefits. Until the competition is held, who knows whether an HPO offers the best deal to the government? *See* OMB Circular A-76, § 5(a) (''Competition enhances quality, economy, and productivity'').

Fairness and Efficiency

For the eighth Sourcing Principle, the report states: ''Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.''[20] The ''fairness'' principle is about as controversial as the Golden Rule—and nearly as well settled in federal procurement law.[21]

However, some of the panel's recommendations run counter to the ''efficiency'' principle. For example, the report recommends extending federal employees the right to protest award decisions,[22] virtually assuring a plethora of protests and adding months to A-76 procurements that may otherwise be unprotested.

The report also contemplates federal employees preparing technical proposals to compete with private-sector proposals in best-value procurements.[23] As the report notes, the average A-76 procurement consumes 20 months from the start of the process until the issuance of the agency solicitation.[24] Given that much of these 20 months presumably relate to the government's preparation of its most efficient organization (''MEO''), imagine how long it would take the government to prepare a technical proposal. Thus, while the report touts the ''efficiency'' principle, some of its recommendations would drive the process in the opposite direction.

Cost and Quality

For the ninth Sourcing Principle, the report states: ''Ensure that competitions involve a process that considers both quality and cost factors.''[25] Hardly any debate could exist about whether cost and/or price should be considered in every procurement. Since the Army's M-16 source selection debacle in the 1960s during which the Army ignored price as a factor in making the final selection,[26] price and/or cost has been a mandatory evaluation factor.[27]

However, the reference to a ''quality'' factor in public-private competitions presents a much more interesting and revealing issue. While the report states that the panel ''unanimously'' supported the ''Sourcing Principles,'' the panel's federal labor union representatives took sharp issue with using ''best value'' procedures or evaluating public-private proposals on the basis of non-cost factors.[28] This schism illustrates how the panel reached a consensus on the undefined principle of ''quality'' without ever having a meeting of the minds on what ''quality'' meant or how it would be evaluated.

Accountability

For the tenth Sourcing Principle, the panel stated: ''Provide for accountability in connection with all sourcing decisions.''[29] In theory, virtually everyone is ultimately accountable. The real question is how, but the report fails to offer any useful specifics.

How would organizations be held accountable? For contractors, the government has a fist-full of potential remedies for non-performance, including default terminations, non-payment for poor performance, and even liquidated damages if the contract so provides.[30] For governmental organizations, the report offers no insight into the authority or mechanics for remedies against ''most efficient organizations'' that prove not to be so

[14] 51 Fed. Reg. 7041 (Feb. 25, 1986).

[15] 53 Fed. Reg. 15,349 (April 28, 1988); 31 U.S.C. § 501 note; Executive Order 12,637 was revoked nine years later by Executive Order 13,048 (June 10, 1997), 62 Fed. Reg. 32,467, 31 U.S.C. § 501 note.

[16] *Id.*

[17] Report at 53.

[18] Executive Order No. 12,615 (Nov. 19, 1987), 52 Fed. Reg. 44853, 31 U.S.C. § 501 note.

[19] OMB Circular A-76, § 4(a) (Aug. 4, 1983, as revised 1999) states that ''it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.''

[20] Report at 35, 48.

[21] *See, e.g., Panafax Corp.,* B-201176, 81-1 CPD ¶ 515 at 3 (recognizing ''the fundamental principle of competitive procurement, embodied in the Federal statutes and regulations, that all competitors be given the opportunity to compete on a common basis'').

[22] Report at 49, 51.

[23] *Id.* at 49-51.

[24] *Id.* at 23.

[25] *Id.* at 36, 48.

[26] 16 Cong. Rec. 20,718 & 20,736 (1968); 20 Cong. Rec. 26,338 (1968).

[27] 10 U.S.C. § 2305(a)(2)(A); FAR § 15.304(c)(1); *Boeing Sikorsky Aircraft Support,* B-277263.2, B-277263.3, 97-2 CPD ¶ 91 at 9-10.

[28] Report at 63-64 (''Dissenting View of Bobby L. Harnage Sr.''), 68-69 (''Dissenting Views'' of Colleen M. Kelley), and 76-77 (''Comments by Robert M. Tobias'').

