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THE IMPLEMENTATION OF THE FEDERAL ACTIVITIES INVENTORY REFORM ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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THE IMPLEMENTATION OF THE FEDERAL ACTIVITIES INVENTORY REFORM ACT

THURSDAY, OCTOBER 28, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:35 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Walden, and Ose.

Staff present: J. Russell George, staff director and chief counsel; Randy Kaplan, counsel; Bonnie Heald, director of communications and professional staff member; Chip Ahlswede, clerk; Rob Singer, staff assistant; P.J. Caceres and Deborah Oppenheim, interns; Trey Henderson, minority professional staff member; and Jean Gosa, minority staff assistant.

Mr. HORN. The Subcommittee on Government Management, Information, and Technology will come to order. The Federal Activities Inventory Reform Act called the FAIR Act was signed into law on October 19, 1998. The law requires that each year executive branch agencies compile a list of the commercial activities they perform and make the list available to the public.

Agencies are required to submit their lists to the Office of Management and Budget for review and then make them available to Congress and the public. Interested parties such as private companies, trade associations, and employee unions can challenge the inclusion or exclusion of the activities on the list.

The FAIR Act represents the first time that the Federal departments and agencies have been statutorily required to develop and publish lists of the commercial activities they perform. One of the main purposes of the FAIR Act is to make agencies account for the commercial activities they perform. Once these activities are identified, agencies can then decide whether to make these positions available to the private sector through a competitive bidding process. Opening these commercial activities to competition could reduce the cost of government by as much as 35 percent according to the General Accounting Office.

The FAIR Act does not demand that Federal agencies outsource these commercial activities. When agencies do outsource, however, the law requires them do so through a competitive bidding process. In this case, they must follow the guidance contained in OMB Circular A–76.

The A–76 administrative policy, which dates back more than 40 years to the Eisenhower administration in which I happened to serve, states that Federal departments and agencies should rely on private sector sources for commercial goods and services. In addition, the policy states that agencies should not begin new commercial activities if they can get a contractor to perform these activities.

The question before us today: Is the FAIR Act working? On September 30, 1999, 52 Federal departments and agencies released their FAIR Act lists. According to the Office of Management and Budget, Federal civilian agencies identified 120,000 of their 1.1 million jobs as commercial in nature that could be outsourced.

Among the agencies that are represented before us today, the Department of Commerce listed 8,529 jobs as commercial in nature but indicated that only about 936 of them would be open to competition. The Environmental Protection Agency labeled about 830 positions as commercial in nature, but only 30 could be put up for competition. The General Services Administration listed 7,249 activities or individuals in the activities as commercial, of which 4,556 could be put up for competition. The subcommittee would like to learn more about these numbers and these categories.

The FAIR Act was broadly drafted to give agencies some flexibility in developing their inventory lists. Consequently, there is little uniformity in either format or method of publication of these lists. Ready access to these lists in a user-friendly format which is essential for those who want to challenge the inclusion or omission of a commercial activity. Today we will examine how well the FAIR Act is or is not working.

We are pleased to have with us some of the key sponsors of this legislation and active enthusiasts, Senator Craig Thomas of Wyoming who sponsored the FAIR Act legislation in the Senate, Representative John Jimmy Duncan who sponsored the legislation in the House. Joining them will be Representative Pete Sessions, former vice chairman of this subcommittee, and Representative Dennis Kucinich, the subcommittee's former ranking member. We welcome all of our witnesses today, and we look forward to their testimony. And we are always glad to see you. And you may start.

[The prepared statements of Hon. Stephen Horn and Hon. Jim Turner follows:]

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"Implementation of the Federal Activities Inventory Reform (FAIR) Act"

OPENING STATEMENT
REPRESENTATIVE STEPHEN HORN (R-CA)
Chairman, Subcommittee on Government Management, Information, and Technology
Thursday, October 28, 1999

A quorum being present, this hearing of the Subcommittee on Government Management, Information, and Technology will come to order.

The Federal Activities Inventory Reform Act – called the "FAIR Act" – was signed into law on October 19, 1998. The law requires that each year executive branch agencies compile a list of the commercial activities they perform, and make the list available to the public. Agencies are required to submit their lists to the Office of Management and Budget for review and then make them available to Congress and the public. Interested parties, such as private companies, trade associations and employee unions, can challenge the inclusion or exclusion of the activities on the list.

The FAIR Act represents the first time that Federal departments and agencies have been statutorily required to develop and publish lists of the commercial activities they perform. One of the main purposes of the FAIR Act is to make agencies account for the commercial activities they perform. Once these activities are identified, agencies can then decide whether to make these positions available to the private sector through a competitive bidding process. Opening these commercial activities to competition could reduce the cost of Government by as much as 35 percent, according to General Accounting Office estimates.

The FAIR Act does not demand that Federal agencies outsource these commercial activities. When agencies do outsource, however, the law requires them to do so through a competitive bidding process. In this case, they must follow the guidance contained in OMB Circular A-76.

The A-76 administrative policy, which dates back more than 40 years, states that Federal departments and agencies should rely on private sector sources for commercial goods and services. In addition, the policy states that agencies should not begin new commercial activities if they can get a contractor to perform the activities.

The question before us today: Is the FAIR Act working?

On September 30, 1999, 52 Federal departments and agencies released their FAIR Act lists. According to the Office of Management and Budget, Federal civilian agencies identified 120,000 of their 1.1 million jobs as commercial in nature that could be outsourced.

Among the agencies that are represented today, the Department of Commerce listed 8,529 jobs as commercial in nature, but indicated that only about 936 of them would be opened to competition. The Environmental Protection Agency labeled about 830 positions as commercial in nature, but only 30 could be put up for competition. The General Services Administration listed 7,249 activities as commercial, of which 4,556 could be put up for competition. The subcommittee would like to learn more about these numbers and these categories.

The FAIR Act was broadly drafted to give agencies some flexibility in developing their inventory lists. Consequently, there is little uniformity in either format or method of publication of these lists. Ready access to these lists in a user-friendly format is necessary before those who want to file a challenge or bid on a job can do so.

Today, we will examine how well the FAIR Act is – or is not – working.

We are pleased to have with us on the first panel: Senator Craig Thomas, who sponsored the FAIR Act legislation in the Senate, and Representative John Duncan, who sponsored the legislation in the House.

Joining them will be Representative Pete Sessions, the former Vice Chairman of this subcommittee and Representative Dennis Kucinich, the subcommittee's former Ranking Member.

We welcome all of our witnesses today, and look forward to their testimony.

STATEMENT OF THE HONORABLE JIM TURNER
GMIT HEARING ON "IMPLEMENTATION OF THE FEDERAL ACTIVITIES INVENTORY REFORM ACT OF 1998"
10/28/98

Thank you, and I appreciate the chairman's focus on this issue. The FAIR Act, which was signed into law on October 30, 1998, was designed to improve government efficiency by taking advantage of private sector expertise. The federal government is seeking to enhance productivity, improve quality, and obtain the best service at the least cost to the taxpayer, through competition. The Act directs the head of each executive branch agency to submit to OMB annually a list of functions that are not inherently governmental in nature (i.e., are commercial) and thus could be contracted out to the private sector.

Although the Act does not require that any of the listed functions actually be subjected to public/private competition, agency heads must review the list "within a reasonable time" and, if the agency considers contracting out with the private sector for a particular function, it must use a competitive process to do so. Currently, the OMB Circular A-76 defines the process for agencies to follow when outsourcing an activity on their inventories. When conducting cost comparisons, the agency must ensure that all costs are realistic and fair costs are considered.

On September 30, 1999, OMB published a notice in the *Federal Register* announcing that inventories of commercial activities performed by 52 federal departments and agencies were publicly available for review. The release of these inventories, which include five Cabinet-level departments, is the first time this information has been available to the public under the FAIR Act. According to

OMB, the remaining agency inventories will be available in upcoming months.

In light of the recent release of the inventories to the Federal Register, we are here today for the first time to assess the implementation of the FAIR Act by the federal agencies. We are interested in how the Act has affected agency operations. In doing so, we will hopefully learn of new ways to improve this important law.

STATEMENT OF HON. CRAIG THOMAS, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. Thank you, Mr. Chairman. I appreciate you holding this hearing today. I think it's important that we talk about this issue. As an alumnus of this committee it is a pleasure to be here, along with my friend, Jimmy Duncan. We were the primary sponsors of this legislation along with Congressman Sessions who played a crucial role in getting the bill signed into law.

The FAIR Act was a result of significant compromise during the negotiations between the Congress and the Office of Management and Budget. I think that's an important point that we started a little differently than where we came out on the basis that OMB thought they could do much of this administratively, and we were going to come together and work together that way.

As you've pointed out, the law requires a submission of an inventory on those activities which are non-inherently governmental by the end of third quarter, June 30th to make those available to the public and Congress. You have 30 days then to challenge the content of the agency's list and finally after an appeal have a chance to review whether or not outsourcing would be more cost efficient.

Mr. Chairman, unfortunately it's my belief the executive branch has not been consistent with either the spirit or the letter of the law. The FAIR Act was signed on October 18, 1998; OMB did not issue the final guidance for implementation until June 14, 1999, just 16 days before the inventories were due. Consequently, the inventories were not publicly released until September 30th.

However, even now a substantial number are still not available. Aside from the long delay, the guidance, I think, was inadequate to the task. We've heard that from various agencies and employees that it was not clear exactly what we were doing and that the guidance was inconsistent with the intent of Congress.

For example, Congress clearly intended that OMB Circular A–76 be replaced. Consequently, I have strong reservations about the implementation of the FAIR Act because of the modest changes that were made to the supplemental handbook. Further, the method in which the inventories were released was not adequate. No central point of contact was provided. As designated FAIR officers vary from agency to agency, potentially interested parties have had difficult times having access to the inventory. I think there ought to be a more effective means of doing that.

Further, the quality of the inventories is not good. They're ambiguous and do not identify the functions in a reasonable manner for interpretation by the agency management or outside parties. Functions are categorized in a rather confusing fashion I think. Similar functions appear multiple times; extremely difficult to identify the functions. For example, EPA's inventory identifies financial and payroll processing functions at both headquarters and regional offices. But nowhere does the agency list the function of payroll processing.

So, I think it makes it very difficult to implement this bill. I realize this is the first time for implementation. I recognize it is not going to be perfect. I recognize that it is something new, almost developing a new culture within a bureaucracy which isn't easy to do. So I think all of us have to have some patience with this process.

I am hopeful, as promised, OMB will work with us to improve implementation of the FAIR Act.

I am still dedicated to the notion that there are many instances in which the private sector could better do these functions and should have an opportunity at least to show which is the most economic and efficient way.

Mr. Chairman, I hope we can continue to monitor and continue to work to implement what I think is something that would be very good for government, good for the American people.

Mr. HORN. Do you have any language you think that might tighten it up given this first round really?

Senator THOMAS. I guess, Mr. Chairman, my concern is more adhering to the language that we already have, then if we find having done that, that language needs to be changed, certainly we ought to do that. But I believe, as I mentioned I think, some of the current guidance is not consistent with the intent of the statute.

Mr. HORN. Thank you.

[The prepared statement of Hon. Craig Thomas follows:]

STATEMENT OF SENATOR CRAIG THOMAS
U.S. HOUSE COMMITTEE ON GOVERNMENTAL REFORM AND OVERSIGHT
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT
ON THE IMPLEMENTATION OF THE FAIR ACT
OCTOBER 28, 1999

Mr. Chairman, members of the subcommittee, thank you for the opportunity to testify before you today regarding the Federal Activities Inventory Reform (FAIR) Act. As an "alumnus" of this committee, it is a pleasure to come back for a brief visit.

As you know, Congressman Duncan and I were the primary sponsors of this important legislation and Congressman Sessions played a crucial role in getting this bill signed into law. The FAIR Act was the result of significant compromises during negotiations between Congress and the Office of Management and Budget (OMB).

The law requires agencies to submit an inventory of non-inherently governmental activities to OMB by the end of the third quarter of each fiscal year (June 30). OMB is then to review the agency submittals and promptly make them available to Congress and the public. Interested parties then have 30 days to challenge the content of an agency's list. At that point, the agency has 28 days to respond to the appeal with a decision and an explanation. Finally, functions labeled non-inherently governmental would have to be reviewed to see whether outsourcing would more cost effective or efficient "within a reasonable time."

Mr. Chairman, unfortunately, it is my belief that the executive branch has violated both the spirit and the letter of this law. The FAIR Act was signed into law on October 18, 1998. OMB did not issue the final guidance for implementing the law until June 14, 1999, just 16 days before the first inventories were due. Consequently, inventories were not released to the public until September 30, 1999. However, only some agencies' inventories were released, we are still waiting on many more. Aside from the long delay in issuing the final guidance, the substance of the guidance was inadequate to the task and erroneous with respect to the intent of Congress. For example, Congress clearly intended that OMB Circular A-76 be replaced. Consequently, I have strong reservations about FAIR Act implementation through modest changes to the OMB Supplemental Handbook.

Further, the method in which the inventories were released was wholly inadequate. No central point of contact is provided; and as designated FAIR officers vary from agency to agency, potentially interested parties may lose valuable time seeking access to inventory materials while the 30 day clock advances for challenging the inclusion or exclusion of inventory activities. It is my belief that agencies should be required to post published inventories on the Internet. OMB should also make all inventory reports centrally available through its own offices or a central link. It is ironic that, for access to information about the government's commercial activities, the public must rely on a private sector magazine, "Government Executive," which has posted all of the inventories on its web site.

Also, the quality of many of the inventories is poor. They are ambiguous and do not identify functions in a reasonable manner for interpretations by agency management or outside parties.

The function descriptions accompanying each function often do not accurately describe the activity. In addition, these functions are categorized in a confusing fashion. Similar functions appear multiple times. It is extremely difficult to identify commercial functions that cross-cut several agency locations. The inventories are also focused heavily on administrative support positions in a particular locality rather than identify a function. For example, EPA's inventory identifies financial and payroll processing functions at both headquarters and their regional offices. But nowhere does the agency list the function of "payroll processing."

Because of the poor nature of the inventories, it makes it difficult for the agencies to study these activities for reinventing or outsourcing. The intent of the FAIR Act was to identify programs that could be studied for private sector performance. Ultimately, the federal government would shed non-core functions and federal employees and resources could be re-directed to core agency programs. The end result is a government that works better and costs less. Unfortunately, implementation efforts thus far leave us far short of that goal.

I realize that this is just the first year of implementation of this Act. Any time you try to make a fundamental change in the way you operate, it is difficult. It seems to me that we have a choice at this point. We can work together to make improvements to the system of implementation by: standardizing the inventory format, making agencies supply more complete data, developing better and more comprehensive guidance, making the inventories more readily available -- specifically by using the Internet -- and finally involving federal employees more throughout the entire process. Or we can let things continue as they have and let the FAIR Act join the trash heap with so many other government reform efforts of years past.

Mr. Chairman, we still have an opportunity to make the FAIR Act a success. I look forward to working with you, the members of this subcommittee, the executive branch and other interested parties to make that happen.

Mr. HORN. The gentleman from Texas is next.

Mr. SESSIONS. Thank you, Mr. Chairman. I appreciate being here before this subcommittee again, a subcommittee which I have previously served as vice chairman in the 105th Congress, and I would like to ask unanimous consent that my written statement be included in the record in addition to those comments which I intend to make.

Mr. HORN. It's automatic that the minute we introduce the speaker the complete statement is in the record at that point. We would love to have you sort of just summarize it.

STATEMENT OF HON. PETE SESSIONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. SESSIONS. Good. Thank you, Mr. Chairman. I would be very pleased to do that. First of all, I would like to be associated with the comments from Senator Thomas. I believe that his careful evaluation exactly mirrors comments that I would make probably.

To summarize very quickly, the day that the initial reports, the FAIR reports, the documentation came out from the agencies, we went about the manner of trying to get a copy of all those that would be available. And I would say that we found it, from our perspective, frustrating to find a point of contact within the agencies and then when we did receive the information, we were disappointed in some of the presentations that were made.

