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Competitive Sourcing Policy: More Sail than Rudder

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COMPETITIVE SOURCING POLICY: MORE SAIL THAN RUDDER?*

Steven L. Schooner

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I. INTRODUCTION: THE DOLDRUMS?

On behalf of The George Washington University Law School, let me begin by expressing appreciation to the Comptroller General of the United States, David M. Walker, and Paul Light, of the New York University and the Brookings Institution, for participating in this colloquium. Rather than dispel my initial pessimism, however, our discussion confirms my less-than-optimistic prescription for the future of competitive sourcing. I fear that, without drastic change, the Bush administration's competitive sourcing initiative is doomed to fail.[1] That may seem obvious to those who scrupulously

1. None of this is meant to suggest that there have not been successful outsourcing endeavors. There have been plenty. Military history someday may recall that many key players in the successful overthrow of Iraq weren't wearing uniforms. While critics fretted that we sent too few

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Steven L. Schooner is Associate Professor and Co-Director of the Procurement Law Program, George Washington University Law School. *I gratefully acknowledge the generous support of the Seymour Herman Faculty Research Fund in Government Procurement Law. I also thank Cheryl D. Block, Karen B. Brown, Daniel I. Gordon, Matthew Harrington, Shi-Ling Hsu, Frederick J. Lees, Heidi M. Schooner, and Christopher R. Yukins for their thoughts, helpful comments, and suggestions; and Nazar Altun and Esther Nelson for their diligent research assistance.*

follow the barrage of assaults—through legislative initiatives[2] and litigation[3]—intended to derail the policy. But these pending roadblocks are mere harbingers. Even if the Bush administration succeeds in implementing its newly minted competitive sourcing policy, failure to achieve the policy's aspirations appears imminent.[4]

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soldiers to invade Iraq, experts knew that, on today's battlefield, the number of soldiers doesn't tell the whole story. In Iraq, our military relied upon contractor personnel not only for transportation, shelter, and food, but for unprecedented levels of battlefield and weaponry operation, support, and maintenance. Accordingly, defense experts now recognize that, without contractors, our military simply cannot project its awesome technical superiority abroad. But by no means does this suggest that all of the legal issues associated with contractors on the battlefield have been resolved. *See, e.g.*, Keith Hartley, *The Economics of Military Outsourcing*, 11 Pub. Procurement L. Rev. 287, 290 (2002) (acknowledging that using "civilians to replace military personnel might have adverse impacts on the morale and 'fighting spirit' of the Armed Forces"); Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 Pub. Cont. L.J. 233 (2000); Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?* 147 Mil. L. Rev. 1 (1995). Brady was ahead of his time in clearly articulating that "citizen contractor employees . . . in the field hold military status. They are legitimate objects of attack and become prisoners of war when captured. . . . They ought not be surprised about their status when they arrive in the field. . . . The time has come to inform contractors about assimilation and make them part of the total force." *See also* Todd S. Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 Mil. L. Rev. 1 (2003) (to be clear, "private military companies" (or PMAs) is the current, politically correct term for "mercenaries"); The International Consortium of Investigative Journalists, Making a Killing: The Business of War (2003).

2. One of the most dramatic examples was the successful Van Hollen Amendment to H.R. 2989, the 2004 Transportation and Treasury Appropriation, which stated: "None of the funds made available by this Act may be used to implement the revision to Office of Management and Budget Circular A-76 made on May 29, 2003." H. Amend. T.379(A026), 108th Cong. (2003), *available at* http://thomas.loc.gov/; Christopher Lee, *Competitive Sourcing Plan Hits Snag: House Votes Against Rules That Would Speed Up Competition for Federal Jobs*, Wash. Post., Sept. 11, 2003, at A21. In late October, this matter went to conference after the Senate approved an amendment by Senator George Voinovich, which imposed a different set of constraints upon the A-76 process. *Senate Votes to Allow Federal Workers to Protest A-76 Competitions in Funding Bill*, 80 Fed. Cont. Rep. 389 (Oct. 28, 2003). *See also OMB Urged to Halt NIH Job Competitions*, 45 Gov't Contractor ¶ 436 (Oct. 29, 2003) (raising concerns that "this aggressive approach to Circular A-76 is undermining the advancement of science"). *See also* the Truthfulness, Responsibility, and Accountability in Contracting Act (TRAC), a bill introduced with 190 cosponsors, intended to limit outsourcing until the costs and benefits were analyzed. Consistent with the discussion below, the TRAC bill included findings that

> (2) Federal agencies have been increasing reliance on service contracting even though there are no reliable and comprehensive reporting systems . . . to determine whether service contracting has achieved measurable cost savings or improved Government services for taxpayers. . . . (4) Federal employees are being replaced by contractor employees without even knowing . . . if the result is reduced costs or improved services. (5) Federal agencies do not have systems in place to provide for work currently performed by Federal contractors to be performed by Federal employees, even after a determination that in-house performance would be more efficient and more cost effective.

H.R. 721, 107th Cong. § 2 (2001).

3. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, National Treasury Employees Union et al. v. Office of Management and Budget, No. 1:03CV01339 (D.D.C. filed June 19, 2003), *available at* http://www.govexec.com/pdfs/NTEU.pdf (requesting a judgment declaring the revised circular illegal and directing use of the prior circular).

4. *See, e.g.*, *Competitive Sourcing: Implementation Will Be Challenging for Federal Agencies*, *Testimony Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the*

Few agencies have the inclination (or resources) to commence any significant number of competitions between civil servants and contractors under the new rules. The competitions that do begin will take time,[5] and aggressive time limits may invalidate some of those. Accordingly, existing civil servants and members of the armed services need not fear that hundreds of thousands of contractor employees will replace them overnight. Nevertheless, the number of government employees will continue to shrink, while the number of contractor personnel serving the Government methodically increases. In addition, more than a decade of experience suggests that the rate of contractor personnel growth will exceed the contraction within the Government's ranks.[6]

Despite this cumulative expansion, as the government employee headcount drops, the administration will declare victory. Herein lies the problem. The current outsourcing initiative will achieve little more than a facially attractive duping of the least sophisticated portion of the electorate. Legislators will trumpet their contribution to the contraction of Big Government, and crowds will dutifully applaud. Empirical research will continue to expose the hypocrisy of this policy,[7] but the suffering will remain relatively quiet.

For a host of reasons, the competitive sourcing policy remains fatally flawed. Most troubling is the Government's unwillingness to appreciate the policy's costs. This leads to the corresponding failure to identify, obtain, and invest appropriate resources needed to properly effectuate the policy. Quite simply, the Government lacks sufficient qualified acquisition, contract management, and quality control personnel to handle the outsourcing burden. This insufficiency includes two separate deficiencies: (1) the number of people

District of Columbia, *Comm. on Governmental Affairs*, U.S. Senate, GAO-03–1022T (July 24, 2003) (statement of David M. Walker), *available at* http://www.gao.gov/new.items/d031022t.pdf. Among other things, the Comptroller General expressed concerns that agencies set appropriate goals rather than rely upon arbitrary quotas. *Id.* at 5. He also left no doubt that "[e]ffective human capital practices will be key to successful implementation of competitive sourcing[.]" *Id.* at 8.

5. The revised Office of Management and Budget Circular No. A-76 [hereinafter OMB Circular A-76], *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf, at Attachment B, ¶ D.1., directs: "A standard competition shall not exceed 12 months from public announcement (start date) to performance decision (end date)" absent a waiver, although a prospective six-month waiver could extend the period to eighteen months. Whether these competitions span a year or many years (the norm under the predecessor A-76) remains to be seen. *See also* The Notice of Revision to the Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32134 (May 29, 2003) [hereinafter Notice of Revision]. *See generally* David M. Walker, *The Future of Competitive Sourcing*, 33 Pub. Cont. L.J. 299, 308 (2004) (noting that "aggressive timeframes might look good on paper").

6. A wealth of literature chronicles the accelerating privatization trend. *See*, *e.g.*, *infra* notes 69–72.

7. In this regard, it is a pleasure to include not only Paul Light's work, but also that of Dan Guttman. *See* Daniel Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub. Cont. L.J. 321 (2004). Guttman was recently profiled for his longstanding work in this area. "Along the way, he became convinced that the Government's increasing reliance on private companies raises basic, even constitutional, questions of accountability. He believes that most agencies can no longer effectively oversee their contractors and that existing oversight tools—such as setting performance standards in contracts—often don't work." Jason Peckenpaugh, *Shadow Boxer*, 36:16 Gov. Exec. 41, 42 (2003).

available and (2) the qualifications necessary for them to perform a complicated, highly discretionary task over extended periods of time.[8] This glaring problem does not derive from the current vehicle for effectuating the policy: the revised Office of Management and Budget (OMB) Circular A-76.[9] But these deficiencies will impede, if not derail, the policy's implementation. Yet the administration fails to acknowledge this need for resources. The silence on this critical detail leads me to question whether the underlying policy is deviously cynical or simply muddled and ill-conceived.

Here, the accompanying articles make a significant contribution. The Comptroller General systematically demonstrates that a competitive sourcing policy (although, arguably, not necessarily *this* competitive sourcing policy) could be derived from accessible and defensible principles.[10] His article logically tracks the ten principles for a competitive sourcing regime agreed upon by the Commercial Activities Panel.[11] Among his numerous refreshing insights, Paul Light reminds us that this policy has little to do with *how many* people perform the Government's missions and everything to do with *who* those "public servants" will be. In other words, the true size of Government cannot be measured by counting civil servants or soldiers. This reminder is imperative if we are to rationally assess the success or failure of either a competitive sourcing or an outsourcing policy.

Against that backdrop, and supplemented by thoughtful contributions from public policy scholars Dan Guttman, John Forrer, and James Edwin Kee, this introductory article predicts a bleak future for competitive sourcing. Let me be clear. I do not doubt the administration's fidelity with regard to competitive sourcing. Rather, despite a dogged commitment to outsourcing, I fear that the Government is ill-positioned to successfully outsource in a manner that generates higher-quality services, lower prices, greater efficiency, or, ultimately, better Government. Instead, I expect the competitive sourcing initiative to further expose "long-standing problems in service contracting, including poor planning, inadequately defined requirements, insufficient price evaluation, and lax oversight of contractor performance."[12] Implementation

8. In addition to inadequacy of the acquisition workforce, discussed at length in Part III.B. below, it seems clear that the cadre of existing government managers lack experience identifying, selecting, tasking, and incentivizing a workforce as it transitions from government to contractor employees.

9. OMB Circular A-76, *supra* note 5.

10. Moreover, in addition to his primary themes, his article highlights numerous important points. For example, I agree that the ramifications of outsourcing are far too important to regulate informally. Over time, it seems appropriate that OMB Circular A-76 should evolve into, or be replaced by, a regulation (whether or not the Federal Acquisition Regulation, Title 48 of the C.F.R.). *See*, *e.g.*, Walker, *supra* note 5.

11. Commercial Activities Panel, Improving the Sourcing Decisions of the Government: Final Report (2002) [hereinafter Commercial Activities Panel Report], *available at* http://www.gao.gov/a76panel/dcap0201.pdf.

12. *Contract Management: Trends and Challenges in Acquiring Services*, *Testimony Before the Subcomm. on Technology and Procurement Policy*, *Comm. on Government Reform*, House of Representatives, GAO-01–753T, at 5 (May 22, 2001) (statement of David E. Cooper), *available at* http://www.gao.gov/new.items/d01753t.pdf.

of the current policy will result in poorly structured contracting out. This leads to disquieting expectations for the future nature of the Government. The administration's inclination to act first and plan later propels this article to conclude that the competitive sourcing strategy is a recipe for disaster.[13]

In the end, this article illuminates an obvious, yet critical, problem. The Government lacks sufficient qualified acquisition and contract management professionals to administer its requirements. Continued outsourcing will exacerbate this systemic weakness. As the Government increasingly relies upon service contractors, the Government exposes itself and the public to greater risks. But before addressing this daunting challenge, this article attempts to explain how we came to this point. Specifically, it seeks to distinguish a principled competitive sourcing policy from an ideological, antigovernment, outsourcing regime.

II. COMPETITIVE SOURCING OR OUTSOURCING?

Competitive sourcing involves determining, prospectively, whether government resources or the private sector offers the Government—as a consumer—the best value in performing certain tasks.[14] Outsourcing, on the other hand, entails replacing existing government personnel with contractors and relying upon the private sector when new tasks arise. Arguably, the policies achieve the same objective—replacing Government with contractor resources—but competitive sourcing dramatically prolongs the transition.[15]

But most people don't really care who supervises or pays the person who determines their Social Security benefits, inspects their meat or produce, audits their taxes, or controls their air traffic.[16] The public simply wants their

13. "[D]ownsizing was not guided by strategic planning, nor has adequate consideration been given to implementation challenges, such as the impact of the government's reduction-in-force rules. Overall, the government's human resources policies and practices have not reflected, nor been aligned with, current workforce dynamics and challenges, including demographics, professional development, mobility, and other issues." Commercial Activities Panel Report, *supra* note 11, at 28.

14. Our discussion is limited to privatization—to the extent it will occur—that takes the form of contracting (or contracting out). Thus, for practical and legal reasons, we ignore the parallel grant-making apparatus. In the larger context of privatization, grants and other unrelated vehicles through which the Government delegates authority must be considered. *See generally* Daniel Guttman & Barry Willner, The Shadow Government: The Government's Multi-Billion-Dollar Giveaway of Its Decision-Making Powers to Private Management Consultants, "Experts," and Think Tanks (1976).