[29] *Id.* at 36, 48.

[30] *See, e.g.,* FAR § 52-249-8 ''Default (Fixed-Price Supply and Service)''; *Home Insurance Co.,* ASBCA No. 22989, 81-1 BCA ¶ 14,884 (government's right to withhold payment for work not performed by contractor).

efficient. For example, how would one governmental activity terminate another for default? Even withholding payment for poor performance raises a thorny issue for a governmental organization, because non-payment for services actually performed by government employees may have Anti-Deficiency Act implications under the prohibition against voluntary services.[31]

How would individuals be held accountable? For contractors, employees who fail to perform may be subject to firing, demotion, and/or salary reductions. For government employees, such remedies presumably represent ''adverse actions'' triggering the various protections and delays associated with federal personnel rules.[32] In short, the report advocates accountability, but neglects to define the necessary remedies to enforce it.

With respect to accountability for tracking and controlling costs, the panel reached consensus on a principle for which history offers faint hope of successful implementation: ''For example, accountability requires that all service providers, irrespective of whether the functions are performed by federal workers or by contractors, adhere to procedures designed to track and control costs, including, where applicable, the Cost Accounting Standards.''[33] If this statement means that the Cost Accounting Standards (''CAS'') would be applied to federal MEOs, chaos will surely ensue because the CAS requirements have bedeviled industry for decades.

If the panel merely meant that federal organizations must ''track and control costs,'' that expectation of cost accountability appears to be unrealistic. Indeed, GAO is still ''unable to express an opinion on the consolidated financial statements [of the United States Government] because of certain material weaknesses in internal control and accounting and reporting issues.''[34]DOD has the largest number of commercial activity positions, yet ''none of the military services or major DOD components have passed the test of an independent financial audit because of pervasive weaknesses in financial management systems, operations, and controls.''[35] If the federal government cannot satisfy the existing requirements for tracking and reporting its financial status, why did the panel expect federal agencies to fare any better with regard to cost accountability for commercial activities? Once again, the panel resorted to consensus upon a broad generalization, leaving the pain of implementation to others who must grapple with enforcing true cost accountability for federal activities.

The Report's 'Supermajority' Recommendations

In addition to the unanimously adopted Sourcing Principles, a ''supermajority'' (two-thirds) of the panel proposed revisions to the commercial activities process and OMB Circular A-76. The most striking and controversial of these recommendations would force government activities to compete for work in much the same way as private contractors through an ''Integrated Competition Process'':

> The Panel believes that all parties—taxpayers, agencies, employees, and contractors—would be better served by conducting public-private competitions under the framework of the Federal Acquisition Regulation.[36]

While a full discussion of this recommendation for FAR-based competitions could fill an epic, four components of this recommendation deserve special attention: (1) the use of technical evaluations and best-value criteria for government offers; (2) the costs associated with government proposals; (3) the guarantee that the government proposal would be in the competitive range; and (4) the right of federal employees to protest awards in public-private competitions.

Technical Evaluations and Best-Value

For FAR-based public-private competitions, the panel contemplates that competing federal activities would submit technical and cost proposals to be evaluated under the same evaluation criteria and by the same evaluation panels as those for private contractors.[37] Thus, many federal employees will find themselves competing on the basis of technical merit for the first time.

A requirement for federal activities to submit technical proposals and compete on a best value basis presents a number of practical challenges for implementation. Who will perform the work if the federal employees are busy writing a technical proposal? Given that federal employees generally have no experience in preparing such proposals, what sources will such employees tap to obtain the expertise to write winning proposals? Will the federal activities have enough technical expertise to create two separate teams, one for writing the technical proposal and another for evaluating it? The panel understandably could not address such details of implementation that must be resolved on a case-by-case basis, but federal managers reading the report must feel like Odysseus when the gods forewarned him of some the horrific travails awaiting him on his journey.