With that said, I believe Senator Thomas has adequately stated this was the first time, this was the first opportunity on behalf of OMB and the administration to do this, and that I believe that they recognize that they can, should, and must do a better job. With that in mind, I sent OMB Director, Mr. Lew, a letter that same day indicating that I felt like that a meeting with him would be something that I felt like could iron out some of the differences that I, in my own mind, had.

As a matter of fact, that meeting took place yesterday with Dee Lee from the OMB. And I found her presentation, her demeanor, and her willingness to work with us and to accept feedback admirable. And the feedback that I provided her was that I felt like that Federal employees, Federal agencies, I felt like had employees that could do a better job than what they did, that they would need to get some feedback based upon the information that they provided, that they should be more instructive to provide narratives about what they were providing and summarizing the information about why it was important and the conclusions that they were drawing even if they were—it was preliminary information.

I also further stated to her that I felt like that at some time next year knowing that the next two or three rounds of release by the administration is probably too far along that I felt like that next year's releases, the people should receive information about the administration's view about what lessons they have learned about the earlier releases. In other words, that they should advise people who are going to release information next year that there could be more information, a better format and to be more forthcoming in a lot of information.

And I believe that OMB will accept those recommendations and will try and make not only the formatting but the information more

user friendly. And I believe that if we allow them the opportunity to provide feedback, they would be the first ones to say that they have learned a lot in this process and intend to get better. I received a sense of willingness and openness on their part; and I believe that we can work together, that your subcommittee can work with them; and I will be very interested finding out their testimony before you today about their ideas on making this better. Thank you.

Mr. HORN. Well, we thank you very much. You've had a major role in this as chairman of the sort of responsibility and performance caucus. And I congratulate you for that.

[The prepared statement of Hon. Pete Sessions follows:]

Statement of the Honorable Pete Sessions (TX)
House Subcommittee on Government
Management,
Information and Technology
October 28, 1999

Thank you Mr. Chairman. I am pleased to be back before this subcommittee of which I served as Vice-Chairman in the 105th Congress.

As you know, Mr. Chairman, I have been involved in the FAIR act since its inception in 1998 and am interested in moving the process forward.

I have had a continuing dialogue with OMB in hopes of facilitating a reasonable implementation of the law. After meeting with OMB just yesterday, I have learned that they too want a smaller, smarter, more common sense government, and are interested in working with my office to achieve this through revisions to the FAIR Act.

I have taken the time to meet with groups of Federal employees to hear their concerns with the implementation of the FAIR Act and its affect on their jobs. I was surprised to hear that many of them did not even know their jobs were part of the commercial activities being listed on the inventories! Shouldn't the agencies make these employees aware that their jobs could be outsourced?

In addition, I have spoken with industry, and heard of the troubles they have encountered with the first release of the inventories. Many of those problems you will hear today, and when you do, I want you to remember that OMB has had from June 30 to September 30 --- 90 days--- to review and revise the inventories the agencies had sent in, and then judge for yourselves whether OMB did all it could to produce fair and transparent inventories.

The FAIR act, supported by both the 105th Congress and the President, was drafted to relieve the Federal government of activities that could be done faster, cheaper, and better by the private sector. Congress wants a more efficient government and expects OMB to deliver this through the tools we have given them in A-76 and FAIR.

I have always believed the government should work for the people not compete against them. FAIR, as envisioned, will take government out of the marketplace and level the playing field for industry. Unfortunately, its implementation by OMB has been less than favorable. In fact, the format of the released list was not user-friendly and actually stymied the mission of FAIR.

I have met with OMB to review problems encountered in trying to get inventories from each contact on the list. In addition, I have suggested to OMB that they strongly advise agencies to put their list of commercial activities on their websites to facilitate public access. Although I understand OMB's concerns with becoming a clearinghouse for the inventories, I believe that in the spirit of open government, they should be leaders in the government contracting industry.

Our next step in addressing outsourcing of government activities is the challenge period following the inventory release. The FAIR act provides thirty calendar days for challenges and appeals to be made to the inclusion or omission of any activity. I will continue my dialogue with industry, agencies and Federal employees regarding FAIR and watch with interest to see how OMB coordinates with each to provide a bridge for public-private partnerships.

Mr. HORN. the gentleman from Tennessee, Mr. Duncan.

STATEMENT OF HON. JOHN J. DUNCAN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. DUNCAN. Thank you, Mr. Chairman. And I would like to thank you for your interest in this legislation and for taking the time to schedule and hold this oversight hearing on the implementation of the Federal Activities Inventory Reform Act or the FAIR Act as we're calling it.

I would also like to thank my good friend, Senator Thomas, who sponsored the Senate version of this bill for all of his hard work on this legislation. Certainly we couldn't have done it without him. And finally, I want to thank Representative Sessions for his great leadership not only on the floor but since then even up until yesterday working on this. As you know, I sponsored the original House version of the FAIR Act. The purpose of this law is to show how many commercial activities Federal agencies are now performing and to see if any of these activities could be more economically and efficiently carried out by the private sector.

Mr. Chairman, since the Eisenhower administration in 1955, it has been official U.S. policy and was stated at that time that ''the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such a product or service can be procured from private enterprize through ordinary business channels.'' This has been—in fact I think at one of the most recent White House conferences on small business, this was listed as their No. 1 concern, what they felt like was competition from government agencies. The legislation we passed in the last Congress will help the Federal Government to adhere to this policy that has been the policy, supposedly, since the Eisenhower administration as you noted in your opening statement.

The FAIR Act requires Federal agencies to submit a list of commercial activities in which they are involved to the OMB and, in addition, the law requires OMB to release a list of these activities known as inventories to Congress and the public.

Now, however, we are running into some road blocks in the early stages of attempting to make this law work for our—the citizens of this great country. First, these inventories are not being released to the public in an efficient manner. When we passed this legislation, most of us believed that these inventories would be readily available to all interested parties and, more importantly, would be easily accessible.

However, instead of publishing a list of the activities that Federal agencies were performing that could be carried out by the private sector only contacts, names, and phone numbers were printed in the Federal Register. It was necessary for interested parties to call these contact numbers in order to obtain a copy of the inventories for each agency. I have been told that when some of these phone numbers were called the individuals at the agencies were not familiar with the FAIR Act or its requirements. And in some cases, these phone numbers were cell phones that were not even answered at all.

This, of course, obviously creates a problem. Once these inventories are released, a member of the public only has 30 days to ap-

peal any inventory which does not list a specific activity that could be considered commercial in nature. In addition, these inventories were not compiled in any uniform manner. Thus they varied from agency to agency making it difficult to interpret their contents.

I do not know if we have any copies of those inventories here today, but if we do not, I would encourage members of the subcommittee to take a quick glance at a couple of them to see how user unfriendly they are.

I also think it is very important that the OMB create some type of one stop shopping where the public can easily access the inventories submitted by any agency. I believe it would be easy to post these lists on OMB's website or at least provide links to the agency's websites where the inventories could be viewed.

The purpose of this act is not to serve as a witch hunt for jobs to privatize within agencies. However, if certain functions performed by agencies can be more economically carried out by the private sector, we need to look at those situations. This would then free up finances and manpower so that Federal agencies can better focus on their core missions.

I hope the OMB will reinforce this point to Federal agencies so that they will provide us with clear inventories, and we can have a more effective government.

Finally, Mr. Chairman, when we were working on this legislation during the 105th Congress, the Heritage Foundation released a report which found that we could easily save at least $9 billion a year by contracting out certain commercial activities performed by Federal agencies. You mentioned, Mr. Chairman, in your opening statement that GAO had estimated the cost of government to be reduced by 35 percent by outsourcing many activities.

I have seen estimates which say we could save billions and billions and really tremendous amounts. We need to make sure that this act is carried out in a manner that will help us achieve these savings. Our Founding Fathers felt that most problems could be solved by the private sector and government should do only those things which people cannot do for themselves; and I think that if we could enforce the FAIR Act, we could come closer to the vision of this government that the Founding Fathers gave to us. And so I yield back the balance of any time that I might have left. Thank you very much.

[The prepared statement of Hon. John J. Duncan, Jr., follows:]

Congressman John J. Duncan, Jr.
Testimony Before the Government
Reform Subcommittee on Government
Management, Information and
Technology
October 28, 1999

I would like to thank you, Chairman Horn, for taking the time to schedule this oversight hearing on the implementation of the Federal Activities Inventory Reform Act (FAIR).

I would also like to thank Senator Thomas, who sponsored the Senate version of this bill, for all of his hard work on this legislation.

And finally, I want my Colleague from Texas, Rep. Sessions, to know that I really appreciate his efforts on this issue.

As you know, I sponsored the House version of the FAIR Act.

The purpose of this law is to show how many commercial activities federal agencies are now performing and to see if these activities could be more economically and efficiently carried out by the private sector.

Mr. Chairman, since the Eisenhower Administration in 1955, it has been U.S. policy that:

"the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such a product or service can be procured from private enterprise through ordinary business channels."

The legislation we passed in the last Congress will help the federal government adhere to this policy.

The FAIR Act requires federal agencies to submit a list of commercial activities in which they are involved to the Office of Management and Budget (OMB).

In addition, this law requires the OMB to release a list of these activities, known as inventories, to Congress and the public.

Now, however, we are running into some roadblocks in the early stages of attempting to make this law work for our citizens.

First, these inventories are not being released to the public in an efficient manner.

When we passed this legislation, most of us believed that these inventories would be readily available to all interested parties and easily accessible.

However, instead of publishing a list of the activities that federal agencies were performing that could be carried out by the private sector, only contacts, names and phone numbers, were printed in the Federal Register.

It was necessary for interested parties to call these contact numbers in order to obtain a copy of the inventories for each seperate agency.

I am told that when some of these phone numbers were called, the individuals at the agencies were not familiar with the FAIR Act or its requirements. And, in some cases, these phone numbers connected to cell phones that were not answered.

This creates a problem. Once these inventories are released, a member of the public only has thirty days to appeal any inventory which does not list a specific activity that could be considered commercial in nature.

In addition, these inventories were not compiled in any uniform manner. Thus, they varied from agency to agency making it difficult to interpret their contents.

I do not know if we have any copies of the inventories here today, but if we do not, I would encourage Members of the Subcommittee to take a quick glance at a couple of them to see how "user un-friendly" they are.

I also think it is very important that the OMB create some type of "one-stop-shopping" where the public can easily access the inventories submitted by any agency.

I believe it would be easy to post these lists on OMB's website or at least provide links to the agencies' websites where the inventories could be viewed.

The purpose of this Act is not to serve as a "witch hunt" for jobs to privatize within agencies.

However, if certain functions performed by agencies can be more economically carried out by the private sector, we need to look at these situations.

This would then free up finances and manpower so that federal agencies can better focus on their core missions.

I hope the OMB will reinforce this point to federal agencies so they will provide us with clear inventories, and we can have a more effective government.

Mr. Chairman, when we were working on this legislation during the 105th Congress, the Heritage Foundation released a report which found that we could easily save at least $9 billion a year by contracting out commercial activities performed by federal agencies. I have seen estimates which say we could save much, much more.

We need to be sure that this Act is carried out in a manner that will help us achieve these savings.

Our Founding Fathers felt that most problems could be solved by the private sector and government should only do those things people cannot do for themselves.

We need to follow through to ensure that the Fair Act is effectively implemented so that we can return this great Country to the type of governing system that our Founding Fathers envisioned.

Finally, let me say I believe it is most appropriate for the Subcommittee on Government **Management**, **Information** and **Technology** to hold this hearing and have jurisdiction over this issue.

This Act is about the **management** of federal agencies; it is about providing the public and Congress **information** regarding commercial activities being performed by the federal government; and I think we can work with the OMB to use **technology** to more effectively implement the Federal Activities Inventories Reform Act.

I believe what your Subcommittee is doing today with this oversight hearing is very important and useful.

Again, I would like to thank you and your Colleagues on the Committee for all of your past work on this issue and for continuing to follow through on its implementation.

Mr. HORN. Well, thank you. You've had a lot to do with this and the progress that's been made. I might add if you have any exchange of letters with OMB, we would be glad to put them in the record at this point. And without objection they will go in the record.

This was strictly a Federal panel from the legislative branch, panel one, and the panel two is essentially the executive branch. We do have a lot of very fine statements submitted by management and labor and without objection we will put those in at the end of Mr. Kucinich's testimony.

And some of the ones here are the American Council of Independent Laboratories, the American Electronics Association, the Contract Services Association, the Management Association for Private Photogrammetric Surveyors, the National Division Industrial Association, the Small Business Legislative Council, the Contract Services Association of America, and also the American Federation of Government Employees, AFL–CIO. And that's a very thorough document. And we also have similar thorough document from the National Treasury Employees Union. And let's see. That's some information from the General Services Administration. Anyhow, they will go at the end really of the testimony here on panel one.

So we now have the gentleman from Ohio, the former ranking member of this subcommittee, a very constructive person, the Honorable Dennis Kucinich from Ohio.

STATEMENT OF HON. DENNIS J. KUCINICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. KUCINICH. Thank you, Mr. Chairman. And I want to say what a privilege it was to work with you in the last Congress on the committee. And I stress the word work with because we had a constructive debate, and I know my friend, Mr. Sessions, and I actually had a chance to debate this particular act thoroughly.

Mr. SESSIONS. And form a friendship.

Mr. KUCINICH. Absolutely. And I understand the spirit in which Congressman Duncan and Congressman Sessions have advanced this. And I think they're to be commended for their interest in trying to get government to function more effectively and more efficiently. And I certainly understand that the people of this country want that to happen.

Now, as you know, Mr. Chairman, I was skeptical when the bill was debated last year. And now that the bill has become law, and I still want to indicate it's my belief the skepticism is in order. The purpose of the law is to direct the Federal Government to identify likely targets for privatization or contracting out.

The underlying assumption is that small business faces a big problem from the public provision of services. I thought the assumption was incorrect last year, and I think it's still incorrect even though I have and I share the sympathy which my esteemed colleagues have for small business. For all the problems that small businesses face, I wonder how significant is the provision. If there is a problem that's created by the public provision of services, I'm not sure that despite the spirited debate that we had in the last Congress that the case was made before the bill was passed.

While the bill concerned contracting out to private companies, it did not exist—it did not address the existing problems afflicting contracting. According to both the Office of Management and Budget and the General Accounting Office, contract administration remains one of the highest risk activities which the government engages in. And examples abound. Senate hearings uncovered $27 billion a year in health care fraud. In 1995, $25 billion in payments to defense contractors could not be matched to invoices. And in many cases the Department of Defense relies on contractors themselves to identify overpayments.

Nevertheless, the Federal Government reduced its contract oversight personnel by over 12 percent between 1992 and 1997. Without adequate personnel to oversee contractors and discover fraud and abuse, the costly problems associated by contracting out cannot be systematically prevented. But in passing the bill, Congress expanded contracting out and it would be logical to conclude expanded the cost of contractings problems.

Last year's bill could have been dramatically improved had it squarely confronted the modern realities of contracted services. Today's hearing concerns the implementation and compliance with the law. And I want to say as a Member of this Congress, you know when we pass a law whether or not I agree with the law, I mean the law is to be obeyed. That's something that I support, and I hope all of my colleagues would. I may not agree with it, but it's the law.

So I look forward to learning about the agency's experience with the law and what analysis has been conducted to determine the effect of the law on fraud and abuse perpetrated on taxpayers by unscrupulous contractors.

So again, I thank the Chair for his ongoing interest in this, and it's an honor to be here with Mr. Duncan and Mr. Sessions.

[The prepared statements of the Contract Services Association of America, the American Federation of Government Employees, the National Treasury Employees, and the 1999 FAIR Act Inventory of the General Services Administration follow:]

CONTRACT SERVICES ASSOCIATION OF AMERICA
1200 G STREET, N.W. SUITE 750 WASHINGTON, D.C. 20005
Ph: (202) 347-0600 Fax: (202) 347-0608

Putting the private sector to work...
for the public good.