15. In practice, competitive sourcing, however subtly, must eventually converge with outsourcing. In a competition, there are only two possible results: (1) the contractor can win and replace the government organization or (2) the Government can win and maintain the status quo. But the government workforce never gains ground. Because competitive sourcing policy periodically (e.g., every five years) subjects the same tasks or requirements to competition, the contractor ranks continue to swell.

16. True, after the September 11, 2001, tragedy, a surprising groundswell of support drove a Herculean effort to replace private baggage screeners with government employees. While this makes for great theater, it runs counter to the governmentwide trend. It also exposes the hypocrisy

benefits (properly calculated) to arrive on time, their families to avoid illness, to be free from harassment, and to enjoy a safe journey. Accordingly, the competitive sourcing debate—determining who would most efficiently provide these services—often fails to resonate with most Americans.

Yet, for those who do care, the debate quickly polarizes participants into two basic camps.[17] One staunchly advocates the (rapidly changing) status quo: that work currently being performed by government employees should remain in-house. This position idolizes, or at the very least respects, the ethos of both public service and, more generally, public servants. The opposite camp advocates outsourcing. The outsourcing proponents, whether favoring the private sector or discounting the public service, assert that for-profit firms are capable of performing much of the Government's work. Further, they claim, the private sector (if properly motivated) should outperform government employees (in terms of quality of service, price of service, or both).[18] Neither of these extreme positions, distilled into an abstract distinction between pro- versus anti-government employees (or contractor employees), is uniquely compelling.

Empirical evidence is scant to demonstrate that government employees are more talented, committed, motivated, or honest than their private sector counterparts, and vice versa. The two groups differ dramatically, however, in at least one regard: their incentive structures.[19] The private sector's exposure

of the underlying policy. Outsourcing reflects the perception that the private sector will outperform government employees. Yet, in the aftermath of a startling and horrific crisis, the public deluded itself into believing, for some inexplicable reason, that it would be safer if federal employees screened baggage. But we should not be surprised. Few legislators would consider it a palatable option to suggest that, rather than mandating who will employ the screeners, a more effective role for Government might be mandating sufficient pay for screeners to attract competent personnel (and, of course, passing on those costs to the flying public).

17. Jody Freeman suggests an entirely different perspective, identifying various types of concerns—consequentialist, technocratic, ethical, and administrative law—regarding contracting out. Jody Freeman, *The Contracting State*, 28 Fla. St. L. Rev. 155, 169–76 (2000). Using Freeman's rubric, the lion's share of my concerns are deemed either consequentialist or technocratic. Freeman perceives that, for most, their "enthusiasm for contracting out . . . [is] motivated solely by a concern about the results . . . rather than whether contracting out conforms to a set of a priori principles of 'moral' action." *Id.* at 169 (citations omitted). With regard to the technocratic concerns, "[t]o some extent, objections to contracting out may be ameliorated by careful attention to contract design. Contracts could specify tasks more clearly, detail procedures more thoroughly, and clarify responsibilities. . . . For those functions that are easier to specify, agencies may be nonetheless ill-equipped to monitor performance. . . ." *Id.* at 170–72. *See also* Harvey B. Feigenbaum & Jeffrey R. Henig, *The Political Underpinnings of Privatization: A Typology*, 46 World Pol. 185 (1994). Feigenbaum and Henig's typology is based upon three perspectives—administrative, economic, and political—leading to three privatization strategies: pragmatic, tactical, and systemic. From this they create an intriguing analytical tool correlating motivation and consequence.

18. A third faction, populated primarily by scholars and academics, eschews broad positions and instead chooses sides based upon the nature of individual tasks, such as schools, prisons, welfare, etc. *See*, *e.g.*, *infra* note 71.

19. Few doubt that, without the type of external pressure exerted by the competitive sourcing initiative, government managers face impenetrable hurdles in attempting to dramatically improve efficiency or service. "Managers face an incentive structure that deters them from making efficiency-enhancing changes. Managers tend to prefer current ways of doing business to vol-

to market forces, and the related corporate purpose of pursuing profit, permits (and, arguably, requires) a more diverse and potent arsenal of employee incentives and disincentives. These tools include compensation (salary, salary increases, bonuses, stock incentives), opportunity for advancement, and, of course, the risk of termination. While the Government can use similar tools, their impact (or the degree to which these tools can influence behavior) is at least perceived as far less dramatic, given a heavily constrained promotion and bonus regime and an impenetrable de facto tenure system. The private sector–government contrast is greatest at the extremes. The private sector offers far greater economic rewards for success and threatens more credible sanctions for less than desirable performance.[20] While some still aspire to reform the civil service system and inject more potent performance incentives,[21] history reminds us that this is a daunting task.[22]

This does not suggest that the Government is not staffed by many able, highly motivated employees.[23] Surely, public service attracts special people

untary cost-cutting activities. However, the A-76 process changes the manager's choice set so that the status quo is not an option." Susan M. Gates & Albert A. Robbert, National Defense Research Institute, RAND, Personnel Savings in Competitively Sourced DoD Activities: Are They Real? Will They Last? xv (2000).

20. My experience suggests that government managers covet the private sector's power to more effectively reward excellence. Yet, comparatively, the more pressing perceived personnel system inadequacy lies in the private sector's ability to jettison underperforming personnel. This makes sense. "[I]n outstanding organizations[,] . . . there is a progressive winnowing of talent. . . . *Microsoft tries to force out the lowest-performing 5% of its highly screened talent each year.* Great organizations are unabashed meritocracies; *great organizations that fail are often those that forget the importance of . . . selective weeding.*" James Brian Quinn et al., *Managing Professional Intellect: Making the Most of the Best*, Harv. Bus. Rev. 74 (1996) (emphasis added).

21. The Department of Defense continues to lead the initiative to eliminate the civil service system. *See*, *e.g.*, Shawn Zeller, *Smashing the System*, 35 Gov. Exec. 30 (2003) (discussing the DoD initiative and the spearhead effort that resulted in the nascent Department of Homeland Security creating its own personnel system). *See also* National Commission on the Public Service, Urgent Business for America: Revitalizing the Federal Government for the 21st Century (2003), *available at* http://www.brook.edu/gs/cps/volcker/urgentbusinessreport.htm ("The federal workforce must be reshaped, and the system that supports it must be rooted in new personnel management principles that ensure much higher levels of government performance."). Pending legislation may permit DoD to engage in a dramatic overhaul of the civil service system. *See generally* Title XI, Civilian Personnel Matters, National Defense Authorization Act for Fiscal Year 2004, *at* http://thomas.loc.gov (search the bill text of the 108th Congress for H.R. 1588.ENR) ("the Secretary [of Defense] may, in regulations prescribed jointly with the Director [of the Office of Personnel Management (OPM)], establish, and from time to time adjust, a human resources management system. . . . The human resources management system established . . . shall be referred to as the 'National Security Personnel System.'. . . Any [such] system . . . shall (1) be flexible [and] (2) be contemporary. . . .").

22. "If the [National Performance Review] made some progress . . ., it proved far less successful in transforming the government's people policies through civil service reform." Donald F. Kettl, Center for Public Management, Brookings Institution, Reinventing Government: A Fifth-Year Report Card, CPM 98–1, at 53 (1998), *at* http://www.brook.edu/dybdocroot/gs/cpm/Government.pdf.

23. While I can offer no empirical evidence, my (albeit anecdotal) professional experiences in Government, particularly my work at the Department of Justice (DOJ), the Office of Management and Budget (OMB), and the U.S. Army, convinced me that there are a wealth of talented, motivated government personnel that rival any I have encountered in the private sector. At the

and brings its own rewards. But contractors performing similar public service tasks frequently experience the same unquantifiable, if not ephemeral, benefits as government employees. Aside from characterizations of personnel, however, no shortage of economic and theoretical arguments favors outsourcing. For example, Keith Hartley's succinct introduction to the economics of outsourcing highlights the importance of competition, which "promotes innovation, the application of new management techniques, the introduction of new equipment and methods of working," and flexibility.[24] Graeme Hodge's thoughtful discussion of the theoretical foundations for privatization begins by noting that economics drives most theories that favor privatization.[25] Hodge introduces various schools of thought that tend to favor contraction of government and, accordingly, outsourcing, including public choice theory,[26] agency theory,[27] new public management,[28] property rights theory,[29] measurement issues (which we frequently refer to as "metrics"),[30] and contingency theory.[31]

Yet it's surprisingly difficult to find a compelling statement of the objectives for the new federal competitive sourcing policy. One of the clearest statements

opposite end of the spectrum, both in Government and in the private sector, I have observed, and at times supervised, an unfortunate number of employees for whom the existing incentive and disincentive structure—encompassing rules and norms—failed to motivate.

24. Hartley, *supra* note 1, at 289. He also mentions the "disciplines of the capital market and the incentives and penalties of a fixed-price contract. . . ." *Id.*

25. Graeme A. Hodge, Privatization: An International Review of Performance 35 (1999).

26. "[F]unctions such as regulation, policy advice, and the delivery of services should be undertaken separately. . . . [G]overnment organizations are often captured by those who traditionally provide the services . . ., and that in the absence of a profit motive, bureaucrats . . . maximize the size of their own bureau rather than maximizing benefits to customers or citizens. . . . ." *Id.* at 36.

27. Building on a market model of organizations, agency theory assumes that the owners of the company (here, the Government) are not the managers, and ownership and control are separate. Therefore, "[t]his theory focuses on finding an optimal way of establishing and operating such contracts. . . ." *Id.* at 38–39.

28. "The central tenets of this new doctrine . . . emphasiz[e] management skills, quantified performance targets, devolution, the separation of policy, commercial and noncommercial functions, the use of private sector practices . . ., monetary incentives, and cost cutting. Importantly, the new public management also emphasizes a preference for private ownership, and the use of contracting out and contestability in the provision of public services." *Id.* at 40.

29. This simple theory suggests that "private ownership of the assets of a company [or the Government] results in superior profitability and effectiveness. . . . [T]he major focus is on incentives for performance improvement, principally at the level of the individual decisionmaker." *Id.* at 41–42.

30. While conceding that it is extraordinarily difficult to measure government performance, "to the extent that the measurement of agency performance might become a more manageable task, and to the extent that interpretation of performance might become clearer, privatization of an agency may be seen as beneficial." *Id.* at 43–44.

31. This theory postulates that "the role of the noneconomic objectives of privatization . . . depends on the influence at any point in time of particular historical contingencies." *Id.* at 44. It recognizes "the plausible idea that privatization does not have an economic rationale at all." Replacing government employees with contractors may further political ends such as disempowering unions or winning votes during elections. *Id.* at 35–36. "In other words, it is simply a tool in the political kit bag available for use when deemed expedient." *Id.* at 44.

within the OMB Circular suggests: "The Administration's general policy is to rely on competition to select the providers of commercial activities. This policy is supported by published reports and historical data demonstrating that public-private competition generates significant cost savings, efficiency, and innovation."[32] The first sentence expresses a *deference to the competitiveness of the private sector*; the latter recognizes the value of *salutary competition between the public and private sectors*. Nothing reconciles the two competing policy statements.

The predecessor OMB Circular A-76 more clearly stated the first principle: "In the process of governing, the *Government should not compete with its citizens*. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength."[33] After that preface, the (classical outsourcing) policy statement concluded: "In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs."[34] But this general language was diluted by the more specific statement (favoring competitive sourcing) that it was the Government's policy to

> *Rely on the Commercial Sector*. The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular and its Supplement, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured **more economically** from a commercial source.[35]

This caveat, mandating an economic balancing, tempered, and some might say neutered, the outsourcing mandate. Now compare that language to the watered-down articulation found in the revised circular: "The longstanding policy of the federal government *has been* to rely on the private sector for needed commercial services. To ensure that the American people receive maximum value for their tax dollars, commercial activities should be subject to the forces of competition."[36]

At one level, little has changed. The articulated deference to the private sector always implied that the policy has been outsourcing (but only when savings were expected); but the current language states the private sector preference with less conviction. The revised OMB Circular A-76 more clearly

32. Notice of Revision, *supra* note 5, 68 Fed. Reg. 32,134, 32,135 (May 29, 2003). The Commercial Activities Panel reaffirmed that "Competitions, including public-private competitions, have been shown to produce significant cost savings for the government, regardless of whether a public or a private entity is selected. Competition also may encourage innovation and is key to continuously improving the quality of service delivery. . . . [F]ederal sourcing policies should reflect the potential benefits of competition, including competition between and within sectors . . ." Commercial Activities Panel Report, *supra* note 11, at 35.

33. OMB Circular A-76 (Aug. 4, 1983, Revised 1999) (emphasis added).

34. *Id.*

35. *Id.* (italics in original; bold added).

36. OMB Circular A-76, Notice of Revision, *supra* note 5.

injects the concept of salutary competition.[37] At another level, the policy suggests the purest form of outsourcing. Use of contractors entails dependence upon the marketplace, which, unlike the Government, is competitive. As discussed below, however, the battleground has shifted. The momentum to outsource now appears to derive from the evolution in the test for what services are deemed commercially available. The administration's signals encourage agencies to transition large numbers of positions from the Government to contractors. And, in the end, actions speak louder than words.

A. *Less Work Is "Inherently Governmental"*

Given the scope of the revision, it is surprising that OMB Circular A-76 retains the longstanding distinction between *inherently governmental functions* and *commercial activities.* If a function is inherently governmental, government employees should perform it. But the converse is not true. The rule is not simply that the private sector should perform all commercial activities. Instead, for commercial activities, the Government must determine whether to keep the task in-house or deputize the private sector to perform the function. That determination depends upon a cost comparison. In the end, therefore, the decision to outsource hinges upon economic (rather than broader policy) considerations, which all too often prove short term in nature.