The federal employee labor union representatives on the panel assailed the recommendation for FAR-based competitions not on the basis of specific difficulties in implementation, but because it is an ''untested program'' and a ''subjective approach'' that ''encourages agencies to make award decisions on the basis of projections and expectations, thereby significantly increasing the role of bias and politics.''[38] Curiously, when DOD rejected the use of technical proposals for A-76 studies in 1983, the stated concern of the Acting Deputy Assistant Secretary of Defense was the risk of bias against contractors, not federal employees:

> It has come to my attention that services are using technical proposals in A-76 studies where factors other than cost are used in determining the successful offeror.
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> If a firm is judged capable of meeting the contract requirements, then cost should be the only factor in determining if the activity is or is not to be converted.

[31] 31 U.S.C § 1342 (Anti-Deficiency Act limitation on voluntary services).

[32] 5 U.S.C. §§ 7501-14 (suspensions, removals, reductions in pay, or furloughs of federal employees).

[33] Report at 36, 48.

[34] GAO, ''U.S. Government Financial Statements: FY 2001 Results Highlight the Continuing Need to Accelerate Federal Financial Management Reform'' 1 (April 9, 2002) (GAO-02-599T).

[35] GAO, ''DOD Financial Management: Integrated Approach, Accountability, Transparency, and Incentives are Keys to Effective Reform'' 1 (March 20, 2002) (GAO-02-537T).

[36] Report at 49.

[37] *Id.* at 49-51.

[38] *Id.* at 64-65, 69.

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> The use of this technique has led to serious allegations that evaluations are being rigged to favor the status quo. I would like to see the practice stopped.[39]

Furthermore, the federal employee labor union position does not address the central paradox that best value competitions among private contractors have turned upon subjective judgment for decades, but such judgment somehow cannot be trusted in public-private competitions. Nonetheless, fears of ''rigged'' competitions, whether favoring the federal employees or the contractors, will undoubtedly haunt the panel's recommendation, regardless of the improbability that hard evidence of bias will ever surface.

Costs Associated With Government Proposals

While championing the use of best value procurements, the report does not address the costs associated with this new way of conducting public-private competitions. For example, the report states that federal employees ''should receive assistance in planning for a competition, preparing a proposal, conducting discussions, attending a debriefing, and filing a protest.''[40]

However, the report does not indicate whether the cost of such ''assistance'' should come out of the federal activity's budget, thereby providing an incentive for fiscal restraint and frugality. Similarly, the report fails to say whether such ''bid and proposal'' costs should be allocated to the MEO's overhead rate, placing the public and private offers on a comparable cost basis. Without such parity, the federal employees would enjoy an unfair competitive advantage because the private offer would reflect an allocable share of bid and proposal costs, while the federal offer would not.

Competitive Range and the Government Offer

The panel tempered its proposal for a FAR-based process by recommending that the federal offer receive a guaranteed slot in the competitive range regardless of the proposal's merit: ''there should be a guarantee that the in-house proposal will not be eliminated from consideration (that is, eliminated from the competitive range) without at least one round of discussions.''[41]

Given that incumbents already have natural competitive advantages of past experience and special knowledge of the work being competed, the report fails to explain why the federal offer needs an artificial advantage of guaranteed status in the competitive range. Indeed, such a guarantee creates a perverse incentive for the federal activity not to put its best offer on the table during the initial round of competition.

In addition, this recommendation cuts against the Sourcing Principle for conducting competitions as ''efficiently as possible.''[42] Instead, the federal activity's guaranteed place in the competitive range virtually assures discussions and a second round of offers in every public-private competition, thereby delaying award and increasing the cost for all competitors, including the federal government.

At one time, the statutory regime for Department of Defense (''DOD'') procurements triggered a second round of offers anytime the best-value offer did not ''result in the lowest overall cost to the United States,''[43] but Congress eventually fixed this glitch due to the burden of forcing a second round of offers in such circumstances.[44] Such past experience, as well as the objective of conducting competitions as ''efficiently as possible,'' weigh heavily against giving the federal offer a free pass to the competitive range.

Federal Employee Protests

For decades, federal employees have unsuccessfully sought the right to pursue bid protests before the courts or GAO against decisions to contract out commercial activities.[45] The panel report would give the federal employees their wish by opening the gates to their protests in public-private competitions.[46]

While this recommendation has the appeal of giving equal access to the protest forums at the courts and GAO, it raises a host of practical problems that greatly complicate its implementation. For example, conflicts of interest would bar government attorneys from representing the federal employees in such protests because the attorneys would be defending the agency's decision in public-private competitions, forcing government agencies to contract out the task of litigating protests.