October 28, 1999

In a statement today to the House Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform, the **American Council of Independent Laboratories, American Electronics Association, Contract Services Association, Management Association for Private Photogrammetric Surveyors, National Defense Industrial Association,** and **Small Business Legislative Council** described their sense of disappointment due to an obvious lack of regard for the "spirit of the Federal Activities Inventory Reform (FAIR) Act" by several Federal agencies.

The statement points out that, although much progress had been made up to now, implementation of the FAIR Act has "faltered due to irrational and inconsistent agency interpretation of the inventory requirements." It goes on to say "The FAIR Act responded to the frustration about inconsistencies relative to inventories and competitions of agency commercial activities," the statement reads. "The final product represented a true compromise between all parties involved—an excellent tool for the Office of Management and Budget (OMB) and the agencies to effectively manage the performance of commercial activities, using all methods available to the Federal government.

The intent of the FAIR Act was to help agency management identify those programs that did not support core missions. Once identified, agency management would then determine what to do with those functions—presumably, the government would shed non-core activities and Federal employees would be redirected to core agency programs. The end result would be a more effective and efficient government that is better able to serve the American public."

That is the way it was supposed to be! However, as all of the above-listed associations have recently observed in the completed inventories coming back from the agencies, there is a still a great deal of "shielding" that is apparent and the accuracy of the data is often in question.

For example, in the case of the inventory performed by the National Aeronautics and Space Administration (NASA), every one of its commercial activities was coded as "core," thus "raising a red flag regarding the seriousness of agency response to the law and OMB implementation." In other submissions, agencies have primarily listed commercial activities as "core" or "commercial exempt."

The six associations submitting the statement also offered recommendations for improving the process. To obtain these suggestions, along with the complete statement sent to the Subcommittee on Government Management, Information, and Technology, contact either Fred Lash or Cathy Garman at 202-347-0600.

ACIL ✦ AEA ✦ CSA ✦ MAPPS ✦ NDIA ✦ SBLC

October 27, 1999

The Honorable Steve Horn
Chairman
Subcommittee on Government Management, Information & Technology
Committee on Government Reform
U.S. House of Representatives
B-373 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

We are writing with regard to your subcommittee's hearing on October 28 about the *Contracting Out of Federal Agency Functions.* We commend the subcommittee for holding this oversight hearing in such a timely fashion.

On behalf of the associations listed below, we will be submitting a more detailed statement for the record. For the present, we would like to summarize briefly our views on the FAIR Act process, the guidance that was issued, and the inventories released in the first round. It is our hope that this summary, and our detailed statement, will prove useful to this subcommittee and the Administration as we move forward with full and proper implementation of the FAIR Act to ensure that it is a useful and beneficial process for ALL involved.

The *Federal Activities Inventory Reform Act* (FAIR Act) responded to the frustration about inconsistencies relative to inventories and competitions of agency commercial activities. The final product represented a true compromise between all parties involved – an excellent tool for the Office of Management and Budget (OMB) and the agencies to effectively manage the performance of commercial activities, using all methods available to the Federal government.

We have made much progress together, but implementation of the FAIR Act has faltered due to irrational and inconsistent agency interpretation of the inventory requirements. We do not believe this serves the best interests of either the public employees whose jobs may be included in the inventory or the private sector companies, particularly small businesses, who review these lists to identify new contracting opportunities.

It is disturbing that the same agency will inventory a similar function (*e.g.,* ADP support) throughout the inventory using several different reason codes – such as "core," commercial exempt or competitive. Agencies, unfortunately, have primarily listed commercial activities as "core" or commercial exempt. For example, we appreciate the National Aeronautics and Space Administration commitment to contract out a substantial portion of their workload. However, the agency coded EVERY inventoried commercial activities as "core." This raises a red flag regarding the seriousness of agency response to the law and OMB implementation.

Briefly, we would like to highlight to few key issues that might make the process more user friendly and understandable for all involved. As we develop our more detailed statement, we will no doubt have additional recommendations.

- Incorporate the requirements of the Raines Memo (May 1998) into the FAIR Act inventories – include 'inherently governmental' on the inventory to improve the accuracy of the inventory data provided.
- Standardize the format and ensure that each agency has included all the information required. This will provide greater consistency of the data inventoried, allowing fair assessments by all parties.
- Require the inclusion of more complete data in the inventories. This would include a brief description of each activity on the inventory, beyond the simple listing of the OMB function code number and title, as well as the reason for any exemptions noted – this also will increase the validity and usability of the inventories.
- Develop better guidance on the challenge process. Not understanding the necessary steps to be taken hinders the effectiveness of this process for all interested parties. The guidance should include a clear statement as to when the 30-day challenge begins and ends; and the name of the individual to whom the challenges should be made.
- Encourage each agency to provide an electronic version of the inventory on the Internet (with hard copies available upon request). This will provide more timely access to the inventories upon release and reduce the paperwork burden on the government employees who have had to respond to the many requests for inventory access.
- Provide prompt notification to Federal employees whose positions may be included on the inventory for potential competition.

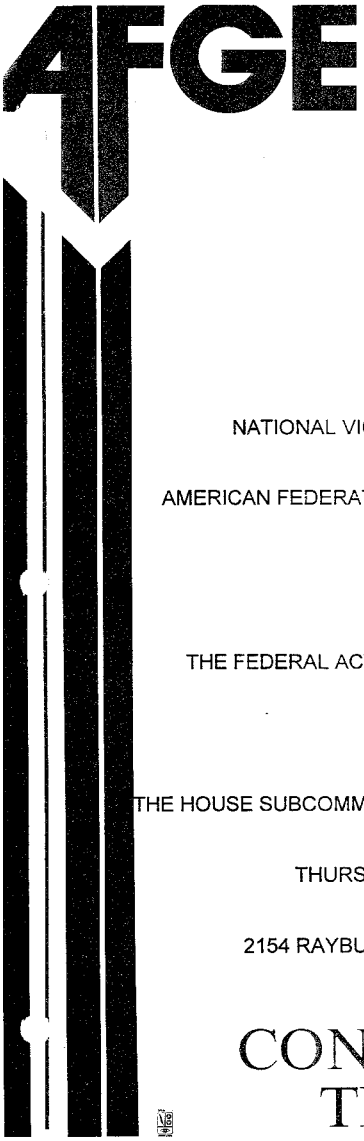
The intent of the FAIR Act was to help agency management identify those programs that did not support core missions. Once identified, agency management would then determine what to do with those functions – presumably, the government would shed non-core activities and Federal employees would be redirected to core agency programs. The end result is a more efficient and effective government that is better able to serve the American public.

Should you or your staff have any questions regarding the statement, or if we can provide any additional information for your review, please contact Cathy Garman, of the Contract Services Association (at 202-347-0600), or Nancy Saucier of the American Electronics Association (at 202-682-4457).

Thank you for your consideration.

Sincerely,

American Council of Independent Laboratories
American Electronics Association
Contract Services Association
Management Association for Private Photogrammetric Surveyors
National Defense Industrial Association
Small Business Legislative Council



American Federation of Government Employees, AFL-CIO

80 F Street, N.W.
Washington, D.C. 20001
(202) 737-8700

TESTIMONY OF

DAVID SCHLEIN

NATIONAL VICE PRESIDENT, 14TH DISTRICT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON

THE FEDERAL ACTIVITIES INVENTORY REFORM ACT

BEFORE

THE HOUSE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT

THURSDAY, OCTOBER 28, 1999

2154 RAYBURN HOUSE OFFICE BUILDING

CONGRESSIONAL TESTIMONY

EXECUTIVE SUMMARY

AFGE understands the Subcommittee's intention to limit testimony at today's hearing to the implementation of the FAIR Act. Although the FAIR Act does not compel public-private competitions, let alone contracting out, the law may lead to additional contracting out. As the Congress has pointed out and the Administration has implicitly admitted, current contracting out efforts are of dubious value to the taxpayers and manifestly unfair to public employees. What measures, if any, have been undertaken to satisfactorily resolve problems and inequities in federal service contracting? Or, with respect to the matter at hand, how can the subcommittee thoroughly examine the implementation of the FAIR Act if the law's impact on those problems and inequities is never discussed?

1. The Failure to Monitor the Costs and Consequences of Contracting Out

Those lawmakers most familiar with contracting out declare that there is "no clear evidence that this effort is reducing the cost of support functions...with high cost contractors simply replacing government employees." The General Accounting Office (GAO) agrees, reporting that the Department of Defense (DoD), the agency that does the most contracting out, has no way of determining if savings from all of its contracting out efforts are actually being realized. The Congress has demanded that DoD finally report on the costs and consequences of its contracting out. Surely it's not too much to ask that the Administration and agency managers be required to prove that contracting out will actually achieve real and significant savings in all agencies before throwing public employees and their families out on the street. In 1998, the Administration agreed to require agencies to develop tracking systems to monitor the costs and savings of contracting out. As a senior OMB official admitted, it is "indefensible" that there should be an inventory of work performed by public employees through the FAIR Act but no similar inventory for work performed by contractor employees, even though two-thirds of the federal government is already contracted out. Although more than a year has passed, no progress whatsoever has been made towards establishing contractor inventories.

2. The Failure to Subject Contractors to the Same Level of Competition as Public Employees

Agencies should be required to contract in work for performance if in-house staff will be more effective, more efficient, and more reliable than contractors. Virtually no work is ever contracted in so it can once again be performed by experienced and reliable public employees. If public-private competition is appropriate for work performed by public employees, then it is just as appropriate for work performed by contractors. If only work performed by public employees is subjected to public-private competition, then the Administration and agency management are simply replacing public employees with contractor employees, rather than trying to make government more efficient. Earlier this year, the Administration "agree(d) with (AFGE) that we should ask federal managers to. . . consider the potential benefits of converting work from contract to in-house performance...OMB will encourage agencies to identify opportunities for the conversion of work from contract to in-house performance..." Unfortunately, the Administration has failed to provide agencies with this guidance. In response, the Congress has required DoD to document just how infrequently work has been contracted in, identify barriers to contracting in, and provide recommendations for maximizing the possibility of effective competition for work that has already been contracted out.

3. The Failure to Shine the Light of Truth on the Shadow Workforce

Despite the Administration's stated intention to document the size of the contractor workforce—often referred to as the "shadow workforce" because it has historically been enshrouded in such mystery—no progress has been made. The House and Senate Armed Services Committees agreed, over the Pentagon's strenuous objections, to require a count of DoD's contractor workforce in this year's defense authorization conference report. A similar requirement was included in report language in the Senate defense appropriations bill.

4. Failure to Prevent Work from Being Contracted Out Without Public-Private Competition
Although generating much attention, OMB Circular A-76 is really a sideshow. Most government work that is performed by contractors is never subject to public-private competition. Either the work has never been performed by public employees and was simply given to contractors from the very beginning ("new starts") or it was started in-house and then transferred to the private sector without giving public employees any opportunity to compete in defense of their jobs. That is, despite all of the talk from Administration officials about the importance of public-private competition, most contractors obtain their lucrative deals without ever having to compete against public employees. The Senate Defense Appropriations Bill includes report language that would enable lawmakers to finally at least get a handle on the problem in DoD, directing Pentagon bosses to provide "an analysis of the amount and value of contracts that were awarded to private contractors through OMB Circular A-76 versus other mechanisms." For the last several years, taxpayers have paid contractors at least $45 billion annually for services provided to agencies other than DoD. Yet, during that time, there have been virtually no OMB Circular A-76 competitions outside of DoD, by the admission of the Administration, which means that public employees have not been allowed to compete for billions of dollars of work. Currently, most work is contracted out without public-private competition by even DoD—the agency often held out as the champion of OMB Circular A-76. Although DoD contracts out in excess of $60 billion annually, public employees have no chance of competing for almost all of that work—even with the Pentagon's increased reliance on the circular. For example, according to a 1998 Army study (Identifying and Estimating the Contractor Shadow Workforce), only 16,000 contractor jobs out of the service's entire contractor workforce of 224,000 were competed through OMB Circular A-76.

5. The Failure to Account for the Extent the Federal Government's Contracting Out Undercuts Public Employees on their Wages and Benefits
If there is little information about the size of the contractor workforce, there is virtually no information about how contractors treat their workforce. It is commonly accepted in the private sector and elsewhere in the public sector that to the extent savings are generated in certain circumstances through contracting out such savings essentially come from contractors short-changing their employees on wages, benefits, and job security. A survey conducted by GAO in 1985 of public employees who were involuntarily separated after their jobs were contracted out revealed that over half "said that they had received lower wages, and most reported that contractor benefits were not as good as their government benefits". When GAO attempted to obtain more recent date about the wages and benefits of contractor workers, contractors refused to cooperate. It is outrageous that Administration officials and more than a few lawmakers—despite their words of support for working Americans—continue to allow contractors to take work away from public employees simply because, in many cases, they pay their workers less and provide them with inferior benefits. When the budget is in surplus, the economy's booming, and the stock market is soaring, how can anyone justify replacing working and middle class Americans with contingent workers who are forced to scrape by with so much less?

AFGE has worked diligently with the Administration and the Congress to attempt to correct those problems and right those wrongs. However, there is still no contractor inventory to track the costs and consequences of contracting out. Agencies are still not subjecting work performed by contractors to the same scrutiny as work performed by public employees. Work is still being contracted out without giving public employees opportunities to defend their jobs through public-private competition. And arbitrary personnel ceilings still prevent federal employees from competing for work in all too many instances. Clearly, public employees and their families have been left with no choice but to insist that there be a suspension of federal service contracting until those matters have been satisfactorily resolved. It is time we stopped wasting America's money on privatization.

INTRODUCTION

My name is David Schlein and I am the National Vice President for the union's 14th District, which includes all of our members in the Washington, DC, area and Europe. On behalf of the American Federation of Government Employees, AFL-CIO, which represents more than 600,000 public employees serving across the nation and around the world, I appreciate the opportunity to testify at today's hearing on the Federal Activities Inventory Reform (FAIR) Act.

With respect to the narrow issues to be explicitly discussed at today's hearing surrounding the implementation of the FAIR Act, I would like to discuss four: the role of the Office of Management and Budget (OMB) in the distribution of the lists of commercial activities, the role of rank-and-file public employees in compiling the lists, the importance of notifying public employees upon finalizing the lists, and the need to ensure transparency with respect to the use of the lists by Members of Congress.

1. OMB should restrict its role of review under the FAIR Act to the mere provision of feedback to agencies upon completion of their lists. Agency managers, especially after consulting with their rank-and-file employees, are in the best position to know how to provide their services. Senior OMB officials, far removed from the government's actual worksites, should resist the urge to substitute their judgments in place of those public employees actually responsible for ensuring that the American people remain well-served by the federal government. We will continue to monitor the implementation of the FAIR Act to ensure that OMB's role of read and review does not become one of meddle and muddle.

2. AFGE continues to urge agencies to the maximum extent possible to incorporate the principles of Executive Order 12871 ("Labor-Management Partnerships") by permitting employee involvement in the list development process. That executive order requires agencies to establish partnerships with their labor unions; involve employees and their union representatives as full partners to identify problems and craft solutions to better serve agencies' customers and mission; and to negotiate over the "permissive" subjects found at 5 U.S.C., Section 7106 (b) (1).

3. AFGE also continues to urge agencies to provide separate notification of the lists to their employees' representatives. Given the reality that *Federal Register* is not daily reading for most rank-and-file federal employees—who, whether they're fire fighters, nurses, mechanics, or food inspectors, are too busy actually serving the public—the potential for the unintentional but very much ill-advised exclusion of a major interested party is significant.

4. The FAIR lists are likely to be used as shopping catalogues by contractors and their Congressional benefactors. The possibility for abuse is obvious. While inquiries to agencies inspired by the FAIR Act may often simply be part of a lawmaker's duties, it is imperative that such inquiries not be used to unduly pressure or even threaten agencies into outsourcing work to well-connected contractors. In many respects, contracting out is already too driven by politics, bereft of oversight and accountability, and based on dubious assumptions of cost savings and efficiencies. Implementation of the FAIR Act should not be used to further politicize the contracting out process. In order to provide transparency, AFGE recommends that agencies keep logs, available to the public, to track Congressional contacts that are related to the FAIR Act lists.