Of course, the problem remains in determining exactly what functions are inherently governmental.

> Concern about which federal agency activities are inherently governmental functions is not new. It goes back as far as the early days of the nation, as evidenced . . . by the discussion in the *Federalist Papers* among the framers of the *Constitution* over what functions are appropriate for the federal government to exercise.[38]

The "inherently governmental" versus "commercial" distinction today proves neither adequate nor realistic. The longstanding policy entails two steps. The Government first determines whether existing functions or tasks are inherently governmental. If the function is deemed *not* inherently governmental, the private sector competes against the Government (recast as a hypothetical most efficient organization, or MEO). The best price (or, preferably, best value) wins.

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37. This interpretation assumes that the words "But now, in order" implicitly precede the sentence beginning "To ensure. . . ." Granted, this may not be every reader's plain meaning, but it does seem to be a plausible interpretation. Obviously, ambiguities in regulatory drafting are not unheard of, but they can wreak havoc on those tasked with policy implementation. *See generally* Steven L. Schooner, *Review Essay: Communicating Governance: Will Plain English Drafting Improve Regulation?* 70 Geo. Wash. L. Rev. 163, 178–80 (2002) (reviewing Thomas A. Murawski, Writing Readable Regulations (1999)).

38. General Accounting Office, Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate, GAO/GGD-92–11, at 2 (1991), *at* http://archive.gao.gov/t2pbat7/145453.pdf. GAO conceded that "Because of the difficulty in defining governmental functions . . . , GAO was not able to definitively conclude that these activities involved such functions." *Id.*

A deep chasm separates a putative government policy not to compete with its citizens from a regime where the Government competes with its citizens when monetary savings might result. While reasonable businesspeople may disagree, both policies—not competing with the private sector and competing with the private sector to maximize efficiency—have merit. Having said that, the former policy represents a concrete principle potentially capable of systematic application.[39] The latter policy—saving money—is more aspirational and limitless. Because the cost savings are projected, they are neither guaranteed nor particularly reliable.

The administration's stated policy pretends to have no dog in this fight, projecting a bland neutrality, favoring neither side. The policy dispassionately makes the lowest *projected* cost (or, hypothetically, the best potential value) the measure of success. The approach is logical only within the rubric of a legal fiction: neither side competes as they currently exist. For the purposes of the competition, the Government organization recasts itself as a hypothetical MEO. Similarly, the contractor's proposal reflects no more than the contractor's current perception of how, and with whom, it would approach and perform the specified task. This scheme never satisfied me. It seems disingenuous that the Government should compete on the assumption that, going forward, it will exercise optimal managerial skills, engage purely in results-oriented behavior, retain its highest-producing employees, routinely jettison its least-productive personnel, and, in a nutshell, outperform the status quo. It begs the question: if the Government could manage a task in such a manner, why

39. Individuals interested in other, less obvious, competitive tensions between the Government and the private sector need only look toward the Government's evolving use of information technology in the marketplace. *See, e.g.*, Joseph E. Stiglitz et al., Computer & Communications Industry of America (CCIA), The Role of Government in a Digital Age (2000), *at* http://www.ccianet.org/govt_comp.php3. CCIA organizes its twelve principles for online and informational government activity using a traffic-light scheme. The green light principles, or areas where the Government's participation is welcome, include (1) providing public data and information; (2) improving the efficiency with which governmental services are provided; and (3) supporting basic research. The yellow light principles suggest that the Government should (4) exercise caution in adding specialized value to public data and information; (5) only provide private goods, even if private-sector firms are not providing them, under limited circumstances; (6) only provide a service online if private provision with regulation or appropriate taxation would not be more efficient; (7) ensure that mechanisms exist to protect privacy, security, and consumer protection online; (8) promote network externalities only with great deliberation and care; and (9) be allowed to maintain proprietary information or exercise rights under patents and/or copyrights only under special conditions (including national security). The red light principles assert that the Government should (10) exercise substantial caution in entering markets in which private-sector firms are active; (11) generally not aim to maximize net revenues or take actions that would reduce competition; and (12) only be allowed to provide goods or services for which appropriate privacy and conflict-of-interest protections have been erected. Applying its principles, for example, CCIA is particularly concerned with the Postal Service's bill-paying market (*see* USPS Payment Services, *at* http://www.usps.com/paymentservices/welcome.htm). To appreciate CCIA's position, one need only ask what public policy is served by the Postal Services' seemingly direct competition with private endeavors such as PayPal, *at* https://www.paypal.com/; Western Union, *at* http://www.westernunion.com/index_consumer.asp; or Ecash/Authorize.Net, *at* http://www.infospaceinc.com/payment/. This is a particularly compelling example because, in almost every service it performs, the Postal Service competes with the private sector for revenue.

has it not done so previously? Moreover, shouldn't the Government's failure to previously have achieved these efficiencies dramatically prejudice its standing in competing for future work?[40] I would prefer a similar, but significantly different, two-step process. The potential for short-term cost savings would play no role.[41] Similar to the current regime, the Government would determine whether an existing function was inherently governmental. The Government would retain inherently governmental functions. The private sector would perform all other functions (which, by definition, would be deemed commercial). Of course, the private sector would experience periodic, routine competition consistent with the federal procurement system's dictates.[42] Over time, the best-qualified firms, offering the most-favorable prices and best service, would perform the lion's share of these services. But nothing suggests that momentum is building for such a simple approach.

What is particularly intriguing about the dilution of the policy statement in the revised circular—the watering down of deference to the private sector—is the apparent disconnect between stated aspiration and expected outcome. The predecessor circular contained a strong policy statement, but proved weak in implementation. The current circular, perceived as a stronger vehicle for outsourcing, hides behind a gentler policy statement.

How did the policy become so muddled? The answer lies in aspirations or metrics. As suggested above, competitive sourcing proponents could offer any number of measures to demonstrate the success of such a policy.[43] The most common metrics include cost savings,[44] superior quality of services rendered,

40. To the extent that the Government increasingly relies upon past performance information to evaluate contractors, it seems silly to ignore the Government's past performance when the government organization is competing directly against the private sector. For a well-researched discussion of the evolution of past performance evaluation, *see generally* Nathaniel Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 Pub. Cont. L.J. 637, 645–59 (2000). For a discussion of the theoretical underpinnings of the initiative, *see, e.g.*, Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance 38–47, 63–69 (1990).

41. This is consistent with my skepticism regarding those who become carried away with the concept of businesslike government. Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001).

42. As David Walker's article suggests, such an approach—in the long term—seems more consistent with reality. Except in an instance of market failure, if the Government is continuously subjected to competition with the private sector, eventually the private sector should be expected to prevail. Once the function migrates to the private sector, it seems unlikely that the Government will subsequently displace the private sector. Walker, *supra* note 5; *see also supra* note 15.

43. *See, e.g.*, Hartley, *supra* note 1; Hodge, *supra* note 25.

44. *See, e.g.*, Gates & Robbert, *supra* note 19, at xiv ("projected personnel cost savings are substantial in both in-house and contractor wins, ranging from 30 to 60 percent"). For a dissenting perspective, see Max B. Sawicky, *Show Me the Money: Evidence Is Sorely Lacking That the Bush Administration's Proposed A-76 Rules for Contracting Will Bring Budget Savings*, Economic Policy Institute Briefing Paper No. 145, *at* http://epinet.org/content.cfm/briefingpapers_bp145. Sawicky asserts that, among other things, (1) the costs savings do not necessarily derive from examples that are representative of the types of work that may be contracted in the future; (2) the case studies were cherry-picked and, accordingly, provide better results than a random survey

and improved customer satisfaction.[45] That might explain why "President Bush [was] a major advocate of . . . hiring private firms to do the government's work—and implemented this policy in Texas while he was governor there."[46]

Yet despite its underpinnings, the current outsourcing policy focused upon a more-direct, easier-to-measure, yet far-less-meaningful benchmark: the number of government employees. The Bush administration today favors outsourcing[47] because, like its Democratic predecessor, it wants to tout the elimination of government employees.[48] Until the political pressure became un-

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would reveal; and (3) the cost savings fail to recognize costs "shifted to other federal agencies or the taxpayer." Moreover, the DoD Inspector General suggested that the pressure to outsource results in increased costs.

> DoD acquisition organizations stated that reductions in in-house . . . support personnel required the[m] to contract for additional services, such as engineering and logistical analysis, that the Government once would have provided. As a result, technical support costs increased because . . . obtaining contract support was more expensive than obtaining in-house . . . support. . . . [C]ontract labor rates are significantly higher [$20,000 to $180,000] per staff year than rates . . . charged for the same service performed by Government employees.

Office of the Inspector General, Department of Defense, DoD Acquisition Workforce Reduction Trends and Impacts, Report No. D-2000–088, at 18 (2000) [hereinafter DoD Acquisition Workforce Report]. *See also* Hartley, *supra* note 1, at 290. Hartley suggests that transaction costs are "[a] central feature of outsourcing and the economics of contracting" and that "the transaction cost analysis shows that the costs of managing contracts, including arranging bids, monitoring outcomes and taking legal action for contract failures, may offset any efficiency savings. . . ."

45. Jacques Gansler asserts that data exist to disprove many of the arguments against competitive sourcing. Specifically, advocates assert that competitive sourcing may lead to (1) better performance; (2) lower costs; (3) savings over time; (4) increased competition opportunities for small business; (5) fewer government layoffs than anticipated and more government control over employees; and (6) a competitive rather than a monopolistic environment. *See*, *e.g.*, Jacques S. Gansler, *Six Myths of Competitive Sourcing*, 35:8 Gov. Exec. 85–86 (2003).

46. Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 Ariz. L. Rev. 83 (2003), *citing* David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 Brook. L. Rev. 231, 232 (1998), for the proposition that "Governor Bush's effort to privatize most of Texas' welfare system, in turn, seemed rooted in his attempt to make a name for himself with the kind of bold experimentation that could carry him to national office." *Id.* at 83 n.2. *See also* Matthew Diller, *Form and Substance in the Privatization of Property Programs*, 49 UCLA L. Rev. 1739, 1763 n.94 (2002) ("Governor Bush sought to hand the administration of the state's welfare system over to the Lockheed Martin Corporation and Electronic Data Systems Corporation." Further, "[d]uring his tenure as governor of Texas, President Bush also sought to involve faith-based institutions in the delivery of government-funded social services. . . .").

47. Competitive sourcing is one of five governmentwide initiatives in the Bush management agenda. *See*, *e.g.*, Office of Management and Budget, The President's Management Agenda, Fiscal Year 2002, *at* http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf.

48. Nor would it be fair or correct to suggest that this represents a dramatic break from prior administrations or that this was not a bipartisan desire. For decades:

> [P]ersonnel ceilings were accompanied by bipartisan silence on the changing nature of the federal workforce. . . . Government budget documents, organization charts, and phone books captured the full dimensions of the official workforce, but gave no hint of the dimensions of the private workforce. . . .
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> In this setting, a new generation of reformers—the Privatizers, Downsizers, and Reinventers of the 1980s and 1990s—came to argue for reform of Big Government with little evident knowledge of the history or legacy of past reforms. When, in 1993, the Clinton administration announced its intent to "reinvent government," the focal point of the announcement was a

bearable, the administration repeatedly offered eye-catching quotas for the number of employees to be cut.[49] Although these quotas are now unofficial and internal,[50] they remain the primary purpose of the policy.[51] Such a policy exhibits a shocking level of cynicism. But the cynicism is fueled by a sufficiently gullible public. Herein lies the attraction of embracing the small government myth.[52]

B. *The Shrinking Government Myth*

The Bush administration's interest in competitive sourcing lies in shrinking the number of federal employees. That's good politics, because the bipartisan

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> commitment to reduce Big Government—by reducing the number of federal employees. Fittingly, just before the century's end, it was the Brookings Institution that reported the discovery that the official federal workforce was only a fraction of the size of the "shadow of government. . . ."

Daniel Guttman, *Public Purpose and Private Service, The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. Rev. 859, 890 (2000); see also Vice President Al Gore, The Best Kept Secrets in Government: A Report to President Bill Clinton 1, 207 (GPO 1996) (the executive branch, excluding the independent Postal Service, has "the smallest workforce in 30 years").

49. *See, e.g.*, Budget of the United States Government, Fiscal Year 2004 (2003), *at* http://www.whitehouse.gov/omb/budget/fy2004/budget.html under the link to Budget and Management Highlights (Defense Department and Department of Veterans Affairs plan to outsource 55,000 civilian positions in 2003); Christopher Lee, *Army Outsourcing Plan Decried*, Wash. Post, Dec. 21, 2002, at A4 (suggesting that the plan could affect more than one of every six Army jobs).

50. *See, e.g.*, Christopher Lee, *OMB to Drop Quotas for Outsourcing of Jobs*, Wash. Post., July 25, 2003, at A23 (noting that skeptics "said OMB officials could still impose de facto quotas by refusing to bless agency plans that do not meet the old goals").