In addition, the cost of such protests must be weighed. Do the protest costs come out of the competing federal activity's budget and if not, how would protest litigation costs be controlled? Furthermore, such protests would come with built-in tensions between federal managers and the affected federal employees regarding who controls the decision to protest, calls the shots on litigation strategy, and holds the purse-strings on protest costs.

The report acknowledged ''criticism that the A-76 cost comparison process takes too much time to complete.'' In fact, many contractors testified that A-76 procurements resulted in substantially higher costs of participation than ''traditional FAR-based procurement,'' with ''a disproportional effect on small businesses.''[47] If the additional delays and costs of federal employee protests were heaped onto an already lengthy and expensive process, at least some portion of the small businesses would be unable to bear the higher cost and risk associated with such competitions.

Finally, while the report proposes to give federal employees access to the courts and GAO for protests comparable to private contractors, the panel does not address another imbalance that favors federal employees. In particular, judicial precedent exists for federal unions to bargain over certain procedures for contracting out commercial activities.[48] In some cases where

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[39] Douglas Farbrother (Acting Deputy Assistant Secretary of Defense (Installations), Memorandum for Messrs. Paul W. Johnson, Chase Untermeyer, and Lloyd K. Mosemann re: ''Use of Technical Proposals in A-76 Studies'' (Oct. 3, 1983).

[40] Report at 51.

[41] *Id.* at 50.

[42] *Id.* at 48.

[43] 10 U.S.C. § 2305(b)(4)(A)(ii) (1988); 48 C.F.R. § 15.610(a) (1990).

[44] Defense Authorization Act for Fiscal Year 1991, § 802, Pub. L. No. 101-510; 56 Fed. Reg. 41,732-33 (1991).

[45] *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 582 n. 28 (3rd Cir. 1979); *American Federation of Government Employees v. Hoffman*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976); *National Assoc. of Government Employees, Local R5-87*, B-212735.2, 84-1 CPD ¶ 37.

[46] Report at 49-51.

[47] *Id.* at 43.

[48] *See Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 744 F.2d 842, 849-51 (D.C. Cir. 1984). However, other courts have concluded that federal managers have no duty to bargain over the process or procedures

the federal employees' collective bargaining agreement required compliance with OMB Circular A-76, unions have had some success in using arbitration to challenge agency decisions to contract out certain functions.[49]

Such arbitration awards raise the specter of pitting inconsistent decisions in two separate forums (such as GAO versus arbitration) against each other with no apparent means to bring all of the parties into one action to resolve the conflict. To the extent that the federal employees gain the statutory right to bring protests before the courts and GAO, a corresponding statutory provision would need to address the right of unions to seek arbitration of contracting out decisions.

governing decisions to contract out commercial activities. *See Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988); *Defense Language Institute vs. FLRA*, 767 F.2d 1398 (9th Cir. 1985).

[49] *See Naval Air Station, Whiting Field, and AFGE Local Union No. 1954*, FMCS No. 83K/06143 (April 29, 1983) (requiring expenditure of approximately $400,000 in back pay); *Department of the Army, Oakland Army Base, and AFGE, Local 1157*, FMCS No. 83K/24072 (Nov. 26, 1984) (directing termination of contract, reinstatement of terminated employees, and back pay from date of termination to date of reinstatement).

Conclusion

The GAO Commercial Activities Panel produced a report that serves a number of valuable functions, including collecting hard-to-find historical data on federal commercial activities, identifying concerns and criticisms regarding the existing commercial activities process, and focusing attention on the critical need for reform. Given the statutorily-mandated composition of the panel, no realistic chance existed for it to reach a consensus on a specific, workable blueprint for the future of public-private competitions. Nonetheless, the report does extend the lightning rod, creating a focal point for criticism and competing proposals from all directions—the Executive Branch, Congress, industry, and federal labor unions—necessary to press forward with meaningful reform of a broken process. Odysseus' journey home took 20 years. Hopefully, effective and meaningful reform of the commercial activities process and OMB Circular A-76 will take a far less circuitous and adventuresome path.

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