PUTTING THE FAIR ACT IN CONTEXT

I understand the Subcommittee's intention to limit testimony at today's hearing to the implementation of the FAIR Act. Although the FAIR Act does not compel public-private competitions, let alone contracting out, the result of the law could be to increase contracting out. As the Congress has pointed out and the Administration has implicitly admitted, current contracting out efforts are of dubious value to the taxpayers and manifestly unfair to public employees. What measures, if any, have been undertaken to satisfactorily resolve problems and inequities in federal service contracting? Or, with respect to the matter at hand, how can the subcommittee thoroughly examine the implementation of the FAIR Act if the law's impact on those problems and inequities is never discussed? I know the members of this subcommittee—and you in particular, Chairman Horn—understand the important oversight role the House Government Management Subcommittee can play with respect to government-wide contracting out, and I appreciate your interest in the issues I raise in my testimony today.

Please note that most of my comments will refer to the experiences of the Department of Defense (DoD) because of that agency's historically greater use of public-private competitions and contracting out. While the problems and inequities I will discuss undermine contracting out efforts in all agencies, they are particularly acute in DoD.

1. The Failure to Monitor the Costs and Consequences of Contracting Out: Supporters of contracting out claim that public-private competitions generate savings for the taxpayers. The Administration's fiscal year 2000 budget alone claims that contracting out "has shown savings of 30 to 40 percent".

Outside of the contractor community, such a claim inspires only skepticism and scorn. That a drastically increased reliance by DoD on contracting out has failed to yield promised savings is no longer subject to dispute. Republican and Democratic lawmakers on the House Appropriations Committee, who are

responsible for tracking the money for DoD activities, both before and after they are contracted out, said in this year's bill that they

> *"harbor(ed) serious concerns about the current DoD outsourcing and privatization effort. While the Committee recognizes the need to reduce DoD infrastructure costs, the cost savings benefits from the current outsourcing and privatization effort are, at best, debatable. Despite end-strength savings, there is no clear evidence that this effort is reducing the cost of support functions within DoD with high cost contractors simply replacing government employees."*

In their version of this year's defense appropriations bill, the Senate Appropriations Committee agreed, "express(ing) concern that projected savings through A-76 planned competitions do not match actual savings."

The General Accounting Office (GAO) agreed with House and Senate appropriators. While consistently noting that public-private competition could save money, Congressional auditors simply do not share the Administration's high opinion of contracting out:

> *"During the long history of our work in this area, GAO has consistently found that evaluating the overall effectiveness of contracting out decisions and verifying the estimated savings reported by agencies is extremely difficult after the fact. As a result, we cannot convincingly prove nor disprove that the results of federal agencies' contracting out decisions have been beneficial and cost-effective."*

That is, even after years and years and billions and billions of dollars in contracting out, the GAO cannot say that the taxpayers have been well-served.

On what basis, then, does the Administration insist that contracting out shows savings of at least 30 percent? That estimate is based on the difference between the costs of performing the work in-house when the contracts are awarded, and the bids that are submitted by winning contractors. Only after persistent questioning will Administration officials admit that they have no proof that the savings promised by contractors are actually realized. Instead, they simply take it on faith that the contractors will deliver services at the costs specified in their contracts despite considerable evidence to the contrary.

In early 1999, after a lengthy review, the GAO, while noting that savings are possible from public-private competitions, cautioned that DoD:

A) Overstates possible savings;

> *"(GAO has) urged caution regarding the magnitude of savings likely to be achieved."*

B) Has no proof that promised savings are actually realized;

> *"In March 1997, we reported that prior savings estimates were based on initial savings estimates from competitive sourcing competitions, but that expected savings can change over time with changes in scope of work or mandated work changes."*

C) Has already plucked the lowest-hanging fruit from the tree;

> *"Further, we noted that continuing budget and personnel reductions could make it difficult to sustain the levels of previously projected savings."*

D) Is apparently incapable of coming up on its own with a mechanism for determining whether its bracing regimen of public-private competitions actually works;

> *According to GAO, entries in the Commercial Activities Management Information System (CAMIS) "are not modified and are being used continuously without updating the data to reflect changes in or even termination of contracts. DoD officials have noted that they could not determine from the CAMIS data if savings were actually being realized from the A-76 competitions. Our work continues to show important limitations in CAMIS data....During our review, we found that CAMIS did not always record completed competitions and sometimes incorrectly indicated that competitions were completed where they had not yet begun or were still underway. We also identified where savings data recorded for completed competitions were incorrect based on other data provided by the applicable service."*

E) Probably doesn't even have enough staff to conduct competitions, let alone determine if they're actually working.

> *"While none of the services has yet fully determined the staff resources necessary to implement its competition program, some service officials have expressed concern about their ability to provide sufficient existing in-house staff as the number of ongoing studies increases and the potential effect on other mission requirements of devoting available resources to meet competition needs. Some officials have already begun to express concern about the adequacy of their resources to initiate and complete ongoing competitions and to deal with other ongoing mission responsibilities. Officials at one Army command stated that they have finite resources to accomplish their overall missions and tasks. If one mission, such as performing competitions, is given command priority, resources are shifted to meet that priority, and other tasks or activities may be delayed or not performed. The large increase in the number of competitions expected to be ongoing in fiscal years 1999 and 2000 is likely to greatly increase resource requirements."*

As even senior Pentagon officials will admit privately to the media, the results of DoD's initial A-76 competitions are positively underwhelming. According to an April 6, 1998, Inside the Navy article, the service's

> *"ambitious (savings) goal (from public-private competitions) will not be achieved and the Navy literally will have to pay for making rosy savings predictions. 'Everybody knows this is a problem,' one military source said. 'We make these grandiose assumptions three or four years ago, and now we have to pay for them.' According to one Pentagon source, the Navy predicted it could save up to $1.2 billion per year, once the jobs were competed, but it will be difficult to reach that level. 'We really don't know how much the savings are,' the source said. 'We know we've overestimated them. We're going to muddle through.'. The source said the service met its goals the first year, FY-97, by making the easy, obvious reductions, but this year the service has met only half of its goal. In upcoming years, the task may become even more difficult, with only a quarter of the predicted savings so far identified. If the service cannot liquidate those positions and generate savings, it will be forced to rob procurement or operations and maintenance accounts to make up the balance."*

Surely it's not too much to ask that the Administration and agency managers be required to prove that A-76 competitions will actually achieve real and significant savings before throwing public employees and their families out on the street. Moreover, it is imperative that these real and significant savings persist over the long-term. There is considerable anecdotal evidence to suggest that whatever initial savings are generated from contracting out dissipate by the time the contract is renewed since there is no public-private competition and precious little private-private competition, thus leaving taxpayers at the mercy of sole-source contractors.

In 1998, the Administration agreed with AFGE that it would require agencies to develop tracking systems to monitor the costs and savings of contracting out. As a senior OMB official admitted when he made that commitment on behalf of the Administration, it is "indefensible" that there should be an inventory of work performed by public employees through the FAIR Act but no similar inventory for work performed by contractor employees, even though two-thirds of the federal government is already contracted out. Although more than a year has passed, no progress whatsoever has been made toward establishing that contractor inventory.

If the House Government Management Subcommittee is to fulfill its mandate, shouldn't that subcommittee be taking the lead in establishing such a contractor inventory? Mr. Chairman, please keep in mind that, in this year's defense appropriations conference report, DoD was required to report on the costs and savings from its use of OMB Circular A-76 over the last several years. Thus your subcommittee would not be the first to begin the long overdue process of establishing a contractor inventory, Mr. Chairman. However, I know that, because of your attention to detail and your subcommittee's broad mandate, your contractor inventory would be both the most comprehensive and the most useful, to managers and lawmakers alike.

2. The Failure to Subject Contractors to the Same Level of Competition as Public Employees

Agencies should be required to contract in work for performance if in-house staff will be more effective, more efficient, and more reliable than contractors. Virtually no work is ever contracted *in* so it can once again be performed by experienced and reliable public employees. If public-private competition is appropriate for work performed by public employees, then it is just as appropriate for work performed by contractors. If only work performed by public employees is subjected to public-private competition, then the Administration and agency management are simply replacing public employees with contractor employees, rather than trying to make government more efficient.

The encouragement of contracting in would keep contractors from forcing taxpayers to swallow costly post-award mark-ups. Usually, there is very little competition among contractors for work, especially when the initial contract comes up for renewal. Columbia University Professor Elliot Sclar, who testified last year on the FAIR Act before this very subcommittee, has described service contracting as a

> *"...dynamic political process that typically moves from a competitive market structure towards a monopolistic one. Even if the first round of bidding is genuinely competitive, the very act of bestowing a contract transforms the relative market power between the one buyer and the few sellers into a bilateral negotiation between the government and the winning bidder.*
>
> *The simple textbook models of competition so prized by privatization advocates provide no guidance to what actually occurs when public services are contracted. Over time, the winning contractor moves to secure permanent control of the 'turf' by addressing threats of potential returns to (contracting in) or from other outside competitors. To counteract the former threat, they move to neutralize competition, most typically through mergers and market consolidation among contractors. This trend helps to explain why two-thirds of all public service contracts at any time are sole-source affairs...."*

Agencies should be required to keep track of when their contracts come up for renewal, so that managers can give due consideration to the option of contracting in certain services if in-house performance would be more effective, more efficient, and more reliable than private sector performance.

The Administration deserves credit for working with AFGE to ensure that in the last revision to OMB Circular A-76, the regulations governing public-private competition for commercial activities, would allow agencies to bring work back in-house. As is the case when work is contracted out, public employees are required to submit a bid at least 10% cheaper than the contractor's in order to convert work to in-house performance.

The Department of Energy (DoE) is a notorious example of what happens when an agency becomes so dependent on sole-source contractors because it can provide no in-house competition when expensive contracts come up for renewal. In 1994, DoE officials became alarmed at skyrocketing service contract costs. Noting that only seven contracts had been put up for bid when an incumbent contractor wanted to stay on, DoE

officials put their collective foot down and said that service contracts would no longer be automatically renewed.

What was the response from DoE contractors? According to *The Washington Post*, "the `specter of competition' led some contractors, including Westinghouse Electric Corp...to offer to reduce costs by 15 percent to 20 percent `If implied competition will do that, imagine what real competition will do,' quipped a DoE official."

This could have been a success story—recompeting contracts seemed so simple a solution. But by 1997 it was clear that this reform effort was not going to have a happy ending. According to the General Accounting Office (GAO), DoE continues to make noncompetitive awards for management and operating (M&O) contracts despite having changed its policy and adopted competitive contract awards as the standards for these contracts. "Of 24 M&O contracts awarded between July 1994 and August 1996, DoE awarded 16 noncompetitively. Also, DoE decided not to compete three major contracts before it renegotiated the terms of the contract renewal—a practice that is contrary to contract reform."

As might be expected, contractors view the prospect of having to compete for their work against public employees with fear and dread. Sure, they leap at opportunities to take work away from public employees. But contractors quickly recoil when it's their lucrative contracts with the government that are finally subjected to public-private competition. In fact, most versions of the contractors' infamous Freedom From Government Competition Act included implicit and explicit prohibitions against public employees competing with contractors for services already contracted out.

Because DoE has given up the capability to do the work itself and will not reconstitute that capability in-house so that work might be contracted in, taxpayers are paying far more than they should for dozens of multi-billion dollar service contracts. Obviously, DoE's contractors have not been shy about using their influence in the Administration and in the Congress to make sure that their sole-source arrangements are left undisturbed. Contractors for other agencies have also been almost completely successful in preventing the use of contracting in throughout the rest of the government. Administration officials are unwilling to reveal how much work has been contracted in, but observers insist that the amount is small, very small.

In response to a letter from AFGE National President Harnage which asked the Administration to work with this union to remove all legislative and regulatory obstacles to contracting in, a senior OMB official wrote,

> *"I agree with you that we should ask federal managers to. . . consider the potential benefits of converting work from contract to in-house performance...OMB will encourage agencies to identify opportunities for the conversion of work from contract to in-house performance..."*

Unfortunately, the encouragement necessary to inspire agency managers to take contracts away from poorly performing but politically well-connected businesses and reassign the work to experienced and reliable public employees has not been forthcoming. In the Administration's fiscal year 2000 budget, a section is devoted to public-private competition in which DoD's plan to compete the jobs of at least 230,000 public employees under OMB Circular A-76 is endorsed. But no mention is made of competing any work performed by contractors. Since the contractor workforce is twice as large as the federal government's public employee workforce, one could argue that if 230,000 DoD public employee jobs are to be competed then the Pentagon should also compete the jobs of 460,000 of its contractor employees.

Fortunately, the Congress—or at least House and Senate appropriators—are taking an interest in contracting in. The defense appropriations conference report requires DoD to document just how infrequently work has been contracted in, identify barriers to contracting in, and provide recommendations for maximizing the possibility of effective competition for work that has already been contracted out. This is another opportunity for your subcommittee, Mr. Chairman, to improve upon the work of the House and Senate Appropriations Committee and thus ensure that all agencies begin to bring work back in-house when public employee performance would be a good deal for the taxpayers.

I know that the prospect of contracting in frightens contractors and their Congressional benefactors. But look at it this way, Mr. Chairman: the ostensible rationale of this emphasis on public-private competition and contracting out is to make the government leaner and fitter. Well, I admit that, like all too many Americans, I'm carrying a little more weight around the middle than I would prefer. However, if I'm going to get rid of that tire around my waist, I'm not going to exercise one-third of my paunch. No, I'm going to exercise the whole thing. So, if the public employee workforce is only one-third of the federal government, why do we think the federal government will be leaner and more fit if we fail—and fail completely—to exercise the two-thirds of the federal government that is run by contractors?

Also, if the contractor workforce is 4,000,000-strong (according to the Brookings Institute), if public employees win 50% of all OMB Circular A-76 competitions (according to the Center for Naval Analysis), and those wins translate roughly into 50% of the jobs

(according to OMB), there are 2,000,000 jobs in the federal government's contractor workforce that could be performed more efficiently by public employees. Only when agencies are required to systematically keep track of what their contracts actually cost the American taxpayers as well as when their contracts come up for renewal, and then put mechanisms in place for contracting in work will agencies and contractors finally be accountable to the Congress and America's taxpayers. Without the real and viable option of contracting in, the emphasis of agency managers on public-private competition is nothing more than a rationale for replacing public employees with contractor employees.

3. The Failure to Shine the Light of Truth on the Shadow Workforce

The Administration has made no progress towards fulfilling its one-year old objective of documenting the size of the contractor workforce, often referred to as the "shadow workforce" because it has historically been shrouded in such mystery. Failing to count the contractor workforce is unfair to public employees (about whom meticulous statistics are kept), encourages indiscriminate contracting out, and stifles important debates about what government is and what it should do. The House and Senate Armed Services Committees agreed, over the Pentagon's strenuous objections, to require a count of DoD's contractor workforce in this year's defense authorization conference report. A similar requirement was included in report language in the Senate defense appropriations bill. The House Government Management Subcommittee should seek the passage of legislation that would shine the light of truth on the federal government's entire contractor workforce.

"The government knows virtually nothing about its shadow"—the ever-expanding number of politically well-connected contractors who are taking more and more work from public employees"—writes Paul Light, who has testified before the House Government Management Subcommittee, of the Brookings Institution, in The True Size of Government. "Neither the Office of Personnel Management nor the Office of Management and Budget (OMB) has ever counted the full-time equivalent non-federal workforce, let alone analyzed its appropriateness."

A former senior OMB official once said when asked about the size of the contractor workforce, "You can use any number you want. . . But whatever it is...it is a lot of people." Indeed, it is. Light's research indicates that the contractor workforce is approximately 4 million employees. In contrast, there are just over 1.8 million public employees. This means the contractor workforce has grown to at least twice the size of the federal government's in-house staff.