51. *See, e.g.*, Office of Management and Budget, Competitive Sourcing: Reasoned and Responsible Public-Private Competition: Agency Activities: A Supplement to the July 2003 Report (Sept. 2003), *available at* http://www.whitehouse.gov/omb/procurement/comp_sourc_addendum.pdf. Attachment A, Table 1, details the "OMB Estimates of Commercial Activities at Agencies Tracked under the PMA." For each agency, the table indicates the total workforce, the number of full-time-equivalents (FTEs) performing commercial activities, the total number of those FTEs available for competition, and the percentage of the total workforce that this number represents. If the numbers are not quotas, why would OMB be tracking them pursuant to the President's Management Agenda? *See also* Attachment B, Competitive Sourcing: New Scorecard Criteria, detailing how agencies earn "yellow" or "green" status, both of which we must assume are better than "red" status. The numbers are startling, particularly given the agencies with the greatest percentage of their workforce available for competition: the Small Business Administration (69 percent); the Department of Education (62 percent); the Army Corps of Engineers (59 percent); Housing and Urban Development (39 percent); the Department of Defense (45 percent—more than 270,000 employees); the General Services Administration (37 percent); the Department of Agriculture (36 percent); the Department of Interior (33 percent); and the Department of Energy (31 percent). Compare these agencies to those with the lowest percentage: the Smithsonian Institution (0 percent); the Environmental Protection Agency (2 percent); the Department of Justice (3 percent); the Social Security Administration (6 percent); and the Department of State (10 percent). Of these, I find the Justice Department figure the least credible. Even given a large number of prosecutorial and policy positions, I have no doubt that the private sector could effectively perform more than 3 percent of the work performed by the agency's attorneys, paralegals, and support staff.

52. As discussed above, Hodge likely would embrace this within his contingency theory. Hodge, *supra* notes 25 & 31.

tale of a shrinking Federal Government, despite its dubious veracity, offers broad-ranging appeal.[53] Some, but not all, of the best tall tales begin with a grain of truth. Enduring fiction involving the Loch Ness monster[54] and Bigfoot (Sasquatch)[55] is often widely believed, despite contradictory empirical

53. Arguably, this could be seen as a classic public choice anecdote. No rational contemporary legislator would risk campaigning based upon promises to hire more government employees. There are exceptions. Candidates seeking to appear tough on crime promise to put more police on the street (although they rarely focus upon the tax increase or corresponding service decrease that will be required to achieve such an end). In an environment of cascading budget deficits, it is similarly risky to even acknowledge that policies, however well received by the public, bear actual costs. Public choice helps us accept why we cannot expect legislation to reflect rational, responsible decision making.

> [M]odern textualists . . . argue that individual legislators' preferences cannot realistically be aggregated into a coherent collective decision, and that legislative outcomes often turn on procedural idiosyncrasies that make the legislature's final choice . . . arbitrary. Building on Condorcet's paradox, modern social choice theory suggests that, while individual policy preferences are transitive (if I prefer A to B and B to C, then I prefer A to C), a multimember body's preferences may be intransitive (the legislature as a whole may prefer A to B to C to A) . . . [and] the intransitivity of the legislature's preferences can lead to an endless cycle of legislative outcomes. The procedures for considering legislation thus play a crucial role in determining its content. . . .
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> [S]ocial choice theory predicts that . . . legislative outcomes will largely depend on the sequence in which alternatives are presented, so that those who control the legislative agenda will . . . influence . . . the legislation's final shape. Hence, the final outcome may represent only one of many possible majority outcomes. . . . [S]trategic voting (including logrolling across different substantive areas) may also decisively affect a given proposal's success.

John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2412–13 (2003). *See also* Saul Levmore, *From Cynicism to Positive Theory in Public Choice*, 87 Cornell L. Rev. 375 (2002) ("It offers incoherent majorities, aggregation impossibilities, and most famously—though perhaps unfortunately—self-serving, overachieving interest groups that are busy imposing external costs on less-organized citizens and generating rent-seeking costs in many subtle ways."); David B. Spence, *A Public Choice Progressivism, Continued*, 87 Cornell L. Rev. 397, 398 n.2 (2002) (using "the term 'public choice' . . . to refer to the analytical approach of neoclassical economics—one characterized by a focus on the maximizing behavior of rational individuals"); Bob Rouder, Note, *Mediating the Professional Paradox: An Application of the Aggregate Idiot Phenomenon*, 80 Tex. L. Rev. 671, 699 (2002) ("[T]he ethos of all social choice studies is to understand the process of preference aggregation—how groups reach a single outcome from varied inputs."); Symposium, *Public Oversight of Public/Private Partnerships*, 28 Fordham Urban L.J. 1357, 1359 (2001) (Jack Beerman observes that "Public choice analysis would assume that [government officials] will privatize only when it is in their interest to do so, i.e., when the gains to government officials . . . (in terms of political support . . .) outweigh any losses. . . ."); Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 Wash. U. L.Q. 975 (1998); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219 (1994).

54. *See, e.g.*, The Legend of Nessie, *at* http://www.nessie.co.uk/ (detailing staggering numbers of sightings, film evidence, sonar contacts, and, of course, stories); The Beast of Loch Ness, *at* http://www.pbs.org/wgbh/nova/lochness/ (with information from the 1999 Public Broadcasting Service broadcast following the scientific sonar survey of the Loch).

55. *See, e.g.*, BFRO, The Bigfoot Field Researchers Organization, *at* http://www.bfro.net/ ("The only scientific organization probing the bigfoot/Sasquatch mystery," noting that "On Friday, September 27, 2002, during National Public Radio's (NPR) *Talk of the Nation: Science Friday* with Ira Flatow, Dr. Jane Goodall made a striking comment on her strong beliefs that large "undiscovered" primates, such as the Yeti or Sasquatch, do indeed exist."); Bigfoot: Fact or Fantasy, *at* http://www.rfthomas.clara.net/bigfoot.html.

evidence.[56] (Granted, recent discoveries appear to confirm the existence of the giant squid, so caution may be appropriate in discussing these weighty issues.[57])

But our Government is not shrinking. Surely, in our lifetimes, the nature of Government changed dramatically. Government employment rolls indicate that we are governed by the smallest civil service, and protected by the leanest military, in decades. But do not be deceived. Behind the "lies, damned lies, and statistics"[58] lies a growing, not shrinking, behemoth. But the growth of Government has been largely masked by cutting government employment rather than programs.[59] Outside of the public conscience, contractors have filled the gap, and the Government has grown. This is why Paul Light's empirical work is so important.[60]

Our elected leaders know that the public accepts the small government myth and ignores the details. There are two strands to the small government story. One, the less frequently told, encompasses actual reductions in the size (and typically the scope) of Government. Before turning to the second outsourcing strand, replacing existing government personnel with contractor personnel, let me offer a single small-government anecdote that, in my opinion, highlights the hypocrisy of the jingoistic small government mantra.

C. *A Disquieting Detour*

Examples abound to illustrate the hypocrisy and costs of perpetuating the small government myth. Consider the Internal Revenue Service (IRS). The president and Congress long have known of the public's enmity toward the instrumentality responsible for collecting the nation's taxes.[61] This sentiment

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56. Truth apparently spreads slower than fiction. *See, e.g.*, *Frequently Asked Questions*, Nat'l Geographic Magazine, *at* http://www.nationalgeographic.com/ngm/faq.html.

> Q: When will you again publish the works of Robert Kincaid—the photographer in *The Bridges of Madison County*?
>
> A: Alas, the sexy, middle-aged photographer, portrayed by Clint Eastwood in the film that followed the book, is pure fiction. There is not, and never was, a Robert Kincaid here, although some of our photographers have shamelessly encouraged the comparison.

57. *See, e.g.*, *Giant Squid Washes Up on Beach*, CNN, July 22, 2002, *at* http://www.cnn.com/2002/TECH/science/07/22/australia.squid/; the Smithsonian Institution's Search for the Giant Squid, *at* http://partners.si.edu/squid/; *Chasing Giants, On the Tail of the Giant Squid*, Discovery Channel, *at* http://dsc.discovery.com/convergence/giantsquid/giantsquid.html; Giant Squid (*Architeuthis clarkei*), *at* http://ncca.bournemouth.ac.uk/main/staff/vassili/giant_squid.html.

58. Mark Twain, Autobiography (1924) (attributing the quote to Benjamin Disraeli).

59. Paul C. Light, *The Public Service*, 31 Gov. Exec. 14 (June 1999).

60. Paul C. Light, *Fact Sheet on the True Size of Government* (2003), *at* http://www.brook.edu/gs/cps/light20030905.htm; *see also* Paul C. Light, *An Update on the Bush Administration's Competitive Sourcing Initiative* (2003), *at* http://www.brook.edu/dybdocroot/views/testimony/light/20030724.pdf.

61. Too few Americans consciously embrace the inscription above the entrance to the IRS headquarters building: "Taxes are what we pay for a civilized society—Oliver Wendell Holmes." Frankly, "[t]axpayers will never like its functions, love its employees, or find the same level of satisfaction they seek in their banking services." Donald F. Kettl, *Taxing Reform: Assessing the Plans*

is deep and widespread. Yet, during the 1990s, our elected representatives deferred to the public's preference for a smaller Internal Revenue Service, or, at very least, a "kinder, gentler" IRS. Even when contrasted with the general downsizing of Government, the IRS suffered swift, dramatic personnel cuts.

Despite the public applause, these reductions are deeply troubling. Not surprisingly, the personnel reductions appear to correlate with a reduction in the rate at which the IRS audits individual tax returns. The following chart, which correlates recent IRS workforce reductions with taxpayer audit rates, paints a stark picture.

Tax-Related Reductions in Personnel and Examination Rates			
Employee Classification	1997[62]	1999[63]	Decrease: 1997–1999
0512—Internal Revenue Agent (average grade: GS-12)	14,609	13,276	9%
0526—Tax Technician (average grade: GS-9)	3,756	3,224	14%
0592—Tax Examining (average grade: GS-7)	19,453	13,643	30%
Total	39,815	32,142	19%
Examination rate of individual returns by year	*1 (0.99)*	*0.50*	*50%*

In 1999, individuals were half as likely to be audited when compared to 1997.[64] But these data—chosen to correlate with available personnel information—actually mask the severity of the decrease. When the 1999 data are compared to the experience over the preceding twenty years, the drop in audit rate appears even more dramatic.[65] It appears, then, that the desire for small

to Transform the IRS, Brookings Institution Policy Brief No. 22 (1997), *at* http://www.brook.edu/dybdocroot/comm/policybriefs/pb022/pb22.htm.

62. Office of Personnel Management (OPM), Federal Civilian Workforce Statistics: Occupations of Federal White-Collar and Blue-Collar Workers as of September 30, 1997, OMSOE-OWI-56–25, at Table W-A2, Full-Time Civilian White Collar Employment by Occupation (1998), *at* http://www.opm.gov/feddata/ocwcbc97.pdf.

63. Office of Personnel Management (OPM), Federal Civilian Workforce Statistics: Occupations of Federal White-Collar and Blue-Collar Workers as of September 30, 1999, OMSOE-OWI-56–26, at Table W-A2, Full-Time Civilian White Collar Employment by Occupation (2000), *at* http://www.opm.gov/feddata/ocwcbc99.pdf.

64. Data derive from the 1997 and 1999 IRS Data Books, *available at* http://www.irs.gov/taxstats/article/0,,id=102174,00.html.

65. For the period 1980–2000, the average examination rate was 1.13. If the post-1997 data are excluded, however, the rate rises to 1.21. In other words, the 1999 rate represents only 41 percent of the average rate for the period 1980–1997. These data derive from IRS Data Books for 1993 through 2001, and IRS Annual Reports for 1982 through 1992.

Government can, at least in this one case, overcome an almost tautological knowledge that an inadequate collection regime must mean that honest taxpayers bear any increased tax burden caused by tax cheaters (and, of course, those that make honest mistakes in their own favor).[66]

At the risk of becoming distracted by this anecdote, this snapshot merits further examination because it presents another troubling, yet classic downsizing experience. It appears that, faced with a budget-based mandate to reduce personnel, the seniority system protected the more senior personnel, while the IRS jettisoned its junior employees.[67] In other words, the personnel reduction rate increased as the seniority level decreased. Arguably, the result of this inverse relationship is that what remains all too often is (1) a top-heavy workforce with a disproportionate number of managers for the remaining workers; (2) too few workers to perform the necessary, but potentially less-interesting, high-volume work; and (3) a significant decrease in workforce energy. While this limited snapshot cannot confirm this theory, it potentially goes a long way toward explaining how a cumulative workforce cut of less than 20 percent could reduce the audit rate by 50 percent.[68]

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66. Ultimately, at some level we must recognize that the antitax sentiment is so strong that consequences are either irrelevant or counterintuitive. *See, e.g.*, Paul Krugman, *The Tax-Cut Con*, N.Y. Times Magazine, Sept. 14, 2003, at 54 (discussing the rationale underlying the naive, but seemingly popular, antitax crusade in the United States).

> One of those doctrines has become famous under the name "supply-side economics." It's the view that the government can cut taxes without severe cuts in public spending. The other doctrine is often referred to as "starving the beast," a phrase coined by David Stockman, Ronald Reagan's budget director. It's the view that taxes should be cut precisely in order to force severe cuts in public spending. Supply-side economics is the friendly, attractive face of the tax-cut movement. But starve-the-beast is where the power lies.
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> . . .
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> For the looming fiscal crisis doesn't represent a defeat for the leaders of the tax-cut crusade or a miscalculation on their part. Some supporters of President Bush may have really believed that his tax cuts were consistent with his promises to protect Social Security and expand Medicare; some people may still believe that the wondrous supply-side effects of tax cuts will make the budget deficit disappear. But for starve-the-beast tax-cutters, the coming crunch is exactly what they had in mind.

See also America's Deficits: A Flood of Red Ink, Economist, Nov. 6, 2003, *available at* http://www.economist.com/world/na/displayStory.cfm?story_id=2189237 ("Mr. Bush has two basic fiscal goals. . . . The first is to starve government of money to force it to tackle entitlement reform. . . .").

67. An interesting gender observation also might be made here. The IRS reductions affected women more heavily than men. Internal revenue agents are primarily (60 percent) male, while tax examiners and tax technicians are predominantly (79 percent and 69 percent respectively) female. *See supra* notes 62 & 63. If these percentages were the same in 1997 and 1999, then female employees accounted for more than 70 percent of the personnel reduction.

68. Of course, I do not ignore the possibility that the plummeting audit rate reflects an evolution toward more sophisticated and effective audit mechanisms that, for example, derive from innovative use of information technology to provide meaningful oversight for the burgeoning volume of electronic filings. I am heartened by work such as that by John Braithwaite, *Meta Risk Management and Responsive Regulation for Tax System Integrity*, 25 Law & Pol'y 1 (2003) ("A further step toward a reflexive risk paradigm is for a tax office to monitor and seek to remake the risk management systems of the organizations it regulates." *Id.* at 2.). Yet, while I concede that this lies outside my area of expertise, my more knowledgeable colleagues caution me not to expect

III. OUTSOURCING'S DIM PROSPECT

Returning to the other, more relevant strand of the small government myth, the outsourcing trend increases the number of nongovernmental personnel performing tasks previously performed by civil servants and military personnel. But that does not mean that there are not other, valid reasons for the trend. No shortage of literature focuses upon the outsourcing phenomenon, particularly from a public policy perspective.[69] The last few years have seen increased examination of the topic in legal scholarship, with numerous journals publishing symposia grappling with a host of related issues.[70] This and other scholarship contemplate some of the thorny issues implicated when Governments, at the federal, state, and local levels, rely on the private sector.[71]

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too much in light of the current, all-too-often-outdated IRS information technology and management resources.

69. *See*, *e.g.*, Phillip J. Cooper, Governing by Contract: Challenges and Opportunities for Public Managers (2003); Mark A. Abramson & Ronald S. Harris III, The Procurement Revolution (2003) (particularly chapters 1, 3, and 5–7); John D. Donahue & Joseph S. Nye Jr., Market Based Governance: Supply Side, Demand Side, Upside, and Downside (2002); Elliott D. Sclar, You Don't Always Get What You Pay For: The Economics of Privatization (2000); Donald F. Kettl, Sharing Power: Public Governance and Private Markets (1993); John D. Donahue, The Privatization Decision: Public Ends, Private Means (1989); Guttman & Willner, *supra* note 14.

70. *See*, *e.g.*, Symposium, *Public Values in an Era of Privatization*, 116 Harv. L. Rev. 1211 (2003); Symposium, *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. Rev. 1687 (2002); Single Subject Issue, *Privatization and Outsourcing*, 30 Pub. Cont. L.J. 551 (2001); Symposium, *Accountability and Democracy in the Era of Privatization*, 28 Fordham Urb. L.J. 1319 (2001); Annual Regulation of Business Focus, *Privatization*, 52 Admin. L. Rev. 813 (2000); Project, *Privatization: The Global Scale-Back of Government Involvement in National Economies*, 48 Admin. L. Rev. 435 (1996); Symposium, *Comparative Models of Privatization: Paradigms and Politics*, 21 Brook. J. Int'l L. 1 (1995).

71. *See*, *e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1371 (2003) ("contend[ing] that constitutional law's current approach to privatization is fundamentally inadequate in an era of increasingly privatized government."); Stevenson, *supra* note 46, at 130 ("in the debate about which government services are best-suited for private enterprise, . . . welfare services should be . . . last in line. The policy goals are simply too complex and, in a democratic society, conflicted."); Janna J. Hansen, Note, *Limits of Competition: Accountability in Government Contracting*, 112 Yale L.J. 1465 (2003) (New York City child welfare services); Lewis D. Solomon, *Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis*, 30 Fordham Urb. L.J. 1281, 1340 (2003) ("As public schools continue to fail . . ., privatization may . . . offer hope for inner-city youth. The system can change through the . . . market forces coupled with rigorous, contractual standards of accountability and greater parental involvement."); Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. Rev. 1 (2002); Jeffrey A. Renshaw, *Utility Privatization in the Military Services: Issues, Problems, and Potential Solutions*, 53 A.F. L. Rev. 55 (2002); Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 Wash. & Lee L. Rev. 1287 (2001); Mathew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. Rev. 1121 (2000); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 Rutgers L. Rev. 323, 324 (1999) ("When . . . companies manage prisons, public schools, and hospitals, and distribute welfare benefits, the inmates, students, patients, and welfare recipients they purport to serve become human commodities. . . ."); Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 Ohio. St. L.J. 1295 (1999); Florecio Lopez de Silanes et al., *Privatization in the United States*, 28 Rand J. Econ. 447 (1997); Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, Q. J. Econ. 1127 (1997).

A wealth of comparative scholarship examines lessons learned and experiences outside the United States.[72]

A. *A Federal Workforce Metamorphosis?*[73]

At the federal level, what troubles me most is neither the stated nor the unstated policy. Rather, my chief concern is that, in its rush to outsource, the administration remains oblivious to the most fundamental realities of implementing its new policy. When the policy gets stripped away, one insurmountable obstacle remains. The macro (governmentwide) and micro (acquisition workforce) effects of the 1990s downsizing frenzy left the Federal Government woefully unprepared to identify, recruit, and manage the revolutionized workforce that the competitive sourcing initiative envisions.[74] That the competitive sourcing initiative exacerbates a previously existing human capital cri-

72. *See, e.g.*, Alessandro Ancarani, *The Impact of Public Firms Commercialisation on Purchasing Management*, 3 J. Pub. Procurement 357 (2003); Yua Wei, *Corporatization and Privatization: A Chinese Perspective*, 22 Nw. J. Int'l L. & Bus. 219 (2002); Lauren Page Ambinder et al., *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market*, 24 Fordham Int'l L.J. 1029 (2001); Hester Lessard, *The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring*, 39 Osgoode Hall L.J. 717 (2001); Ewell E. Murphy Jr., *The Prospect for Further Energy Privatization in Mexico*, 36 Tex. Int'l L.J. 75 (2001); Ellen Dannin, *To Market, To Market: Legislating on Privatization and Subcontracting*, 60 Md. L. Rev. 249 (2001) (the author's biographical footnote contains a wealth of sources relating to privatization in New Zealand); Bernard Black et al., *Russian Privatization & Corporate Governance: What Went Wrong?* 52 Stan. L. Rev. 1731 (2000); Tony Prosser, *Public Service Law: Privatization's Unexpected Offspring*, 63 L. & Contemp. Probs. 63 (2000); Colleen Flood, *Contracting for Health Care in the Public Sector*, 31 Canadian Bus. L.J. 175 (1999); Kristen V. Campana, *Paying Our Own Way: The Privatization of the Chilean Social Security System and Its Lessons for American Reform*, 20 U. Pa. J. Int'l Econ. L. 385 (1999); Cento Veljanovski, *Privatization in Britain*, 71 Marq. L. Rev. 558 (1998); Roger Barrett James, *Information—The Key to Fair Privatization: British Successes and Russian Pitfalls*, 20 Loy. L.A. Int'l & Comp. L. Rev. 837 (1998); Heather M. Stack, *A Comparative Analysis of German Privatization*, 46 Duke L.J. 1211 (1997); Philip Nichols, *Privatization in Central Asia*, 29 N.Y.U. J. Int'l L. & Pol. 299 (1997); Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, 13 Oxford Rev. Econ. Pol'y 67 (1997); Maxim Boycko et al., *A Theory of Privatisation*, 106 Econ. J. 309 (1996); Evan Atwood & Michael J. Trebilcock, *Public Accountability in an Age of Contracting Out*, 27 Canadian Bus. L.J. 1 (1996); Michael A. Schelble, *A Comparative Analysis of Privatization of Public Housing in Great Britain and the United States*, 9 Wisc. Int'l L.J. 463 (1991); Alan. S. Gutterman, *Japanese Security Markets: The Impact of the Privatization and Deregulation of Japan's Public Enterprises*, 12 U. Pa. J. Int'l Bus. L. 589 (1991).

73. This seems as good a point as any to mention that, in Paul Light's earlier work on the evolving "shape" of government, he focused upon growth in terms of height (reflecting increased layers of bureaucracy) and contraction in terms of girth (identifying reductions in middle management, military base closures, and basic job cutting). *See* Paul C. Light, *The Changing Shape of Government*, Policy Brief No. 45, *at* http://www.brook.edu/comm/policybriefs/pb45.htm. Light suggests that this morphing "means that ordinary Americans will be less likely to contact a federal employee when they call a government 800 number, write an office, or use a service . . . [and] that the nation's elected and appointed leaders will be further from the front lines, and less likely to know what the public is getting for its tax dollars."

74. "If Government is to have a larger role and yet reduce its responsibilities as public provider, simply put, public servants will have to become better public contract managers." John Forrer & James Edwin Kee, *Public Servants as Contract Managers?* 33 Pub. Cont. L.J. 361, 367 (2004).

sis within the government acquisition workforce is no secret.[75] But the failure to address the problem prompts a race toward chaos. Specifically, the acute procurement personnel shortages resulted in an accelerating proliferation of poorly structured employee augmentation personal services[76] contracts with inadequate oversight.[77] That's a troubling outlook for governing.

The root cause is the unacknowledged, unbudgeted price of effectuating the competitive sourcing policy. Replacing government employees with contractors means the Government needs more (or larger) service contracts. But successful service contracts are tough to write. More importantly, they require significant resources to manage. Yet, while OMB spurred agencies to outsource functions, it made no effort to provide the resources agencies needed to plan and conduct competitions. Nor were resources provided to manage the successful contractors. Time magnifies these problems as the privatized workforce grows. This would be true *even if* the Government had sufficient resources to handle its ongoing procurement function. But that is not the case, because the Government foolishly eviscerated its acquisition workforce during the 1990s.

No one disputes the simple premise that "While managing spending effectively is always a key management responsibility, the need for effective management is more acute in agencies that rely heavily on acquiring goods and services to carry out their missions or support their operations."[78] As the Office of Federal Procurement Policy articulated:

> The extent of reliance on service contractors is not by itself a cause for concern. *Agencies must, however, have a sufficient number of trained and experienced staff to man-*

75. "The increasing significance of contracting for services has prompted—and rightfully so—a renewed emphasis . . . to resolve long-standing problems with service contracts. To do so, the government must face the twin challenges of improving its acquisition of services while simultaneously addressing human capital issues. One cannot be done without the other." Statement of David E. Cooper, *supra* note 12, at 10. Having said that, it is unfortunate that these issues were (and continue to be) ignored.

> [M]ost of the privatization discussion . . . has been more concerned with ideology or supporting . . . consulting firms than with ensuring a good deal for the taxpayer. It focused more on assumptions about the virtues of the private sector and the presumed weaknesses of the public sector than . . . on providing the capacity needed to ensure not only that good contracts are developed but also that they will be effectively administered to achieve . . . the essential values . . . in public contracting.

Cooper, *supra* note 69, at 9 (footnotes omitted).

76. *See* discussion *infra* at text accompanying note 105 *et seq*.

77. I also agree with those, like Dan Guttman, who fret that the lack of adequate oversight capacity also is problematic for reasons unrelated to the performance of individual contractors in terms of cost control or task completion. Guttman frets "[t]hat outsourcing will make government less accountable to the public. Contract employees are not listed in agency employee directories. . . ." Peckenpaugh, *supra* note 7, at 49.

78. General Accounting Office, Federal Procurement: Spending and Workforce Trends, Report to the Committee on Government Reform, House of Representatives, and the Committee on Governmental Affairs, U.S. Senate, GAO-03–443, at 24 (2003), *available at* http://www.gao.gov/new.items/d03443.pdf.

> *age Government programs properly*. The greater the degree of reliance on contractors the greater the need for oversight by agencies.[79]

Unfortunately, no one seems willing to pay the price.

B. *The Looming Acquisition Workforce Crisis*

> [G]overnmentwide reductions in the acquisition workforce along with a number of procurement reforms—including an increased reliance on services provided by commercial firms . . . have placed unprecedented demands on the federal acquisition workforce.[80]

Despite clear mandates requiring agencies to contract out government functions, no concurrent emphasis has been placed upon retaining or obtaining skilled professionals to plan for, compete, award, or manage these sophisticated long-term service contracts. Sadly, there are not enough qualified acquisition professionals or buyers left in the Federal Government to do the job.[81] Nor are there enough experts to define the various tasks government employees perform and then evaluate whether the private sector can outperform the Government. And, once the contractors are chosen, there are insufficient specialists to ensure the Government gets what it pays for.

Granted, both executive and legislative branch pressure prompted the reduction in the size of the federal bureaucracy. Both political parties reveled in, and claim credit for having contributed to, the reduction in size of the Federal Government. None preached caution at the time. But this effort, particularly in this context, was penny wise and pound foolish.

During the government downsizing frenzy of the 1990s, however, agencies routinely deemed their acquisition professionals nonessential to their core missions. Accordingly, buyers, auditors, contract specialists, and quality assurance personnel were jettisoned in waves,[82] at rates far more severe than

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79. Policy Letter from Allan V. Burman, Administrator, Office of Federal Procurement Policy (OFPP), to the Heads of Executive Agencies and Departments, No. 92–1, § (7)(h) (Sept. 23, 1992) [hereinafter OFPP Policy Letter 92–1], *at* http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL92–1.html (emphasis added).

80. Letter from David M. Walker to Senators John Ensign and Daniel Akaka, March 19 Hearing on Sourcing and Acquisition—Questions for the Record, GAO-03–771R (May 23, 2003) [hereinafter Walker Letter] (citing GAO-03–443, *supra* note 78).