Although the Administration has directed agencies to rely more on contractors than ever before, the shadow workforce has been built up over many, many years. As Light has observed, the shadow workforce reflects in large part "decades of personnel ceilings, hiring limits and unrelenting pressure to do more with less. Under pressure to create a government that looks smaller and delivers at least as much of everything the public wants, federal departments and agencies did what comes naturally. They pushed jobs outward and downward into a vast shadow that is mostly outside the public's consciousness." Administration officials have long dismissed the need to document the size of the contractor workforce, both at the micro (i.e., number of workers employed under specific contracts) and macro (i.e., number of contractor workers employed agency-wide and government-wide) levels. "Numbers are not important," they would insist blithely. "What really matters is how well the job is done." In an ideal world, those Administration officials would be right. But we don't live in an ideal world—especially when it comes to federal service contracting.

In documents ranging from the federal budget to the OMB Circular A-76 inventory to the FAIR Act, detailed information is kept on the number of public employees, at both the micro and macro levels. Clearly, Administration officials, like those who came before them, believe it is very important to maintain meticulous records about the size of the federal government's in-house workforce. However, they have historically professed no interest whatsoever in keeping the same statistics about the contractor workforce.

The government's ability to easily quantify its in-house workforce has put public employees at a severe disadvantage vis-a-vis their contractor counterparts. Put bluntly, if the Administration and the Congress know who you are and where you are, they can hurt you.

- In the Federal Workforce Restructuring Act, for example, the President and the Congress arbitrarily slashed the number of civil servants by 275,000—without also cutting by the same proportion all of the services performed by public employees. As a result, much work performed by public employees has simply been contracted out—often at higher costs—because of insufficient in-house staff. This political expediency creates an illusion that plays well in the polls but does nothing to improve the effectiveness of services or make the government more accountable to the American people.

- The use of numbers to "manage" the federal workforce doesn't stop there; in fact, the practice has grown even worse. Today, the extensive (and sometimes illegal) use of arbitrary personnel ceilings

forces agencies to contract out work, often at higher costs, because they are either forced to fire or forbidden from hiring the staff needed to perform the work in-house.

- Moreover, the Department of Defense (DoD) has arbitrarily decided to compete the jobs of at least 230,000 public employees under OMB Circular A-76. If DoD officials were actually interested in competing certain types of work, they'd just list the services to be placed under scrutiny. However, because DoD's quota refers to the number of employees to be competed, rather than the services to be put up for bid, the Pentagon's drastically expanded use of OMB Circular A-76 is just another attempt to replace public employees with contractor employees.

Contrary to the assertions of Administration officials, numbers do count—at least for public employees. In order to ensure equity, the contractor workforce must be documented in a similar manner.

Of course, the importance of documenting the size of the contractor workforce is not just that it puts contractor employees at the same disadvantage in the budget process as public employees. Light concludes that, "More information about the size of the contractor workforce would also influence agencies' contracting out decisions." For example, the Army has determined after a comprehensive review of its records for fiscal year 1996 that it employed 224,000 contractor employees. Prior to conducting the research that went into the report, the Army had assumed it employed only 47,000 contractor employees. Analysts pointed out that the failure of the Army to "take full credit for (its) level of contracting... could result in driving increased civilian manpower cuts that may compromise governmental control and erode critical technical and readiness capability in" important functions.

We cannot talk intelligently about what government does and what it needs to do without an accurate head count of the contractor workforce. As Light argues,

> *"It is impossible to have an honest debate about the role of government in society if the measurements only include part of the government. The government also is increasingly reliant on non-federal workers to produce goods and services that used to be delivered in-house. Not only does the shadow workforce create an illusion about the true size of government, it may create an illusion of merit as jobs inside the government are held to strict merit standards while jobs under contract are not. It may also create*

illusions of capacity and accountability as agencies pretend they know enough to oversee their shadow workforce when, in fact, they no longer have the ability to distinguish good product from bad...

"Expanding the headcount (to include, among others, contractor employees) would force Congress and the President to confront a series of difficult questions. Instead of engaging in an endless effort to keep the civil service looking small, they would have to ask just how many (employees working directly and indirectly for the government) should be kept in-house and at what cost. One can easily argue that the answers would lead to a larger, not smaller, civil service, or at least a civil service very differently configured."

In July 1998, the Administration finally decided to document the size of the federal government's entire contractor workforce. An article in the October 7, 1998, edition of The Washington Times ("Workers targeted for count: U.S. seeks number of private employees") even discussed that commitment. According to the article,

"The Clinton administration has reacted to criticism of its downsizing policies by planning to count how many nongovernment employees are under private contract to perform federal work...Administration leaders say they are committed to collecting the data soon so that manpower decisions—such as whether to privatize other federal jobs—can be made with more accurate information. 'It is a done deal as far as I am concerned,' said G. Edward DeSeve, acting deputy director for management at the Office of Management and Budget."

That objective was restated in writing by the Administration on February 2, 1999, when a senior OMB official wrote that "(the Administration) will work with AFGE and other interested parties to...estimate the number of contract employees, in the aggregate, by agency and function."

However, no progress whatsoever has been made towards achieving that objective. It is now up to the House Government Management Subcommittee to help the Administration carry out its own policy and finally shine a bright light of truth on the costs and consequences of the uncountable and unaccountable shadow workforce.

4. Failure to Prevent Work from Being Contracted Out Without Public-Private Competition

Although generating much attention, OMB Circular A-76 is really a sideshow. Most government work that is performed by contractors is never subject to public-private competition. Either the work has never been performed by public employees and was simply given to contractors from the very beginning ("new starts") or it was started in-house and then transferred to the private sector without giving public employees any opportunity to compete in defense of their jobs. That is, despite all of the talk from Administration officials about the importance of public-private competition, most contractors obtain their lucrative deals without ever having to compete against public employees. The Senate Defense Appropriations Bill includes report language that would enable lawmakers to finally at least get a handle on the problem in DoD, directing Pentagon bosses to provide "an analysis of the amount and value of contracts that were awarded to private contractors through OMB Circular A-76 versus other mechanisms." Clearly, there is plenty of room for the House Government Management Subcommittee to take a leading role on this issue.

For the last several years, taxpayers have paid contractors at least $45 billion annually for services provided to agencies other than DoD. Yet, during that time, there have been virtually no OMB Circular A-76 competitions outside of DoD, by the admission of the Administration, which means that public employees have not been allowed to compete for billions of dollars of work. At the Department of Housing & Urban Development (HUD), for example, some services are automatically given to contractors without any public-private competitions because agency managers contend that OMB Circular A-76 doesn't apply to "new" services--even though they are usually identical or extremely similar to work already ably performed by the agency's in-house workforce.

Currently, most work is contracted out without public-private competition by DoD—the agency often held out as the champion of OMB Circular A-76. Although DoD contracts out in excess of $60 billion annually, public employees have no chance of competing for almost all of that work—even with the Pentagon's increased reliance on the circular. For example, according to a 1998 Army study (Identifying and Estimating the Contractor Shadow Workforce), only 16,000 contractor jobs out of the service's entire contractor workforce of 224,000 were competed through OMB Circular A-76.

Various rationales are offered for not allowing public employees to compete. Work is arbitrarily defined by Pentagon officials as "new", as at HUD, or as "reconfigured", thus negating rules that require public-private competition. As is happening on DoD base after DoD base, work is arbitrarily split up into functions of less than ten employees in order to fall below the threshold that normally mandates A-76 competitions. Sometimes, the work is not deemed subject to public-private competition because it is being "privatized"—on the pretext that the government "is getting out of the business". However, that misses the point. DoD may decide that it will no longer perform work in-house, but that doesn't mean it no longer needs the work. In fact, the work will continue to be done for DoD—but by contractors, not public employees. And since the taxpayers will still be paying for that work to be done for DoD, whether the work is contracted out or privatized, why shouldn't they at least have the security of knowing contractors have to prove that they can perform the work more efficiently, more effectively, and more reliably than public employees? Finally, as GAO reported earlier this year, DoD managers have been told to look for waivers and exceptions to the use of A-76 whenever possible.

A major reason for preventing public employees from competing for work is the use of arbitrary personnel ceilings which prevent agencies from hiring or forces the firing of the necessary public employees. With no in-house staff to perform the work, agencies simply contract it out—often at higher costs. Agencies should be required to manage their workforces by missions and budgets, not by arbitrary numbers.

The Administration admits that management by arbitrary personnel ceilings is a widespread problem. According to OMB, several agencies—including the Departments of Agriculture, Health & Human Services, Housing & Urban Development, State, Education, and Treasury, as well as the Environmental Protection Agency—said that they each could have saved millions of dollars by performing work with public employees instead of contractors but did not do so because they were forced to work under arbitrary personnel ceilings. GAO has also reported that agencies sometimes manage their in-house workforces by personnel ceilings set by OMB that "frequently have the effect of encouraging agencies to contract out regardless of the results of cost, policy, or high-risk studies."

The problem is particularly bad at DoD. In 1995, the personnel directors of the four branches of the Armed Forces told the Congress that arbitrary personnel ceilings—not workload, cost, or readiness concerns—were forcing them to send work to contractors that could be performed more cheaply in-house. GAO reported in 1997 that a "senior command official in the Army stated that the need to reduce civilian positions is greater

than the need to save money". An earlier report by the DoD Inspector General noted that the goal of downsizing the public workforce is widely perceived as placing the DoD in a position of having to contract for services regardless of what is more desirable and cost-effective. In mid-1998, the Vice President's staff confirmed that the management of DoD public employees by arbitrary personnel ceilings was still taking place. This February, the Administration said, in writing, that it would provide guidance to agencies to address this serious problem. However, no such direction has been forthcoming.

The House and Senate Appropriations Committees included report language in both of their versions of the Treasury-Postal Appropriations bills that requires OMB to provide the necessary guidance to agencies to stop managing their public employees by arbitrary personnel ceilings. Considering how deeply embedded the practice of management by arbitrary personnel ceilings is throughout the government, it is likely that a far more forceful measure will be needed.

This is another issue that is crying out for your special kind of leadership, Mr. Chairman. Administration officials pretend that shrinking the public employee part of the government's workforce is saving money. What they don't say, of course, is that this is often costing the taxpayers more because the work is still being done by contractors, albeit at higher costs. It will take a real legislative truth-teller to force lawmakers to finally understand the connection between arbitrary personnel ceilings and wasteful contracting out. However, I know that you are very familiar with this subject. One of your former staffers, during a discussion of the Freedom From Government Competition Act, once regaled AFGE staff with stories about how arbitrary personnel ceilings in the General Services Agency, a part of the government with which he was very familiar because of his work for your subcommittee, forced work to be contracted out without public-private competition.

5. The Failure to Account for the Extent the Federal Government's Contracting Out Undercuts Public Employees on their Wages and Benefits

If there is little information about the size of the contractor workforce, there is virtually no information about how contractors treat their workforce. It is commonly accepted in the private sector and elsewhere in the public sector that to the extent savings are generated in certain circumstances through contracting out such savings essentially come from contractors short-changing their employees on wages, benefits, and job security.

A survey conducted by GAO in 1985 of public employees who were involuntarily separated after their jobs were contracted out revealed that over half "said that they had received lower wages, and most reported that contractor benefits were not as good as their government benefits".

Much to your credit, Mr. Chairman, you and then ranking minority member Dennis Kucinich (D-OH), last year asked GAO to study the wages and benefits of contractor employees. However, GAO auditors have told AFGE, as well as your own staff, that they have been unable to conduct a reliable study because of inadequate access to contractor records. To be blunt, contractors simply refused to cooperate with GAO. The Administration, which could require contractors to provide such access to GAO, has already rejected a request to conduct a similar study.

It is outrageous that Administration officials and more than a few lawmakers—despite their words of support for working Americans—continue to allow contractors to take work away from public employees simply because, in many cases, they pay their workers less and provide them with inferior benefits. When the budget is in surplus, the economy's booming, and the stock market is soaring, how can anyone justify replacing working and middle class Americans with contingent workers who are forced to scrape by with so much less?

Unfortunately, much-needed corrective action is unlikely to be undertaken until the spotlight of publicity is turned on the contractor workforce. It's hard to generate the political momentum to help people who are hidden in the shadows. The millions of men and women who constitute the contractor workforce will never be treated fairly until the federal government is at least required to begin documenting the size of that contractor workforce.

Mr. Chairman, AFGE appreciates the interest you and Mr. Kucinich showed in this important issue. Clearly, however, stronger measures are required. We would urge you to consider taking the lead on legislation that would require contractors to provide information on the wages and benefits, if any, they provide to their workers as a condition of continuing to do business with the federal government.

CONCLUSION

We have tried to work with the Administration to correct the problems and inequities that consistently undermine the efficacy and fairness of its contracting out effort. The Administration has agreed to develop a contractor inventory to keep track of the costs and savings from contracting out. The Administration has agreed to encourage contracting in. The Administration has agreed to determine the size of the contractor workforce. The Administration has agreed to discourage contracting out without public-private competition. And the Administration has agreed to discourage agencies from managing the public employee part of its workforce by arbitrary personnel ceilings. Unfortunately, no progress whatsoever has been made towards translating those intentions into actions. Moreover, we have every reason to believe that work continues to be contracted out in order to undercut public employees on their wages and benefits.

Those failures have left AFGE with no choice but to seek a suspension of federal service contracting until a contractor inventory has been established to track the costs and consequences of contracting out, agencies emphasize contracting in to the same extent they emphasize contracting out, agencies stop managing public employees by arbitrary personnel ceilings that prevent us from competing for work, agencies stop contracting out work without giving public employees opportunities to defend their jobs, and there is a better understanding of the extent to which contracting out simply replaces working and middle class Americans in the public employee part of the workforce with a poorly-paid, poorly benefitted contingent workforce. Until then, it is time we stopped wasting America's money on privatization.

As I discussed, the Congress, particularly those lawmakers who know the most about contracting out because of their work with DoD, are beginning to understand the importance of finally holding contractors accountable to the taxpayers and allowing public employees fair opportunities to defend their jobs. In the months to come, Mr. Chairman, we hope to work with the House Government Management Subcommittee to address the concerns raised today in my testimony.

TESTIMONY OF

COLLEEN M. KELLEY

NATIONAL PRESIDENT

NATIONAL TREASURY EMPLOYEES UNION

ON

CONTACTING OUT OF FEDERAL AGENCY FUNCTIONS

BEFORE

THE HOUSE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT

2:30 PM

THURSDAY, OCTOBER 28, 1999

2154 RAYBURN HOUSE OFFICE BUILDING

901 E Street, N.W. • Suite 600 • Washington, D.C. 20004-2037 • (202) 783-4444

Chairman Horn, Ranking Member Turner, Members of the Subcommittee:

I am Colleen M. Kelley, the National President of the National Treasury Employees Union (NTEU). On behalf of the more than 155,000 federal employees across the government represented by NTEU, I appreciate your holding this hearing today.

It has been said time and again by the President, by Members of Congress, by Cabinet Secretaries and by other federal agency heads that the most important resource the federal government has is its employees. Yet, they are a resource Congress seems ready to jettison in favor of contracting out federal government functions at every possible turn.

NTEU is no stranger to the issue of contracting out federal jobs. We have testified before Congress at least half a dozen times over the past several years on the subject of contracting out. We have vociferously opposed legislation that seeks to undermine the federal government's accountability by contracting out even greater numbers of federal jobs.

Contracting out is not the panacea some believe. It does not

automatically save the federal taxpayer money. It is rather, a process, one that has been used with alarming frequency in recent years as evidenced by the vast sums of money the federal government spends on contract services each year. It has led to documented (although largely ignored) examples of waste, fraud and abuse and has, more often than not, been accomplished without even the most basic checks and balances.

Congress is currently considering an across the board cut of approximately 1.4% in all discretionary spending in order to meet its artificial budget targets. Yesterday's Washington Post reported that some members of Congress believe this will cause little more than a rooting out of waste, fraud and abuse in the federal government.

What we know about a 1.4% cut in discretionary agency funding is that it will lead to further hiring restrictions and possible federal employee furloughs and reductions in force. NTEU is adamantly opposed to any across the board reductions in federal funding precisely for these reasons. This is no way to run the government. The extensive use of arbitrary personnel ceilings often forces agencies to contract out for necessary services, even if doing so results in higher costs. While federal agencies operate under severe personnel ceilings, there is seemingly no limit on the number of contract employees an agency can hire. These artificial personnel ceilings and hiring freezes have forced the federal

government to look to outside contractors to provide vital services even when the federal government could save millions of dollars by performing these functions directly.