81. Nowhere is this more clear than at the Defense Department, which accounts for more than 60 percent of the federal procurement budget. "Between fiscal years 1990 and 2001, the Department of Defense's (DOD) acquisition workforce was reduced significantly—by more than 50 percent. At the same time, DOD's contracting workload increased by 12 percent." Walker Letter, *supra* note 80.

82. The acquisition workforce experienced a sustained, dramatic, congressionally mandated reduction in force, leaving the Government's buyers overwhelmed, undertrained, retirement eligible, and ill-suited to meet the daunting demands they faced. *See, e.g.*, DoD Acquisition Workforce Report, *supra* note 44. The DoD Inspector General reported an acquisition workforce reduction from 460,156 in 1991 to 230,556 in 1999. "DOD's total workforce and acquisition workforce have declined by 9 percent since fiscal year 1997, continuing a decade-long decline that began in the early 1990s." GAO-03–443, *supra* note 78, at 32; General Accounting Office, Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges, GAO-02–630, at 2 (2002), *at* http://www.gao.gov/new.items/d02630.

those experienced in the across-the-board downsizing.[83] While I continue to bemoan the systematic procurement personnel reductions, little point is served in revisiting the Faustian bargains made. The reformers consented to deep personnel cuts in exchange for the increased flexibility that defines the 1990s acquisition reforms.[84] Only after the fact did senior leadership concede the stark ramifications of the acquisition workforce purge.[85]

That's a shame, because little (and arguably no) empirical evidence supported the procurement personnel reductions at the time. The trend in workforce reduction could not have been more poorly timed, in that it coincided with an era of aggressive acquisition reform.[86] Implementation of reforms suffered because the increased workload on remaining personnel denied them the opportunity to receive the training needed to learn the new skills required

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pdf ("Between 1989 and 1999, DOD downsized its civilian acquisition workforce by almost 50 percent to about 124,000 personnel as of September 30, 1999."). These reductions came through mandated 10 or 15 percent cuts each year. *See, e.g.*, the National Defense Authorization Act for 2000, Pub. L. No. 106–65, § 922, 113 Stat. 512, 724 (1999). While the lion's share of analysis focuses upon the Defense Department, which experienced the most dramatic cuts, GAO leaves no doubt that its "concerns are equally valid regarding the broader civilian agency contracting community." Statement of David E. Cooper, *supra* note 12, at 8. For a graphic illustration, see Figure 7, Commercial Activities Panel Report, *supra* note 11, at 30.

83. In 1997, the Defense Department reported that

> When comparing the . . . acquisition workforce . . . results to other areas . . ., acquisition workforce reductions outpace all of them. During this FY89–FY01 period when the Departments estimated a 48% personnel reduction in acquisition organizations, there is a corresponding 32% reduction in active duty military . . ., estimates for total civilian personnel reductions are 28.6% . . .[.] Additionally, . . . estimates for total federal employment reductions in the FY89–FY01 period are 18.6%.

Office of the Under Secretary of Defense (Acquisition & Technology), Right-Sizing the Department of Defense Acquisition Workforce 28 (1997), *at* http://www.dau.mil/career/files/906rpt.pdf. *See also* The Acquisition 2005 Task Force, Final Report: Shaping the Civilian Acquisition Workforce of the Future (2000) [hereinafter Acquisition Task Force Final Report], *at* http://www.acq.osd.mil/dpap/Docs/report1000.pdf ("Over the last decade, the rate of reduction in the civilian acquisition workforce has substantially exceeded that of the rest of the DoD workforce." *Id.* at ES-3.). Moreover, DoD "projects additional losses approaching 50 percent in some key acquisition occupations primarily due to retirement over the next 5 to 6 years." *Id.* at 2.

84. "Acquisition reforms, as one downsizing driver, help make it possible to achieve the mission with a smaller workforce." Under Secretary of Defense, *supra* note 83, at 8. "The FY 1996 actual reductions and estimates of further right sizing . . . indicate payoff from numerous prior plans, studies and activities. The long term results . . . reflect a continued emphasis on active management . . . in the acquisition community. The Department is confident of our ability to achieve further improvements and achieving the reductions currently planned for in FY 2000, while posturing our acquisition workforce to fully support diverse mission requirements in the 21st century." *Id.* at 5.

85. "The Department of Defense (DoD) is facing a crisis that can dramatically affect our Nation's ability to provide warfighters with modern weapon systems needed to defend our national interests. After eleven consecutive years of downsizing, we face serious imbalances in the skills and experience of our highly talented and specialized civilian workforce." Action Memorandum (Oct. 11, 2000), *in* Acquisition Task Force Final Report, *supra* note 83.

86. *See, e.g.*, Steven Kelman, *Remaking Federal Procurement*, 31 Pub. Cont. L.J. 581 (2002); Stephen M. Daniels, *An Assessment of Today's Federal Procurement System*, 38 Procurement Law. 1 (2002); Steven L. Schooner, *Change, Change Leadership, and Acquisition Reform*, 26 Pub. Cont. L.J. 467 (1997).

by the reformed regime.[87] The steady pace of reductions proved devastating to procurement personnel morale, and these professionals saw little to suggest optimism in the future. The mandated workforce reductions not only meant a rapidly aging and retirement-eligible workforce,[88] but they also foreclosed new hires (and the resulting failure to infuse "new blood" into the procurement workforce). A Defense Department Inspector General concluded that the personnel reductions resulted in, among other things, insufficient staff to manage requirements; reduced scrutiny in reviewing acquisition actions; difficulties retaining personnel; and insufficient contract surveillance.[89]

Fortunately, this troubling trend seems to have stalled. But nothing suggests a pending reversal of the trend.[90] That leaves a void. While the procurement workforce shrank, the number of acquisitions—both the total and those in excess of $100,000, which absorb more energy and effort—increased. A steady stream of evidence demonstrates the crippling impact of an inadequately staffed acquisition workforce, for example, at Housing and Urban Development,[91] NASA,[92]

87. GAO explains: "Changes in what the government buys, its contracting approaches and methods, and its acquisition workforce combine to create a dynamic acquisition environment. . . . However, our work has found that the lack of proper training, guidance, and internal controls can increase an agency's procurement risk and lead to reduced public confidence." GAO-03–443, *supra* note 78, at 24.

88. According to DoD's Acquisition 2005 Task Force, eleven consecutive years of downsizing produced serious imbalances in the skills and experience of the highly talented and specialized civilian acquisition workforce, putting DoD on the verge of a retirement-driven talent drain. Statement of David E. Cooper, *supra* note 12, at 7 (citing Acquisition Task Force Final Report, *supra* note 83).

89. DoD Acquisition Workforce Report, *supra* note 44, at 17–20.

90. *See*, *e.g.*, GAO-03–443, *supra* note 78.

91. *See*, *e.g.*, General Accounting Office, HUD Management: Action Needed to Improve Acquisition Management, Report to Congressional Requesters, GAO-03–157 (2002), *at* http://www.gao.gov/new.items/d03157.pdf; *HUD Faces Challenges Effectively Overseeing Contractors, GAO Says*, 44 Gov. Contractor ¶ 470 (Nov. 27, 2002). Like many other agencies, HUD dramatically downsized its staff—including its procurement staff—during the 1990s, despite the fact that its workload did not decrease. (GAO described a "serious staffing shortage" and referred to the Office of the Chief Procurement Officer (OCPO) as "an organization in crisis.") Like other agencies, HUD today relies more heavily upon private contractors. Thus, consistent with the experience at other agencies, HUD has more contracts to award and administer, and fewer professionals to perform this work. Not surprisingly, the procurement training story is a sad one. Although HUD disputed this finding, GAO reported that HUD's centralized training records indicated that 89 percent of HUD's Contracting Officers, contract specialists, procurement analysts, and purchasing agents do not meet federal training requirements. Over half of the government technical representatives (GTRs) had not received the training mandated by the Clinger-Cohen Act in 1996. Only 7 *percent* of HUD's 495 government technical monitors (GTMs) had received *any* specialized training.

92. *See* Office of Inspector General, Audit Report: NASA Contracts for Professional, Administrative, and Management Support Services, IG-03–003 (2002), *at* http://www.hq.nasa.gov/office/oig/hq/ig-03–003.pdf. Among other things, the IG reports:

> Over the last decade, Federal agencies, including NASA, have substantially increased their purchases of services. . . . Prior [IG] audits identified management control weaknesses related to support services contracts. These weaknesses included, in part, inadequate competition and a lack of cost control. . . . NASA can improve its award and management of support services contracts. For three of the five support services contracts reviewed, contractors did not obtain adequate competition for . . . 59 percent of . . . subcontracts awarded. . . . NASA did not max-

and the Immigration and Naturalization Service (INS).[93]

Now, after a decade of arbitrary procurement workforce reductions, Congress simply demands that buyers "do more with less." That's posturing, not policy, and it is terribly irresponsible.[94] The result is an insufficient workforce to manage the contracting-out burden. Nor is reliance upon the private sector an attractive option, to the extent that, historically, the procurement function was deemed inherently governmental.[95] Not surprisingly, GAO found that

> it is becoming increasingly evident that *agencies are at risk of not having enough of the right people with the right skills to manage service procurements.* Consequently, a key question we face in the government is *whether we have today, or will have tomorrow, the ability to acquire and manage the procurement of increasingly sophisticated services the government needs.*[96]

> imize opportunities to facilitate the use of fixed-price contracting for routine administrative services with reasonably definite requirements. As a result, NASA assumed more risk than necessary because the use of cost-type contracts rather than fixed-price contracts can minimize the contractor's incentive to control costs and perform effectively. In addition, cost-type contracts can be more costly and burdensome for NASA to administer due to more stringent contract reporting and review requirements.

NASA IG Report Finds Agency Needs to Improve Award and Management of Support Services Contracts, 44 Gov. Contractor ¶ 446 (Nov. 13, 2002). *See also* Office of Inspector General, Audit Report: Procurement Workforce Planning, IG-01–041 (Sept. 27, 2001), *at* http://www.hq.nasa.gov/office/oig/hq/ig-01–041.pdf (NASA lacks enough adequately trained acquisition professionals to handle its future procurement workload demands). In the broader context, see *Columbia* Accident Investigation Board Report (Oct. 28, 2003), *at* http://www.nasa.gov/columbia; Greg Schneider & Ariana Eunjung Cha, *Cost-Conscious NASA Relies on Contract Firms*, Wash. Post., Feb. 3, 2003, at A17; David H. Johnson et al., *NASA's Restructuring Through Privatization: A View to Its Impact on Procurement*, 34 Procurement Law. 1 (1999).

93. *See, e.g.*, General Accounting Office, Contract Management: INS Contracting Weaknesses Need Attention from the Department of Homeland Security, Report to the Committee on Government Reform, House of Representatives, GAO-03–799 (July 25, 2003), *at* http://www.gao.gov/new.items/d03799.pdf; John Cibinic, *Contract Mismanagement: The GAO Gives the Agency an "F"*, 17 Nash & Cibnic Rep. ¶ 50 (Oct. 2003).

94. A classic example is the clearly ignored mandate:

> When contracting for services, it is the policy of the Federal Government that . . . d. Sufficient trained and experienced officials are available within the agency to manage and oversee the contract administration function[; and] e. Effective management practices are used to implement the guiding principles contained herein to prevent waste, fraud, and abuse in services contracting.

Policy Letter from Steven Kelman, Administrator, OFPP, to the Heads of Executive Departments and Establishments, No. 93–1, ¶ 7 (May 18, 1994) [hereinafter OFPP Policy Letter 93–1], *at* http://www.acqnet.gov/Library/OFPP/PolicyLetters/Letters/PL93–1.html.

95. "Governmental functions normally fall into two categories: (1) the act of governing . . . and (2) monetary transactions. . . ." Moreover, "[a]n inherently governmental function involves . . . the interpretation and execution of the laws . . . so as to . . . exert ultimate control over the acquisition . . . of the property . . . of the United States, including the . . . control, or disbursement of appropriated . . . funds. . . ." OFPP Policy Letter 92–1, *supra* note 79, at §§ 5, 5(e). *See also* Ralph C. Nash & John Cibinic, *Contracting Out Procurement Functions: The "Inherently Governmental Function" Exception*, 14 Nash & Cibinic Rep. ¶ 45 (Sept. 2000). Professors Nash and Cibinic lay out the test for determining whether the Government can provide sufficient oversight of contracted service functions and conclude by "wonder[ing] whether some agencies have enough personnel left in-house to provide the proper answers to the questions."

96. Statement of David E. Cooper, *supra* note 12, at 1 (emphasis added). Moreover, "agencies

Demands upon overtaxed acquisition corps lead to a triage-type focus on buying, which has severely limited the resources available for contract administration. Agencies must apply their limited resources to meet their most pressing needs. When faced with applying limited resources, agencies focus first upon *awarding* contracts and less upon *administering* those contracts once awarded.[97] This point merits emphasis—the Government lacks the people needed to manage the contracts necessary to replace the outsourced government personnel. Steve Kelman, chief architect of the 1990s acquisition reforms, now concedes that "the administration of contracts once they have been signed has been the neglected stepchild of [procurement system reform] effort."[98] More broadly, the cuts diminished internal (or government oversight) of the contracting process.[99] This is a recipe for disaster that hides significant downstream costs.