What a 1.4% across the board cut seemingly won't touch, however, is federal contracting. I think Congress, and this Subcommittee in particular, need to answer the question why? It is ironic that the one place where we are fairly certain waste, fraud and abuse do exist in the federal sector appears to once again be exempt from the budget knife. In fact, Congress could easily avoid making a 1.4% across the board cut by directing the federal government to reduce - by even a small percentage - the estimated $120 billion it spends annually on federal contracting. NTEU has suggested this area of savings many times in the past, however, our suggestions have been ignored.

Poor management and ineffective federal oversight of federal contracting has led to astronomical amounts of waste and fraud that have been well documented by both the General Accounting Office (GAO) and the Office of Management and Budget (OMB). GAO continues to bring to Congress' attention examples of millions of dollars of missing government property and instances of unallowable and questionable contractor overhead expenses that have the potential to cost taxpayers hundreds of millions of dollars annually.

And the GAO and OMB have provided detailed examples of

contracts where the federal government could save roughly 50 percent by performing the work in-house. Their reports have highlighted contract cost overruns, nonexistent oversight, lax management and outright fraud and abuse in the billions of dollars. When NTEU last testified before your Subcommittee in March of 1998, copies of these reports were submitted with our testimony. Further reports highlighting the fiascos associated with contracting out federal jobs have subsequently been issued. The examples of waste, fraud and abuse these reports contain could fill a bookcase.

Both GAO and OMB have repeatedly pointed out that the federal government is unable to adequately supervise all the contracting it currently undertakes. From September 1992 until December 1997, the federal government reduced its contract oversight personnel by 3,930 positions - a 12.4% reduction in the federal workforce that oversees federal contracts. These are personnel that manage, supervise and evaluate contract price proposals and the administration of contracts. You simply cannot slash the number of purchasing and contract personnel at federal agencies while simultaneously turning the keys over to the private sector. Any tax dollars saved by this exercise are swallowed up by the black hole of federal contracting. Furthermore, expanding federal contracting while simultaneously downsizing the federal personnel who oversee these contracts is an open invitation to those contractors who may be less than scrupulous to gouge federal taxpayers and increase their profits.

Federal employees, on the other hand, are working harder and smarter as part of a workforce that has declined by more than 300,000 in recent years. The federal workforce is the smallest since John F. Kennedy was President in 1964. The same cannot be said of the contractor workforce that has grown exponentially to take its place. The federal government's contracting budget still exceeds that for the annual federal payroll, including pay and retirement benefits. Moreover, we are proud of the fact that nearly 40 percent of federal civilian workers have at least a Bachelors Degree compared to an estimated 20 percent of the general population.

If there were any doubt as to the size of the federal contractor workforce, Paul Light, the Director of the Brookings Institution's Center for Public Service's recent book, The True Size of Government laid them to rest. Mr. Light's research points to a dramatic reshaping of the federal government in recent years that has led to the contractor workforce growing to more than twice the size of the federal government's in-house civil service.

Light's findings indicate that nearly 17 million people work directly and indirectly for the federal government. Using 1996 data, Light found that there were 1.9 million full-time civilian federal workers, 850,000 postal employees and another 1.5 million uniformed military personnel.

The "shadow workforce" he found consisted of 2.4 million jobs created by federal grants, another 4.7 million jobs at the state and local levels created by federal mandates and most telling, another 5.6 million jobs (4 million contractor positions in service jobs and another 1.6 million providing goods) created by federal government contracts. While the federal budget provides an annual headcount of the federal government's in-house workforce, it offers no insight into this shadow workforce.

Moreover, while meticulous records are kept about the size, pay, and benefits of the federal workforce, Paul Light points out what NTEU has long known. We know next to nothing about this 5.6 million strong contractor workforce. Are some of these 5.6 million federal-contract-created employees the same people who have been forced out of the federal government by downsizing and budget restrictions? Which agencies do they work for? How much are they paid? What benefits do they receive?

The only anecdotal evidence we have again comes from GAO. In testimony before Congress in March of 1995, GAO presented a snapshot of what happens most often to federal employees when their jobs are replaced by contractors. GAO stated that although their earlier reports indicated that a significant number of displaced federal workers found employment in other government jobs, the current downsizing environment did not present the same

opportunities. GAO's follow-up with those employees who had been involuntarily separated revealed that over half received unemployment compensation or public assistance. In addition, 53 percent who went to work for contractors said that they received lower wages, with most reporting that contractor benefits were not as good. This is not surprising. The annals of contracting out are replete with examples of contracting out being done to avoid unions, undermine employee pay and benefits and generally shortchange workers.

NTEU has repeatedly pressed for an inventory of the federal government's contract workforce. We continue to work with the Administration on this point and look forward to the release of data on federal contracting out costs and the number of federal contract employees working for the federal government. Nonetheless, we continue to believe that the proper place for this accounting of the federal government's shadow workforce is alongside the inventories of the federal government's in-house workforce that are currently being made available under the provisions of the Federal Activities Inventory Reform (FAIR) Act.

During deliberations on the FAIR Act, NTEU made clear that the legislation addressed only one side of the issue. To make public an inventory of the in-house workforce while systematically ignoring the contract workforce presents a skewed picture of the

actual work being performed on the federal government's behalf.

The FAIR Act grew out of Congressional efforts to steer an even greater portion of federal spending to private business. This Subcommittee, as well as a bipartisan group of Senators and Members of Congress alike, wisely rejected earlier versions of the legislation (H.R.716, S.314) in the 105th Congress dubbed the "Freedom From Government Competition Act". This legislation was a reckless and highly controversial attempt to give the bulk of the federal government's work to private sector contractors without regard to cost. Under this legislation, contractors - and only contractors - would have been given rights to judicial review of agency determinations of what constituted inherently governmental functions. This legislation did not pass the laugh test and was rightfully rejected by Congress.

In passing the FAIR Act, Congress recognized that even whether to consider transferring work to the private sector is a decision left purely to agency discretion. Federal agencies retain the right **not** to contract out any service. This is as it should be.

The oversight questions Congress should be asking are what are the most efficient methods for delivering services to the American people? Who should be performing what services and how can those services be provided most effectively, most efficiently and for the best value? Some members of Congress display a predisposed view

that the private sector can always perform better. We wholeheartedly disagree.

The truth of the matter is that what commonly passes for bad government is often, in fact, bad contracting. The system in place now may not be perfect, but at least it is accountable. When Congress has concerns about the direction of a federal agency, it holds the power to demand answers and even a fundamental change of course. If contractors were running America's public service programs, where would that accountability lie?

Any contracting out of federal services must be evaluated on a case by case basis. In addition, until such time as a complete picture of the true size and nature of the federal government's contractor workforce is available, a moratorium on any further contracting out is the most sensible answer. I hope that the members of this Subcommittee agree. Thank you.

1999 FAIR ACT INVENTORY
OF THE
GENERAL SERVICES ADMINISTRATION

Office of the Chief Financial Officer

Part A

INTRODUCTION

U.S. General Services Administration
Using A76 and the FAIR Act as Tools to Hone Our Excellence

The GSA Mission

The U.S. General Services Administration has three services, complimented by the work of the Office of Governmentwide Policy, that carry out the mission of the agency: the Public Buildings Service, the Federal Supply Service, and the Federal Technology Service.

The agency was created in 1949 to efficiently and economically provision Federal civilian agencies so that Federal employees could do their jobs while saving tax dollars. Today, GSA operates with even more effectiveness than was envisioned by the post World War Two Hoover Commission that recommended the consolidation of four agencies into one to avoid "senseless duplication, excess cost, and confusion in handling supplies and providing space." The reason for creating GSA is as valid today as it was when the Agency was founded.

GSA does business with every part of the Federal workforce and supports both civilian and military agencies. Unlike the original mandatory operations, GSA currently competes with other Federal agencies to carry out our mission, i.e., ***to provide expertly managed space, products, services and solutions, at the best value, and policy leadership, to enable Federal employees to accomplish their missions.*** To compete successfully, we must provide Federal agencies with the highest quality goods and services at the best value to the taxpayers. We must also incorporate sound, easily understood Government policies, which are developed cooperatively with Federal agencies under the guidance of our Office of Governmentwide Policy.

Because we deliver on the promise that is implicit in our mission statement, we add value to everything we provide to Government agencies. As a result, all the agencies we serve are able to provide better service to the taxpayers.

This is Not Your Father's GSA:
Three Important Changes

There are three changes in the way GSA does business in 1998 that distinguish us from our competitors and from our own traditional mode of operations.

1. **GSA outsources many of its operational tasks:** We manage contractors who perform formerly in-house operations.

2. **GSA competes for Federal business:** We are no longer primarily a mandatory source of supplies and services for Federal agencies.

3. **GSA is becoming industrially funded:** We are earning our own way from our business success and have become almost independent of direct appropriations.

1999 FAIR ACT INVENTORY OF THE GENERAL SERVICES ADMINISTRATION

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Part B: 1999 FAIR Act Inventory

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Part D: Additional Function Codes Created by GSA

Part E: Definitions of Classifications as Used by GSA

Part F: Contact Information

These changes in our business impact the way we view our employees. While we value our workforce as the critical element in achieving our objectives, we recognize that as a practical matter, we must leverage expertise whether it is internal or found in the private sector. This means that we do not limit ourselves to statutory reviews of the way we operate our business; we are constantly reviewing operations in search of faster, cheaper, smarter ways to meet our business objectives.

Change #1: GSA Manages Contractors
Nearly 94% of GSA's $13-billion budget is spent for contractors

While our mission remains virtually unchanged, our work methods are dramatically different today than they were fifty years ago. Today, GSA functions essentially as managers of private sector contractors. We no longer can afford to retain employees for construction, custodial work, programming, or fleet maintenance services at old motor pools. Instead, GSA negotiates with private sector contractors who provide direct operational support to Federal agencies. By way of example, in 1997 GSA contracted with private real estate firms to provide leasing services for Federal agencies. The unprecedented National Real Estate Services contracts with five real estate brokers across the country will provide many of the pre-and post-acquisition realty services previously managed in-house.

Change #2: GSA is Non-Mandatory
FTS2001 Long-Distance Service Went Competitive in FY1999

Contrary to popular misconceptions, GSA is not a monopoly or a mandatory source of supplies and services for Federal agencies. The majority of programs under GSA's Federal Supply Service became non-mandatory long ago, and relies on providing best quality and value for its successful operations. FTS2000 long-distance services, which make up about 20% of the business in the Federal Technology Service, have been legislatively mandated since 1988; however, that mandate is being phased out with the awarding of the FTS 2001 contracts in FY1999. GSA's Public Buildings Service entered the non-mandatory arena in 1996 with the introduction of two programs – "Can't Beat GSA Leasing" and "Can't Beat GSA Space Alterations." Both programs are successful, and costs and delivery times have been reduced substantially.

Change #3: GSA is Industrially Funded
Of GSA's $13-Billion Budget, Less Than 2% is Directly Appropriated

GSA earns its way by generating approximately 98% of its budget from industrial, or reimbursable, funding. The Federal agencies that use GSA's services pay GSA directly for the services they choose to buy. We have become increasingly self-supportive by relying more on our own good work and less on direct appropriations from Congress. Since 1993, direct appropriations have declined over 23%. Because the important governmentwide policy leadership is part of our statutory mandate, we do not expect to become entirely self-supporting.

The Impact of Change:
Doing More with Fewer People

The new GSA is a leaner, more flexible organization that is innovative and less encumbered by the regulatory burdens of the past. Not only have we experienced dramatic changes in our business processes and a corresponding challenge in our mission, but we must also learn to manage our business with a workforce that is almost 29% below our 1993 levels and a whopping 64% below our staffing highs of the mid-1970s. Much of the change is a result of moving from performing operations to supervising contractors who do the work.

GSA has reorganized to help us manage agency programs more efficiently with our reduced workforce. Among the more significant changes are the separations of policy and service delivery through the creation of the Office of Governmentwide Policy; changes in GSA oversight responsibilities for information systems across government; and legal and regulatory changes to the Federal procurement system.

The Impact of Change:
GSA Adds More Value

Recognizing the value of GSA, President Clinton, Vice President Gore and the National Performance Review all recommend the use of GSA schedules to "select goods and services that are 'best value' instead of lowest price." GSA, however, strives to deliver the lowest price whenever possible. We negotiate great deals for the Government by leveraging our experience in working with competing vendors and in managing a substantial portion of the Federal purchasing power.

The following deeply discounted prices are measures of GSA added value:

- "Can't Beat GSA Leasing" cut leasing time in half.
- "Can't Beat GSA Space Alterations" cut costs by 10% and delivery time by 60%.
- Performance-based contracts in PBS property management cut custodial costs by 40%.
- Airfares for Federal travelers are nearly 70% less than normal unrestricted coach fares.
- Overnight package delivery is priced 44% lower than comparable corporate rates with a money-back guarantee for late delivery.
- Charge cards cut $616-million in administrative costs, simplify purchasing and provide increased accountability.
- Vehicle fleet services are the most cost-effective anywhere; a 4-door compact sedan leases for as little as $146 per month.
- Long-distance telecommunications service costs Federal customers as little as 2 cents per minute for calls within the FTS network.
- Sales of surplus Federal real estate achieved prices 8% higher on average than the property's previously determined fair market value.

The Impact of Change:
Reinventing GSA

GSA has been on the leading edge of change and reinvention in the Federal community. In fact, like every successful institution, GSA is driving change. We know that we must continue to raise the bar on ourselves to re-evaluate our services in our search for the efficiency and effectiveness which will mark our ability to survive in an era of increasing competition and a shrinking, downsized Federal government.

The A-76 Circular is an important tool in this process but not a new one for GSA. We have used A-76 many times to review our operations and services, identify areas of improvement in efficiency and economy, and solidify our added value to the Government and taxpayers. This regular review and the concomitant opportunity to discuss our business with our stakeholders are an important and welcome tool in our planning process.

Using A-76 and other tools like the Federal Operations Review Model (FORM), we have expanded and contracted to meet the demands of Government and the societal changes around us. For instance, as early as the 1980s, GSA supported the transfer to independent agency status of the Federal Emergency Management Agency and the National Archives and Records Administration when it made more sense for them to stand alone. Congress, through the Brooks Act, gave GSA oversight responsibility for policies and procurements of "automated data processing" goods and services. As these products became commodities, GSA supported the Clinger-Cohen Act that, in 1996, decentralized this function and delegated to agencies the authority to buy and manage their own computer equipment and services. Most recently, in FY 1998, GSA transferred its printing operations to the Department of Defense. Increasingly, GSA has sought measures that would allow us to achieve superiority over industry benchmarked performance standards.

Impact of Change:
GSA and Its Shadows

Both President Truman and the 1949 Congress that created GSA recognized that "great savings can be achieved by the government through the elimination of competition among executive agencies for like articles in the same markets, unnecessary purchasing, lack of quantity purchases and other efficiencies." This mandatory environment has been replaced by a trend toward privatization and an environment that favors deregulation. Increasingly, competition is coming from "shadow GSAs" that are multiplying in departments and agencies throughout the Federal government. This trend is resulting in the kind of duplication of services and excessive costs that the authorizers sought to avoid fifty years ago.

GSA is positioned to compete effectively because of our long years of experience and success in the marketplace. However, GSA management believes that while we welcome fair competition, we must question the wisdom of encouraging it among Federal agencies during a time of government downsizing and fewer discretionary dollars. Agencies may wish to evaluate the use of their resources to carry out their primary missions and weigh the results against creating extra missions as a way to cling to people and dollars. In the same A-76 process that encourages dialogue between GSA and our supervising committees in Congress and the Office of Management and Budget, agencies may address this issue to determine if these proliferating shadow GSAs are in the best interests of the taxpayers.

GSA's Commitment to Our Stakeholders:
The Taxpayers

The GSA strategic plan provides the road map for achieving our mission and the context within which we performed the FAIR Act inventory. We will:

1. Manage Government assets wisely and disseminate best practices in asset management to all Federal agencies.
2. Expand the use of GSA's programs throughout Government because they offer the best value to the customer and cost savings to the taxpayer.
3. Create loyal customers by providing excellence in customer service.
4. Lead the Federal government in anticipating future workforce needs.

GSA has both the energy and the experience to deliver on our promise to our stakeholders, the taxpayers.

Part B

THE GENERAL SERVICES ADMINISTRATION'S
1999 FAIR ACT INVENTORY

AS OF JUNE 30, 1998

1	2	3	4	6	7	8
DESCRIPTION	FUNCTION CODE	INHERENTLY GOVERNMENTAL	COMMERCIAL EXEMPT	COMMERCIAL COMPETITIVE	COMMERCIAL IN-HOUSE	FTE - TOTAL
Personnel Management	B	31	12	130	60	233
Financial Program Management	C403	22	0	0	100	121
Management Support	D000B	6	4	0	0	10
Administrative Support	D000D	0	2	0	0	2
Regulatory Activities	D100	20	0	0	0	20
Data Collection & Analysis	D200	7	0	0	0	7
Management	DG00A	6	0	0	0	6
Management Support	F000B	5	1	1	0	7
Contracting (Operational)	F200	140	0	0	89	229
Management Support	G000B	0	0	5	0	5
Management	G00A	1	0	0	0	1
Inspector General	I100	236	50	0	0	286
Management Support	M000B	17	6	3	0	26
ADP Support	M000C	0	5	3	0	8
Administrative Support	M000D	0	9	26	0	35
Policymaking Activities	M100	81	0	0	0	81
Mgmt of Gov'twide Info Coll & Dissem	M200	30	0	0	0	30
Coll & Analysis of Data or Practices	M300	1	2	2	0	5
Specialized Activities to Support Policy	M400	2	0	3	0	5
Compliance Reviews	M500	0	0	1	0	1
Real Property Disposal	M999	90	16	0	0	106
Management	MG00A	31	0	0	0	31
Financial & Payroll Services	S702	0	0	61	455	516
Supply Operations	S731	971	25	1,143	0	2,139
Transp. Mgmt. Services	S740	59	4	102	0	165
Veh. Acq. & Flt. Mgmt.	S740A	373	8	520	0	901
Security and Protection	S900	860	33	0	268	1,161
Disp. Excess/Surplus	T819A	199	2	35	0	237
Special Studies & Analysis	T821	19	0	0	0	19
Professional. Dev. Trng	U500	0	48	0	0	48
Management	W000A	1	0	0	0	1
Management Support	W000B	4	0	0	0	4

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9/27/99

Part B

THE GENERAL SERVICES ADMINISTRATION'S
1999 FAIR ACT INVENTORY

AS OF JUNE 30, 1998

1	2	3	4	6	7	8
DESCRIPTION	FUNCTION CODE	INHERENTLY GOVERNMENTAL	COMMERCIAL EXEMPT	COMMERCIAL COMPETITIVE	COMMERCIAL IN-HOUSE	FTE - TOTAL
Administrative Support	W000D	0	2	3	0	5
Other ADP Functions	W999	0	0	1	9	10
Management	Y000A	118	2	0	40	160
Management Support	Y000B	66	0	1	74	141
ADP Support	Y000C	23	2	0	66	91
Administrative Support	Y000D	16	0	1	69	85
Business Services	Y000E	0	0	95	0	95
Congressional Liaison	Y000F	12	0	0	0	12
Identifying & Dev. Consumer Info	Y000G	20	0	0	0	20
Agency Corp Planning	Y000H	13	0	0	0	13
Financial Systems Management	Y000I	0	0	0	25	25
Communications	Y000J	10	0	0	23	33
Management Services	Y000K	4	0	64	0	68
Statutory Mgnt & Oversight	Y1000	25	0	16	0	41
Legal Services	Y400	132	0	0	0	132
Judicial	Y420	18	0	0	0	18
Budget & Financial Prog Mgmt	Y510	71	23	12	10	116
Budget Formulation	Y510A	3	0	0	0	3
Budget Execution	Y510B	0	0	0	20	20
Pers, Cmty, Act & Mnpwr Prog Mgmt	Y530	0	0	0	7	7
Info & Telecom Program Mgmt	Y550	291	65	25	359	740
Marketing	Y700	129	7	45	44	225
Acq Career Mgnt & Rel Pro	Y725	9	0	0	0	9
Agency Acq Mgnt & Rel Act	Y750	7	0	0	0	7
Property Development	Y800	166	12	33	0	231
Realty Acquisition Services	Y900	142	11	72	0	225
Management	Z000A	98	34	36	0	168
Administrative Support	Z000D	0	0	2	0	2
Other Maintenance	Z999	2,426	489	2,115	101	5,131
GSA TOTALS		7,029	874	4,556	1,819	14,278

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JUSTIFICATION FOR COMMERCIAL RETAINED IN-HOUSE FTE

The classification Commercial Retained In-House identifies functions that are not currently available for competition. This temporary exclusion from competition is due to the fact that the functions are currently undergoing a reinvention initiative.

The General Services Administration has classified 1,819 FTE as Commercial Retained In-House in accordance with the above definition. Upon the conclusion of each reinvention effort, the associated FTE will be reclassified as appropriate.

Applicable reinvention efforts include the following:

PEGASYS
Charrette
SEAT Management
FTS 2001
Concept of Operations

ADDITIONAL FUNCTION CODES CREATED BY GSA

M Governmentwide Management Policymaking (other than regulatory) and Support Services
Covers all functions relating to the activity of governmentwide management policymaking

MG00A Management
Involves planning, direction, and control of Federal programs and overall office-level program priorities

M000B Management Support
Provides support to management for the planning, direction, and control of Federal programs and overall office–level program priorities

M000C ADP Support
Provides computer related support

M000D Administrative Support
Provides high level administrative support in direct link to office management

M100 Policymaking Activities
Interpretation, implementation, development of intergovernmental policy which pertains to government(s)

M200 Management of Governmentwide Information Collection and Dissemination
Involves the management of governmentwide information collection and dissemination for government activities

M300 Collection and Analysis of Data or Practices
Collection and analysis of data pertaining to governmentwide policymaking

M400 Specialized Activities to Support Policy Implementation
Involves specialized activities supporting policy implementation

M500 Compliance Reviews
Involves examining whether an agency or element of an agency is in compliance with a particular law, regulation, or policy

M999 Real Property Disposal
Covers general activities associated with determinations and dispositions for real property assets of the government

S740A Vehicle Acquisition and Fleet Management
Provides oversight and management for governmentwide acquisition and leasing of motor vehicles and equipment

S900 Security and Protection
Provides Federal real property security and law enforcement activities

T819A Disposition of Excess and Surplus Personal Property
Exerts ultimate control over the disposition of excess and surplus personal property of the United States on a governmentwide basis

Y000E Business Services
Encompasses a variety of functions performed by the conduit serving the government and the private business communities

Y000F Congressional Liaison
Serves as primary entity within the agency for facilitating relations between the Congress, the Office of Management and Budget, the White House, other Federal agencies, and state and local officials

Y000G Identifying and Developing Consumer Information
Providing to the public helpful unbiased consumer information on a variety of subjects from all agencies

Y000H Agency Corporate Planning
Encompasses functions associated with assisting government senior management with internal policy functions

Y000I Financial Systems Management
Planning, designing, and development of new financial systems and/or significant enhancement to existing financial systems

Y000J Communications
Disseminate information on the agency's mission, policies, programs and initiatives to various internal and external activities

Y000K Management Services
Encompasses diverse activities associated with providing assistance to the various offices within a government agency

Y510A Budget Formulation
Focuses primarily on functions related to budget formulation

Y510B Budget Execution
Focuses primarily on functions related to budget execution

Y700 Marketing
Focuses on business development, marketing and public relations activities

Y725 Acquisition Career Management and Related Programs
Involves the management of curriculum development for the acquisition workforce governmentwide

Y750 Agencywide Acquisition Management and Related Activities
Involves development and promulgation of agencywide acquisition policy and non-regulatory guidance

Y800 Property Development
Involves major projects that include construction, rehabilitation, renovation, alteration and modernization of real property

Y900 Realty Acquisition Services
Acquisition, management and administration of real estate occupancy and transactions for realty services

Y1000 Statutory Management & Oversight
Enforcement of all statutes and regulations established to foster the viability of the required program

JUSTIFICATION FOR ADDITIONAL FUNCTION CODES

The function codes listed above are necessary to augment those listed in the "A-76 Commercial Activity Functional Codes" document in order to provide for all functions performed by GSA.

DEFINITIONS OF CLASSIFICATIONS AS USED BY GSA

GSA adhered to the guidelines and definitions provided in the FAIR Act, the May 12, 1998 OMB Data Call, the March, 1996 OMB Circular No. A-76 Revised Supplemental Handbook, Performance of Commercial Activities, and communications with OMB. Nonetheless, in order to help ensure that the information represented by the included GSA inventory is clearly understood, we have recorded below our working definitions used in classifying the Agency's functions.

Inherently Governmental

A function that is so intimately related to the exercise of the public interest as to mandate performance by Federal employees.

Commercial Exempt - Core

Commercial functions currently performed by GSA employees that must be maintained without cost comparison are exempt.

A number of reasons are available to support classification of a function as Commercial Exempt. In this iteration of the GSA inventory, the reason for using the Commercial Exempt classification is the need to maintain a minimum core capability of specialized or technical in-house employees and related commercial workload.

Commercial Competitive

Commercial function that could be sourced from other Federal or private sector providers.

Commercial In-House

Commercial function currently undergoing reinvention. Upon completion of the reinvention, it will be reclassified as appropriate.

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Mr. HORN. I thank the gentleman. I'm going to have questioning done by two of your colleagues and we can start with the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman, and yes we're delighted to have you here. I want to thank you as someone who has come late to this process having had this past last session, we appreciate what you're trying to accomplish. Do you think that there are some specific legislative changes that should be made to make this a more user friendly document? I mean, I was glancing through some of what we have here and it's—and as a small business person in real life, I'm not sure I would be any better off looking at this than not knowing.

Mr. SESSIONS. Perhaps there would be some disagreement that we have here, but I believe that we should work further with the process that OMB did not provide a one-size-fits-all package to tell people how to do their job but rather left it up to the agencies to do their own determination, their own fact finding, their own evaluation. And somehow I believe that even though the end product the first time was not exactly what I would have wanted, I believe that they recognize the importance of following the law and that they see where providing—learning from their—what they have first done and providing more information will be very valuable internally, most of all to their own employees. Because once these documents are presented, they don't answer questions that employees would have, they don't provide information to employees or to the vendor community; and they need to go a little bit further. And I think the internal working would allow them that opportunity to get closer.

And at this point, it would be my recommendation not to offer advice but rather to ask them what do you think needs to be changed. I think they should be asked here today, what with the realistic expectation that not the next time and not the next time because the Department of Defense will be released in December, I understand, but early next year up on the releases that they would have had a chance to provide information and to get better at it. And then that would be a chance if we did not—if we had disagreement then to go in and tinker with our reporting process.

But I'm happy with the outline we've given them and believe they are prepared even perhaps today to admit that themselves.

Mr. DUNCAN. I agree with that. We ought to be able to work with the agencies; and if over this next year, we keep running into these problems in spite of guidance being given to the different agencies, then that—then we could consider some changes.

Mr. HORN. Any comments from the gentleman from Ohio?

Mr. KUCINICH. Again I think to hear the agencies' experience with this is really going to be essential. And I will repeat that you know, Congress passed this law, agencies are going to have to abide by it. But it's important to see what the fit is between the conceptual framework of the law and the practical experience in the administration of it. So and I think that's—that's the whole process here in Congress: We keep learning; we pass the law, then we see how it works.

Mr. WALDEN. There's been some concern voiced about the impact of the FAIR Act inventories on Federal employees. Do you have any concerns or——

Mr. KUCINICH. Well, I would say to the gentleman that you know I'm generally philosophically opposed to privatization. I'll just put my cards on the table there. I think that government does have a role to play in our society and certainly this committee in particular has the ability to make the government work better through providing some guidance.

I do understand the concerns which my good friend, Mr. Sessions, advanced throughout the debate over this about how there are certain areas that there's a question as to whether government should be in it or not. I don't think there's anything wrong with reviewing those. But just as a matter of course you know, I am not for dismantling the government. At least not while I'm a Member of Congress.

Mr. SESSIONS. My feedback, if I could add on with Mr. Kucinich, would be this, that I believe that the information that is provided by agencies is being followed very closely by employee groups and that they should receive every bit of information and be told is this preliminary, is this final, how is this going to be used, that they should know what's at risk, that they should be able to plan themselves.

And if you just look at the substance that's been provided, it makes it seem like that your job is gone. It's far from that. There's a lot of information that is still yet to be gleaned and this is the—really, the first shot or first evaluation that has been made about determining, I think, whether something is inherently governmental or whether it's competitive. So there's a whole lot of things that we need to learn and get more information and employees would be one of those groups of people that needed just as much as the community that might wish to participate in being a part of it.

Mr. WALDEN. Two other issue areas that I might just float out there. One is does this act cover the Postal Service as well as they get into look—at getting into different private sector activities.

Mr. SESSIONS. I would have to defer to somebody that knows what they're talking about. But in my opinion, no. Well, a year ago—there's bound to be somebody that knows about it; but in my opinion, no. I didn't get sworn in, did I? In my opinion, no.

Mr. HORN. We do not swear in Members I'm told by Chairman Clinger after I was swearing them in all the time. And we do have a little code here that if anybody lies to us it's the last time we speak to them.

Mr. SESSIONS. Does that apply to Russell too or just the Members? I think not to answer your question.

Mr. WALDEN. What I'm hearing may be unclear, so we'll ask the second panel.

Mr. SESSIONS. In my opinion, that was specifically a part of a discussion that we had; and, in my opinion, they were not included because of their statutory—where they fit in the scope.

Mr. KUCINICH. If I may, I think one of the aspects of that is self-evident is that if the Postal Service had been included in that, they

would have to hold this hearing in a field house because there's such strong feelings about that particular issue. So I'm——

Mr. WALDEN. I've run into that. That's why I wondered.

The second question I have which may be totally off the wall, but in terms of prison labor and competition there, does this act get into that at all? I'll tell you from a State perspective, we had a ballot measure passed in Oregon that said we're going to put all prisoners to work 40 hours a week.

The upshot of that is they are mandated to go do jobs now and are literally taking jobs away not only from the private sector but from the nonprofit sector. My own little community there was an organization that dealt with mentally handicapped people who were doing piecework, and the prison laborers could do it cheaper, and they lost their contracts. That's going on in the recycling industry and elsewhere. So actually, I think, we're modifying that change in the law in Oregon. But I wonder at the Federal level.

Mr. SESSIONS. To answer that question, as I recall the Department of Justice is included and every one of its employees would be included but not——

Mr. WALDEN. Prison programs. OK.

Mr. SESSIONS [continuing]. Those people who were engaged as prisoners any sort of activities.

Mr. KUCINICH. I would say, however, at a future date it would be interesting to see where prison labor might be replacing jobs in the private sector. I would be interested in that as well.

Mr. WALDEN. I heard another one, this is all, you know, those little stories you pick up at town meetings and all about a fellow, a college kid who was no longer out fighting fires because they were using prison laborers to come in and fight forest fires. I haven't run that one down. But there is some of that going on out that there where we're displacing law abiding citizens.

Mr. KUCINICH. Wonder if they had anybody convicted of arson doing that.

Mr. WALDEN. How do you start a fire?

Thank you, Mr. Chairman.

Mr. HORN. The gentleman from California, Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman. My questions really are very specific and that is how do we get from the position where we're at right now relative to these reports to a position where the report is standardized so that anybody in 10 minutes time can understand what's possible and what's not. I think that's the objective. Obviously we started somewhere. OK. Well, this doesn't work. I mean it's just—well, I'm not a rocket scientist.