Nor did the Government invest in sufficient training for existing (or remaining) personnel to learn how to transform Government.[100] The well-

are not clearly defining their requirements, fully considering alternative solutions, performing vigorous price analyses, and adequately overseeing contractor performance." *Id.*

97. For example, "Four of the 14 DoD acquisition organizations believed that less oversight will be placed on contracts for administrative review as the organizations experience more workforce reductions." DoD Acquisition Workforce Report, *supra* note 44, at 31. Further:

> In this regard, DCMC [the Defense Contract Management Command] commented that some contractors stated that when DCMC stopped performing inspections of all products, so did the contractors. As a result of the lack of inspections and recent failures with hardware in the Space Program, DCMC is concerned that it may have reduced its quality assurance program too much. Also, DLA [the Defense Logistics Agency] stated that customer complaints about the quality of material received ha[ve] increased; however, it has placed less emphasis on responding to the customer complaints because of acquisition workforce reductions.

Id. at 77.

98. Steven Kelman, *Strategic Contracting Management*, *in* Donahue & Nye, *supra* note 69, at 88, 89–90, *citing*, *inter alia*, Donald F. Kettl, Government by Proxy: (Mis?)Managing Federal Programs (1988) (with a reference to the "hollow state"). Kelman observes: "The most fundamental problem with the current system is that it insufficiently recognizes contract administration as in the first instance a management function." *Id.* at 93. *See also* General Accounting Office, Contract Management: No DoD Proposal to Improve Contract Service Costs Reporting, Report to Congressional Committees, GAO-01–295 (2001), *at* http://www.gao.gov/new.items/d01295.pdf (as an example).

99. Schooner, *supra* note 41, at 671–72 (including the graphic on page 672). For example, between 1990 and 1999, the number of "accounting and budget" personnel within the acquisition workforce fell from 17,504 to 6,432, a decrease of 63 percent. The cumulative reduction in these specialties is more dramatic, because these figures *exclude* "the Defense Contract Audit Agency[, whose] staffing decreased from 7,030 work years in FY 1990 to 3,958 in FY 1999, a reduction of about 44 percent." Further, during the same period, the number of "quality assurance, inspection, and grading" personnel fell from 12,117 to 5,191, a decrease of 57 percent. DoD Acquisition Workforce Report, *supra* note 44.

100. Fortunately, some attention has been paid to this problem, particularly through the long-pending Services Acquisition Reform Act of 2003 (SARA), relentlessly championed by Representative Tom Davis of Virginia. Section 1412 of SARA would create a training fund from revenue skimmed from agency purchases through the General Services Administration's Federal Supply Schedule. *See*, *e.g.*, Title XIV, Military Personnel Authorizations, National Defense Authorization Act for Fiscal Year 2004, H.R. 1588, conference report, *at* http://www.house.gov/rules/H1588_CR.PDF, which included portions of SARA, previously H.R. 1837. *See*, *e.g.*, Press Release, *Congressman Tom Davis, Defense Authorization Conference Report Includes Davis Procurement Reforms* (Nov. 7, 2003), *at* http://tomdavis.house.gov/cgi-data/news/files/67.shtml. While I laud

intentioned promises of the Defense Acquisition Workforce Improvement Act (DAWIA) and the Clinger-Cohen Act remain underfunded and, accordingly, unfulfilled.[101] Asking this workforce, without additional resources, to handle this burden is fiscally irresponsible,[102] but no longer surprising. The following exchange between two Senators and the Comptroller General is elucidating:

> Q. Would you agree that the challenges of meeting the Administration's goals for public-private competition, and of managing services contracts that result from such competition are more likely to require an increase in acquisition resources rather than a decrease?
>
> A. The . . . goals . . . could have a significant impact on the acquisition workforce in a number of ways. . . . [T]he current process for conducting these competitions is complicated, and therefore requires a skilled acquisition workforce to support the studies. Any changes to the process will require additional resources for training and perhaps additional personnel. . . . [T]he number of positions proposed for study . . . is higher than in the past, greatly increasing the competitive sourcing workload. . . . [T]o the extent that an increase in competitive sourcing studies results in an increase in the award of service contracts . . ., agencies will need to ensure that they have a sufficient acquisition workforce in numbers and abilities to administer those contracts effectively.[103]

Despite this obvious need for additional resources, no effort has been made to increase or upgrade the acquisition workforce. Faced with ballooning deficits, Congress is paralyzed.[104] Like an ostrich, head in the sand, Congress sees no way to provide the resources agencies need to transform themselves.

C. *Employee Augmentation and Personal Services*

One particularly unfortunate outcome is the Government's increased reliance on employee augmentation and personal services contracts.[105] Histori-

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any effort to invest in acquisition training, I remain less than enthusiastic about this enterprise because Congress should fund necessary training programs through the normal budget and appropriations process.

101. Defense Acquisition Workforce Improvement Act (DAWIA), 10 U.S.C. §§ 1701–1707, and The Clinger-Cohen Act, Pub. L. No. 104–106, § 4307 (1996) (adding 41 U.S.C. § 433).

102. *See*, *e.g.*, Richard Stillman II, The American Bureaucracy: The Core of Modern Government 307–09 (2d ed. 1996) (suggesting that the growth of contracting out has "tended to accelerate numerous problems and dilemmas of managerial efficiency, oversight, and accountability").

103. Walker Letter, *supra* note 80, at 4–5.

104. *See*, *e.g.*, David M. Walker, Truth and Transparency: The Federal Government's Financial Condition and Fiscal Outlook, Remarks at the National Press Club (Sept. 17, 2003), *available at* http://www.gao.gov/cghome/npc917.pdf (accompanying slides available at http://www.gao.gov/cghome/npc917/); *America's Deficits*, *supra* note 66 ("There will be no 'peace dividend' from the end of the cold war (indeed, the pressure on military spending may continue to increase). America is unlikely to see another stock market bubble, with its surge in tax revenues. As baby-boomers retire, the pressure from entitlement spending will be more acute. Set against this background, the path back to a sustainable fiscal policy will be extremely painful, even without any dramatic fiscal crisis.")

105. This problem is not new. *See*, *e.g.*, GAO/GGD-92–11, *supra* note 38, at 3–4 ("the major reasons that agencies use contractors to administer some functions that may be governmental in nature are the lack of authorized federal positions for employees and the lack of federal employees with sufficient expertise to do the work"). What is new is the increased severity of the problem.

cally, contracting in this manner was prohibited by statute or regulation and further discouraged in policy and practice.[106] But that line has been breached. Knowledgeable procurement professionals and experienced government contracts attorneys concede that this dirty little secret is no longer little. What is particularly intriguing about this phenomenon, however, is how it neutralizes one of the most significant ongoing acquisition reform initiatives, performance-based service contracting. In order to appreciate the problem, some background on contract types may prove helpful.

Government procurement law, policy, and practice historically distinguished contracts for *services* (ranging from custodial to, in this case, clerical and medical) from those for *supplies* (end items or widgets, ranging from furniture to fighter aircraft) and *construction* (designing, building, repairing, or renovating structures or, generally, improving real estate). The Federal Acquisition Regulation (FAR)[107] defines a service contract as "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task *rather than to furnish an end item of supply*."[108]

Conventional wisdom acknowledges that service contracts, in addition to being difficult to write well, have a tendency to require more contract management resources than supply contracts. The Office of Federal Procurement Policy aptly states: "Contracting for services is especially complex and demands close collaboration between procurement personnel and the users of the service to ensure that contractor performance meets contract requirements and performance standards."[109] Hiring contractors to replace experienced workers to perform a task is more complicated than buying a widget, whether an appliance, a car, or even a new home.[110] If you've ever relied on a contractor to remodel your kitchen or bathroom, think how much time you spent choosing your contractor, then looking over his or her shoulder.[111]

Within the universe of service contracts, the field again subdivides, distinguishing *personal* services contracts from *nonpersonal* services contracts. In a nonpersonal services contract (the historical norm in federal procurement),

106. *See infra* notes 113–15 and accompanying text.

107. Title 48 of the C.F.R.

108. 48 C.F.R. § 37.101 (2002) (emphasis added).

109. OFPP Policy Letter 93–1, *supra* note 94, at ¶ 7.

110. In this context, Hartley cautions that significant risks are inherent in the performance of these contracts, particularly in the defense arena. "[P]rivate firms will have a 'gilt-edged' guaranteed income stream; they are experts on their production function and cost conditions; their 'in-house' rivals will have been eliminated; and they will seek opportunities to economize or default on those aspects of the contract which have not been specified completely (e.g., aspects of service quality)." Hartley, *supra* note 1, at 297.

111. Granted, not all service contracts are alike.

> While effective management oversight is required for all types of service contracts, some require less oversight than others, as, for example, such routine services as lawn mowing and food preparation. Conversely, *services that tend to affect Government decision-making, support or influence policy development, or affect program management* are more susceptible to abuse. These, therefore, *require a greater level of scrutiny*.

OFPP Policy Letter 93–1, *supra* note 94, at ¶ 7 (emphasis added).

the Government delegates a task or function to a contractor. These tasks might include operating a mess hall (specifically, serving meals to a population of soldiers); performing custodial services (such as cleaning a court house); overhauling an aircraft engine; training an organization on a specified skill; or operating an information technology help desk. The Government delegates the task to the contractor, and the contractor directs its employees to complete the task.[112] Conversely, in personal services contracts, the Government retains the function, but contractor employees staff the effort. "A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel."[113] Although pending legislation would increase flexibility in this regard,[114] the Government operates under longstanding legal and policy objections to the use of personal services contracts.[115]

A common form of personal services contract is referred to as the *body shop* or *employee augmentation arrangement*. As the name implies, the Government uses this type of contract to hire contractor personnel to replace, supplement, or work alongside civil servants or members of the armed forces. As a matter of practice and necessity, the Federal Government today relies heavily upon this type of employee augmentation contract. This reliance is driven by the juxtaposition of the two trends discussed above: (1) increased government downsizing and (2) targeted acquisition workforce reductions. The impact of this trend, and the associated open-ended contracts with imprecise (if not intentionally vague) work statements, is troubling. Rather than hire contractors to perform tasks, the Government hires contractor personnel to act like the predecessor government employees.[116]

Contrast this with the contract model to which the Government aspires.

112. "'Nonpersonal services contract' means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101 (2002).

113. 48 C.F.R. § 37.104(a) (2002). "An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee." 48 C.F.R. § 37.104(c)(1) (2002).

114. *See, e.g.*, Subtitle D, Section 841 of the National Defense Authorization Act for Fiscal Year 2004, Additional Authority to Enter into Personal Services Contracts.

115. The basic procurement regulation explains: "Agencies shall not award personal services contracts unless specifically authorized by statute . . . to do so." 48 C.F.R. § 37.104(b) (2002). The FAR offers a list of descriptive elements to assess whether a proposed contract is personal in nature. 48 C.F.R. § 37.104(d) (2002).

116. In response to my op-ed piece, *Downsizing Government on the Cheap*, Star-Ledger, Sept. 28, 2003, Perspective, at 6, I received the following e-mail from an experienced practitioner:

> [F]rom [the] practical standpoint of advising companies doing (or trying to do) business with the government, the current procurement system has degenerated in parts into a wild west of sorts from the solicitation process to contract administration. That there is "no one guarding the hen house"—other than perhaps the outsourced "Wily Fox Guard Service"—increasingly seems to be the rule. . . . At the front end, if your company did not have some say in the work statement, likely you are not in the picture. Schedule purchases all too often seem to be wired. Once in, there appears to be precious little oversight. [The i]mpact is that incumbents on vague

In nonpersonal services contracts, the definition of the task is paramount. Over the last decade, the process of task description—the drafting of statements of work—resulted in an extensive, pervasive push to embrace a performance-based contracting scenario. In performance-based contracting, the entire process focuses upon *performance achieved* rather than *effort expended*.[117] We call this approach performance-based service contracting, or PBSC, and, today, it is the model for procuring services preferred by statute, regulation, and policy.[118] My predecessors, Professors Emeriti Ralph Nash and John Cibinic, explained that "[P]erformance-based contracting is *contrasted* with contracting using . . . work statements that specify . . . the work force that must be furnished."[119] Accordingly,

> Performance-based service contracting (PBSC) emphasizes that *all aspects of an acquisition be structured around the purpose of the work to be performed as opposed to the manner in which the work is to be performed*. . . . It is designed to ensure that contractors are given freedom to determine how to meet the Government's performance objectives, that appropriate performance quality levels are achieved, and that payment is made only for services that meet these levels.[120]

The Government's early PBSC policy guidance elaborates: "When pre-

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service contracts are so entrenched, with so little oversight, there is little chance for [an] improved newcomer to break in on re-competes.

E-mail on file with the author. Another experienced practitioner, Joseph Petrillo, recently captured the essence of this race to the bottom in his column, *Federal Contract Law: How Not to Place Contract Orders*, 22: 25 Gov. Computer News, Sept. 1, 2003, *at* http://www.gcn.com/22_25/manager/23337–1.html.

117. *See also* 48 C.F.R. § 37.601 (2002) ("Performance-based contracts (a) Describe the requirements in terms of results required . . . ; (b) Use measurable performance standards (i.e., terms of quality, timeliness, quantity, etc.) . . .; and (d) Include performance incentives where appropriate.").

118. 48 C.F.R. § 37.102(a) (2002), *citing* Pub. L. No. 106–398, section 821, and cross-referencing 48 C.F.R. Subpart 37.6.(2002). *See generally* Policy Letter from Allan V. Burman, Administrator, OFPP, to The Heads of Executive Agencies and Departments, No. 91–2 (Apr. 9, 1991) [hereinafter OFPP Policy Letter 91–2], *at* http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL91–2_4–9-91.html (officially commencing the Government's initiative); General Accounting Office, Contract Management: Guidance Needed for Using Performance-Based Service Contracting, Appendix III: Major Performance-Based Service Contracting Events 2, GAO-02–1049 (2002) ("To achieve greater cost savings and better outcomes with [the more than $130 billion spent each year acquiring services] . . ., the Congress and the administration have encouraged greater use of performance-based service contracting."); Paul J. Seidman et al., *Service Contracting in the New Millennium—Part I*, Briefing Papers (2002), *citing Moving Forward with Services Acquisition Reform: Hearing Before the SubComm. on Technology and Procurement Policy*, *House Committee on Government Reform*, 107th Cong. 24–42 (2002) (statement of Angela B. Styles, OFPP Administrator); Lawrence L. Martin, *Making Performance-Based Contracting Perform: What the Federal Government Can Learn from State and Local Governments*, *in* Abramson & Harris, *supra* note 69, at ch. 4.

119. Ralph C. Nash & John Cibinic, *Performance-Based Service Contracting: The New FAR Guidance*, 11 Nash & Cibinic Rep. ¶ 56 (Nov. 1997) (emphasis added). Moreover, "[t]he theory of performance-based contracting is . . . that the Government will benefit . . . if the contractor is permitted to devise the most efficient and effective way to perform the work."

120. Office of Federal Procurement Policy, A Guide to Best Practices for Performance-Based Service Contracting 4 (final ed., Oct. 1998) (emphasis added) [hereinafter Best Practices Guide], *at* http://www.arnet.gov/Library/OFPP/BestPractices/PPBSC/BestPPBSC.html.

paring statements of work, agencies shall, to the maximum extent practicable, describe the work in terms of 'what' is to be the required output rather than 'how' the work is to be accomplished."[121] In other words: "The PBSC [work statement] describes the effort in terms of measurable performance standards (outputs). These standards should include such elements as 'what, when, where, how many, and how well' the work is to be performed."[122] The Office of Federal Procurement Policy (OFPP) later added:

> Agencies . . . should not include detailed procedures in the [work statement] that dictate how work is to be accomplished. Instead, they should structure the [work statement] around the purpose of the work to be performed, i.e., what is to be performed, rather than how to perform it. For example, instead of requiring that the lawn be mowed weekly, or that trees be pruned each Fall, state that the lawn must be maintained between 2–3" or that tree limbs not touch utility wires or buildings.[123]

The OFPP's *Best Practices Guide* also provides some lessons learned or success stories. For example, routine vehicular maintenance tasks might be purchased for a fixed price[124] or custodial work might be described to commercial standards.[125] But what is important is that "*[t]he contract does not specify how many plane captains, mechanics or parachute riggers are required to be in a crew or on the job.*"[126]

But these examples do not reflect a broad-based successful evolution toward performance-based contracting.[127] Instead, the Government has struggled to adopt performance-based service contracting as the norm.[128] This is not surprising, given the difficulty in performing the task well.[129] Sometimes,

121. OFPP Policy Letter 91–2, *supra* note 118.

122. Best Practices Guide, *supra* note 120, ch. 2.

123. *Id.*, ch. 4.

124. For example: "A GSA vehicle maintenance specification for service calls was changed from an hourly rate to a price-per-occurrence. This resulted in a noticeable difference in the contract price." *Id.*

125. For example: "The Air Force found that it saved 50 percent by specifying that floors must be clean, free of scuff marks and dirt, and have a uniformly glossy finish, rather than requiring that the contractor strip and rewax the floors weekly." *Id.*

126. For example: "Under the Navy contract for aircraft maintenance, the contractor is held to a standard of performance and is empowered to use best commercial practices and management innovation in performance." *Id.* (emphasis added).

127. *See, e.g.*, GAO-03–443, *supra* note 78, at 18–19. In Fiscal Year 2001, the Government awarded slightly less than a quarter of its service contract dollars through performance-based contracts. While NASA spent approximately two-thirds of its service dollars through performance-based contracts, no other agency approached one-third. Three agencies (Agriculture, Treasury, and the Veterans Administration) awarded fewer than 10 percent. But see *id.*, notes accompanying fig. 7, in which two agencies dispute GAO's data.

128. For example, the GAO found that

> DOD has . . . been challenged to implement performance-based service contracting. . . . DOD, like other agencies we reviewed had achieved mixed success in incorporating four basic performance-based metrics into its contracts. . . . Our report also raised concern as to whether agencies have a good understanding of performance-based contracting and how to take full advantage of it.

Walker Letter, *supra* note 80, *citing* GAO-02–1049, *supra* note 118.

129. "Writing complete contracts is problematic and costly." Hartley, *supra* note 1, at 290.

agencies do not even try. With this diffusion of responsibility, accountability suffers. "Accountability requires defined objectives, processes and controls for achieving those objectives, methods to track success or deviation from objectives, feedback to affected parties, and enforcement mechanisms to align desired objectives with actual performance."[130] Loss of accountability is too high a price to pay.

The alternative to the performance-based approach is all too often that agencies merely purchase labor or "fill seats." Contracts do not specifically describe tasks to be performed, but instead merely state manpower requirements and labor category descriptions. The distinction is one well known to the defense acquisition community, as articulated in the DoD guidebook:

> Previously, manpower requirements were commonly prescribed in terms of "required number of bodies" or by using other qualifiers such as college degrees or specific years of experience. Prescribing manpower requirements limits the ability of offerors to propose their best solutions, and it could preclude the use of contractors' qualified personnel, who may be well suited for performing the requirement but may lack, for example, a college degree or the exact years of specified experience.[131]

That's what the Government's buyers have been reduced to—filling empty seats with substitute employees. That's not the way to achieve the type of objectives—increased quality, cost savings, efficiency, etc.—typically sought in a principled outsourcing regime. Nor will the trend toward greater reliance on time and materials contracts further the ends desired by the Government.[132] But the convergence of outsourcing policy with poorly planned ac-

130. "Accountability serves to assure federal workers, the private sector, and the taxpayers that the sourcing process is efficient and effective. Accountability also protects the government's interest by ensuring that agencies receive what they are promised, in terms of both quality and cost. . . ." Commercial Activities Panel Report, *supra* note 11, at 36.

131. Office of the Deputy Under Secretary of Defense for Acquisition Reform, Performance-Based Service Acquisition 11 (2001), *at* http://www.dau.mil/pubs/misc/PBSA_GUIDEBOOK.pdf.

132. Section 1432 of the pending SARA legislation, *supra* note 100, would broaden the Government's flexibility to rely upon time and materials (T&M) contracts. "The legislation clarifies the existing statutory definition of commercial item to authorize the use of time and material and labor-hour type contracts for certain commercial services that are commonly sold to the public through such contracts and are purchased by the Government on a competitive basis." *Id.* This issue spawns strong reactions. *See, e.g.*, Ralph C. Nash & John Cibinic, *Time-and-Materials and Labor-Hour Contracts*, 17 Nash & Cibinic Rep. ¶ 19 (Apr. 2003) (including a letter from Vern Edwards asserting that the "agency . . . would have been better off with a cost-plus-fixed-fee contract than a time-and-materials contract" and that "time-and-materials contracts are always worse deals for the Government than cost-reimbursement contracts, and their use can be justified only by necessity and conformity with standard commercial practice"); Ralph C. Nash & John Cibinic, *Time-and-Materials and Labor-Hour Contracts*, 17 Nash & Cibinic Rep. ¶ 9 (Feb. 2003) (discussing the *CACI* case); John Cibinic, *Time-and-Materials Contracts: A Different View*, 13 Nash & Cibinic Rep. ¶ 56 (Oct. 1999) (including a letter from Vern Edwards arguing that a "T&M contract is the worst of all pricing arrangements. . . . A buyer should use it only when its use is standard commercial practice and when there is no practical alternative."); Michael K. Love, *Labor-Hour and Time-and-Materials Contracting*, 13 Nash & Cibinic Rep. ¶ 24 (May 1999) ("propos[ing] that, while the goal must continue to be to find reasonable ways to use firm-fixed-priced

quisition workforce reductions leaves agencies and their procurement professionals little choice.

IV. CONCLUSION: THE FUTURE OF COMPETITIVE SOURCING

All of which brings me back to a simple problem. It seems disingenuous to rush to eliminate government employees and hire contractor replacements without a plan and (this may be equally, if not more, important) the resources to execute the plan.

Unclear policy hinders, often irreparably, implementation. If people know what the goal is, it is easier to achieve it. Herein lies the rub. Two conflicting goals compete for dominance. One vision entails Government that does not compete with the private sector, performing only that work which, by its very nature, the state must perform. Another vision demands that Government provide its services in the most cost-effective manner. Either vision would recognize an increase in the volume and complexity of service contracts that the Government competes, awards, and manages. Accordingly, fulfilling either aspiration requires appropriate acquisition resources to avoid large-scale waste and inefficiency. But the administration's competitive sourcing policy is animated by neither vision; hence it frets less over the details of successful implementation.

My suggestions are simple. The Government should revisit the now-defunct, but principled and rational, policy that the Government should not compete with the private sector. By truncating the language in the original OMB Circular A-76 to delete the cost savings predicate, a simple policy emerges:

> The Federal Government shall rely on commercially available sources to provide commercial products and services. The Government shall not start or carry on any activity to provide a commercial product or service.

With that as a guide, serious thought should be devoted to determining which functions are inherently governmental (and which—presumably commercial activities—are not). Arguably, that's what the FAIR Act was supposed to do.[133] That regime should not be ignored. The Government should then

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vehicles, T&M contracts should be preferred to using cost-reimbursement contracts when firm-fixed-price contracts are not practicable"); Ralph C. Nash & John Cibinic, "*Cost-Based" Contracting: On the Way Out?* 12 Nash & Cibinic Rep. ¶ 58 (Nov. 1998) (discussion of "alternatives to cost reimbursement contracting"); Ralph C. Nash & John Cibinic, *Time and Materials and Labor-Hour Contracts: Fixed-Price or Cost Contracts?* 12 Nash & Cibinic Rep. ¶ 1 (Jan. 1998) (including research provided by Steve Feldman).

133. Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105–270, 112 Stat. 2382. *See also* 2003 FAIR Act Inventory User's Guide, *at* http://www.whitehouse.gov/omb/procurement/fair/2003users_guide.html, which explains:

> The FAIR Act directs . . . agencies to issue . . . an inventory of all commercial activities performed by federal employees. . . . Upon the completion of [OMB] review and consultation,

systematically prioritize activities on the FAIR Act inventory depending upon how robust the marketplace is for similar services.[134] (In other words, begin by outsourcing those services most readily available in the private sector.) Once a function shifts to the private sector, market forces take over. Before plowing through the FAIR Act inventory, however, the Government must devote sufficient resources to ensure that the contracts that replace the government personnel are driven by meaningful metrics; select appropriate contractors; ensure appropriate oversight into the performance of the contracts; collect sufficient information to determine whether the metrics are being achieved; and adjust the contracting vehicles accordingly.

A rational transition means identifying the right jobs to compete, then incentivizing successful contractors to outperform the people they replaced. Poorly planned and executed contracts won't lead to quality improvements, and they waste taxpayers' money.

There's no such thing as a free lunch. Changing the nature of Government can't be done on the cheap. Eliminating government employees makes for great political rhetoric. But whether you call it competitive sourcing, contracting out, outsourcing, or downsizing, without proper planning, it won't be efficient, and it won't enable the Government to serve the public well.

The outsourcing train has left the station. Until it returns, the future of Government depends upon a massive cadre of Contracting Officers, contract

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> the agency is required to transmit . . . the . . . Inventory . . . to the Congress and . . . the public. The FAIR Act then establishes a limited administrative challenge and appeals process under which an interested party may challenge the omission or the inclusion of a particular activity. . . .

134. This is not necessarily what the Defense Department seeks to achieve through its core competency approach. As GAO explained:

> In providing guidance for determining whether activities or functions . . . are considered to be inherently governmental in nature, DOD has sometimes equated the term "inherently governmental" with the somewhat parallel term "core." . . . DOD has sometimes used the term to designate military and civilian essential positions required for military and national security reasons.
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> . . .
>
> [I]n April 2002, [DOD] launched a departmentwide effort to distinguish . . . functions with an emphasis on retaining in-house only those functions deemed core to the warfighting mission. . . ."

General Accounting Office, Defense Management: DOD Faces Challenges Implementing Its Core Competency Approach and A-76 Competitions, Report to the Ranking Minority Member, Subcommittee on Military Readiness, Committee on Armed Services, House of Representatives, GAO-03–818, at 7–8 (2003), *at* http://www.gao.gov/new.items/d03818.pdf (also describing the Army's "Third Wave," which, "unlike the earlier two waves, . . . focused on A-76 studies of about 25,000 and 33,000 positions, . . . potentially involv[ed] over 200,000 positions"). Among other things, GAO reported that the Army "found that distinguishing between core and non-core functions, by itself, has limited value because that distinction alone does not necessarily prescribe a sourcing decision." *Id.* at 9. For an extensive discussion of DoD's approach before the Third Wave, *see*, *e.g.*, Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 Mil. L. Rev. 48, 52 (1998) ("As government officials looked inward to discover where and how to change, they called for a more streamlined, efficient government. Within the DOD, leaders seized upon downsizing and outsourcing to achieve these goals.").

specialists, contract managers, auditors, and quality assurance personnel. Despite their best intentions, they are not up to the present task. Nor can they meet the challenges ahead. Congress must replenish and upgrade the acquisition community to address the Government's burgeoning reliance on service contractors. Failing to do so is malfeasance. That's no way to run a Government.