Mr. SESSIONS. I'll give a stab at it. I think that's what we've been talking about. And I believe in continuous improvement, and I believe that the OMB does also, that they want to have an opportunity to learn from what the exercise that they've been through. And that I think they call it gymnastics as opposed to just regular floor exercise, that this was a tough thing. We were dealing with people that aren't as familiar with this. But I think that's their goal.

I would just once again state they've got two more releases that are already in print, don't look at the next one or the next one, say by golly they didn't hear us. In fact they do hear us, they've got

great ears, they were listening. And I'll be very much listening today to hear how open they are because they've had at least 15 or 20 hours since my meeting to think about it. And so we'll see what they come back with.

Mr. OSE. One of the things I did do, and this follows up on one of Mr. Kucinich's concerns, is I read the testimony from the Treasury Employees Union. And there is a provision—I'm still not—it's still not on, Mr. Chairman. Can you hear me? The act itself includes a provision for costing an in-house proposal. I think it's section 2 subparagraph E, realistic and fair cost comparisons. And I would hope that as we look specifically at that, as we are refining these reports, we can also give some thought as to how to get a fair costing algorithm, for instance, for current Federal agency employees to bid on this work. I think that's the height of fairness and would serve us all well. I think that would address much of the concern that you have.

Mr. KUCINICH. I think the gentleman's point is well taken. You know, when you consider the cost of employees you also have to include not just their wages but their benefits as well. And in the private sector, from the experience that I've seen, is that let's say on a municipal level, contracting out, the contractor may not offer the same wages, the same level of benefits. That's why this privatization issue is so powerful in some places in the country because people feel that their ability to make a decent wage with benefits is under attack. That's like another area of concern.

So I would suggest that your point is well taken in terms of trying to get a fair-cost comparison. I would like to see that the benefits and as well as wages added. Because my guess is that most privatization would—most of the contractors would not want to pay the same wages and same benefit levels because where they're making the money I would respectly suggest often is in reduction of wages and benefits. That's why this can be such a very vexing issue because what we want, while we want government to be efficient, at the same time we should be concerned that we're not engaging in the construction of public policies that would undermine the very constituencies that we're here to serve.

Mr. OSE. I would echo your remarks, and I think you covered a couple of things in section 2 E. But I would also make sure that we cover the either real or imputed overhead costs that might come from office space, utilities, phones, supplies, and whatever and price that not at the margin, but at the core costs.

My other question, Mr. Chairman, and I appreciate any senior input on this is how do we accurately define what is a core activity as opposed to a non-core activity? I understand exempt versus non-exempt, but how do we define core versus non core?

Mr. HORN. Well, I think we're going to ask that question of Ms. Lee and the various orders that OMB has put out in guidance because you're absolutely right that we've got to get a little firm definition. And I would hope this round has just as you did in lifting that report that we would get some clarification as to how you can deal with it. And when you do something like this, obviously a lot of people in agencies, not just in government, but large human organizations just sort of throw up their hands and say what are these people really trying to ask us. So we need to clarify that with

panel two since we'll have the working people that put it all together.

Mr. OSE. Thank you, Mr. Chairman.

Mr. HORN. OK. No more questions? Well, we thank you very much, and you're welcome to stay since you're both government groupees. You're certainly welcome if you like. Thank you very much for coming.

We now will swear in panel two. And it will be the Honorable Deidre Lee, Acting Deputy Director for Management, Office of Management and Budget; Mr. Christopher Mihm, Associate Director, Federal Management Work Force Issues, General Accounting Office; and the Honorable Sallyanne Harper Chief Financial Officer of the Environmental Protection Agency; Mr. William Early, the Chief Financial Officer, General Services Administration; Ms. Linda Bilmes, Acting Assistant Secretary for Administration, Acting Chief Financial Officer, Department of Commerce.

So if you have staff with you that might be also saying things let's get them all sworn in at once behind you, if you have any. Anybody have them here. OK. We're now talking with essentially five witnesses then. Please raise your right hands.

[Witnesses sworn.]

Mr. HORN. The clerk will note all five witnesses affirmed. And I'm going to switch a minute. On this agenda it wasn't quite put together right. I want the GAO first, and then we will go to the members of the administration. So, Mr. Mihm, you can begin as usually we have the GAO first.

And we welcome you.

STATEMENTS OF CHRISTOPHER MIHM, ASSOCIATE DIRECTOR, FEDERAL MANAGEMENT WORK FORCE ISSUES, GENERAL ACCOUNTING OFFICE; DEIDRE LEE, ACTING DEPUTY DIRECTOR FOR MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET; SALLYANNE HARPER, CHIEF FINANCIAL OFFICER, ENVIRONMENTAL PROTECTION AGENCY; WILLIAM EARLY, CHIEF FINANCIAL OFFICER, GENERAL SERVICES ADMINISTRATION; AND LINDA BILMES, ACTING ASSISTANT SECRETARY FOR ADMINISTRATION, ACTING CHIEF FINANCIAL OFFICER, DEPARTMENT OF COMMERCE

Mr. MIHM. Thank you, Mr. Chairman. And again it's a pleasure and and honor to appear before you today to discuss the implementation of the FAIR Act. As you mentioned in your opening statement, the act requires executive agencies to list their activities that are not inherently governmental.

The implementation of the FAIR Act, as we heard from the first panel, is in its very early stages. Many agencies have only recently released the inventories of activities, and many other agency inventories have not yet been made available to the public including 14 of the 24 CFO Act agencies, the largest agencies in the Federal Government.

At the request of this subcommittee, we are beginning a body of work to assess agencies' efforts under the FAIR Act. This afternoon, I'll briefly describe the status of initial steps taken to implement the act, then I will highlight some of the questions that are being raised by our examination of the FAIR Act inventories from

the Department of Commerce, Environmental Protection Agency, and the General Services Administration. We will be following up to get answers to these questions at those agencies and other CFO Act agencies as other inventories are released.

In regards to my first point on the status of FAIR Act implementation, as you pointed out in your opening statement, the act requires executive agencies to submit each year to OMB inventories of activities that are not inherently governmental. In addition to listing the activities, the inventories are to include information about: First, the fiscal year an activity first appeared on an inventory; second, the number of full-time-equivalent, that is FTE, staff years to do the activity; and then, third, a contact point for additional information.

As was mentioned, inventories from 52 agencies have been made available. Of these 52 inventories, 10 were from CFO Act agencies including five cabinet departments, Agriculture, Commerce, Education, Health and Human Services, and HUD. The remaining 42 inventories were from smaller agencies.

Clearly then the agencies and OMB still have plenty of work ahead to implement even the first step of the FAIR Act, and that is the issuing of the inventories. Nevertheless, our initial review of the selected inventories that have been released raise a number of important questions that we plan to pursue at the request of this subcommittee. These questions include: First, what decisions did agencies make about whether or not activities were eligible for competition and what were the reasons for those decisions.

Second, what processes did agencies use to develop their inventories.

Third, how useful were the inventories—and we heard quite a bit of commentary on that from the first panel.

And finally, what supplemental information can be included in the inventories to increase their usefulness. This is information over and above what is required by the FAIR Act.

As I mentioned, we'll be seeking answers to these and other questions over the coming months in order to assess agency efforts and to develop a body of best practices as efforts under the FAIR Act move forward. In doing so, we hope to contribute to the oversight of this subcommittee and others in Congress.

Each of these questions is discussed in some detail in my written statement, so in the interest of brevity I'll discuss on just the first and the fourth of these questions this afternoon.

First then, what decisions did agencies make about whether or not activities were eligible for competition and what were the reasons for those decisions. Our initial review of the inventory suggests that questions can be raised about how agencies decided whether or not a commercial activity could be subject for competition. This is not the distinction between an inherently governmental activity, but once we've decided an activity is commercial, whether or not it should be competed. This particularly is an issue when an agency reports that relatively few of its commercial activities should be competed.

For example, the Environmental Protection Agency's inventory shows that EPA has decided that most of its commercial activities are exempt from competition. This includes about 775 FTEs or over

93 percent of the total number of full-time equivalents performing commercial activities at EPA. According to EPA, these activities are exempted from competition because EPA needs to retain a core staff capability. For example, EPA told us that the exempted positions were selected positions requiring scientific expertise in its Research and Development Office that oversee the work done in laboratories by other contractors.

The second question is what supplemental information can be included to increase the usefulness of the inventories. We are seeing that beyond the requirements of the FAIR Act, some agencies are including information with their inventories that provides additional very helpful perspective on the contracting and management issues confronting that agency. Specifically, some of the agencies are listing inherently governmental activities which are not required by the act.

Second, they're also describing the scope of activities currently under contract to provide a sense of the overall level of contract support within that agency.

And third, they're discussing how listed activities contribute to the agency's strategic and annual performance. In that regard, the inventory for the Environmental Protection Agency was particularly helpful in showing how commercial activities were aligned with the strategic goals of the agency. For example, including information about inherently governmental functions as GSA did helps provide perspective about all of the agency's activities not just those that the agency considers commercial and the relationships between commerical and inherently governmental activities.

In summary, Mr. Chairman the agencies and OMB still have plenty of work ahead to implement the FAIR Act. By enacting FAIR, Congress has increased the visibility of agencies' commercial oversight activities. Oversight hearings such as today's and, I should add, the statements from the Members of Congress that we heard on the first panel, send clear messages to agencies that Congress is serious about improving the efficiency and effectiveness of government operations and the effective implementation of the FAIR Act.

We look forward to continuing to work with you and other Members of Congress as your oversight efforts continue. That concludes my statement. I would be happy to take any questions that you or other members of the subcommittee may have.

[The prepared statement of Mr. Mihm follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Government Management, Information and Technology
Committee on Government Reform
House of Representatives

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COMPETITIVE CONTRACTING

Preliminary Issues Regarding FAIR Act Implementation

Statement of
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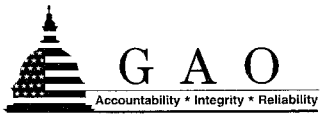

GAO/T-GGD-00-34

Statement

Competitive Contracting: Preliminary Issues Regarding FAIR Act Implementation

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our observations on the initial implementation of the Federal Activities Inventory Reform (FAIR) Act of 1998.[1] As you know, as a first step, the FAIR Act requires executive agencies[2] to identify their activities that are not inherently governmental and make this information publicly available.[3] The implementation of the FAIR Act is in the early stages—many agencies have only recently released their inventories. Many other agencies' FAIR Act inventories still have not been made available to the public—including 14 of the 24 agencies covered by the Chief Financial Officers (CFO) Act.

At the request of this Subcommittee we are beginning a body of work to assess agencies' efforts under the FAIR Act. As agreed, my statement today will discuss the progress to date in developing and releasing agencies' FAIR Act inventories. I will briefly describe the status of the initial steps taken to implement the FAIR Act. Then I will highlight some of the questions that are being raised by our examination of the Department of Commerce, the Environmental Protection Agency (EPA), and the General Services Administration (GSA) FAIR Act inventories. We are examining FAIR Act efforts at these and selected other agencies at the request of the Chairwoman, Subcommittee on Oversight, Investigations, and Emergency Management, House Committee on Transportation and Infrastructure.

Initial Steps to Implement the FAIR Act

The FAIR Act requires executive agencies to submit each year to the Office of Management and Budget (OMB) inventories of activities that, in the judgment of the head of the agency, are not inherently governmental functions. The first FAIR Act inventories were due to OMB by June 30, 1999. According to an OMB official, most agencies met this requirement.

OMB, after a period of "review and consultation" with the agencies about their inventories, is to publish a notice in the Federal Register stating that the agencies' lists are available to the public. The agency heads are responsible for promptly transmitting a copy of the FAIR Act inventory to Congress and making the list available to the public. The FAIR Act requires

[1] Public Law No. 105-270, 112 Stat. 2382, 31 U.S.C. 501 note (1998).

[2] Executive agencies are broadly defined in the FAIR Act to include civilian or military departments, or independent establishments within the meaning of 5 U.S.C. 101, 102, and 104 respectively, with certain specified exceptions.

[3] Inherently governmental functions are those functions so intimately related to the public interest as to mandate performance by government employees. An inherently governmental function includes activities that require either the exercise of discretion in applying government authority, or the making of value judgments in making decisions for the government.

these inventories to include information about (1) the fiscal year the activity first appeared on the FAIR Act list, (2) the number of full-time-equivalent (FTE) staff years necessary to perform the activity by a federal government source;[1] and (3) the name of a federal government employee responsible for the activity from whom additional information about the activity may be obtained. It is important to note that the FAIR Act does not require an agency to list activities that the agency determines are inherently governmental and therefore not commercial.

OMB published draft guidance in March 1999 and issued final guidance on the implementation of the FAIR Act on June 24—about a week before the first inventories were due. OMB implemented the FAIR Act by revising its Circular A-76, "Performance of Commercial Activities," and the A-76 Supplemental Handbook. Under Circular A-76, executive agencies are to conduct cost comparison studies of commercial activities performed by government personnel to determine whether it would be more cost efficient to maintain them in-house or contract with the private sector for their performance.

Under OMB's revised guidance, agencies were expected to list the activities the agency determined are not inherently governmental using specific codes established for A-76. These include both "reason" and "function" codes. The "reason codes" are used to show whether the agency believes that an activity determined to be commercial should be subject to an A-76 cost comparison or not, including identifying those commercial activities that cannot be competed because of a legislative or other exemption.

The function codes are to characterize the types of activities that the agency performs. The function codes range from fairly broad categories, such as "family services," to much more specific (and defense-related) activities, such as "Intermediate, Direct, or General Repair and Maintenance of Equipment—Missiles."

OMB's implementation guidance stated that OMB could not set a firm timetable for its review and consultation about agencies' FAIR Act inventories but estimated that it would take about 60 days after receiving an agency's inventory and any requested supplemental information. Because of the staggered submission of agencies' inventories and the workload involved with reviewing the inventories, OMB officials said they

[1] FTEs are used to measure civilian employment. 1 FTE is equal to 1 work year of 2,080 hours.

would group a set of inventories for release together, rather than releasing them on a rolling, agency-by-agency schedule.

In a September 30, 1999, Federal Register announcement, OMB listed the first group of FAIR Act inventories—from 52 agencies—that were made available to the public. Of these 52 inventories, 10 were from CFO Act agencies. Five of these were from cabinet agencies (Agriculture, Commerce, Education, Health and Human Services, and Housing and Urban Development) and the other five were from EPA, GSA, the National Aeronautics and Space Administration, the Social Security Administration, and the Agency for International Development. The remaining 42 inventories released in September 1999 were from smaller executive agencies such as the Marine Mammal Commission and the Office of National Drug Control Policy.

The next step in implementing the FAIR Act includes potential challenges to the lists. According to the FAIR Act, within 30 days after publication of the notice of the public availability of the list, an interested party may challenge the omission of a particular activity from, or an inclusion of a particular activity on, the FAIR Act inventory. Within 28 days after an executive agency receives a challenge, it must decide the challenge and provide written notification, including a discussion of the rationale for the decision, to the challenger. This decision can be appealed to the head of the agency within 10 days after the challenger receives written notification of the decision.

Initial Implementation of the FAIR Act Raises Important Questions

Clearly, executive agencies and OMB still have plenty of work ahead to implement even the first step of the FAIR Act—the public release of inventories. Nevertheless, our initial review of selected inventories that have been released raise a number of important questions about the efforts thus far. On behalf of the Subcommittee, we will be seeking answers to these and related questions over the coming months in order to assess agencies' efforts and to develop a body of best practices, as efforts under the FAIR Act move forward.

What Decisions Did Agencies Make About Whether or Not Activities Were Eligible For Competition and What Were The Reasons For Those Decisions?

A major area of interest during the initial implementation of the FAIR Act concerns the decisions agencies made about whether or not activities were eligible for competition and the reasons for those decisions. The FAIR Act provides that when an agency considers contracting with a private sector source for a commercial activity on its list, the agency shall use a competitive process to select the source unless it is exempted from doing so. A commercial activity in an agency can be exempted from competition for a variety of reasons. These reasons include legislative restrictions, other actions by Congress, Executive Orders, OMB decisions, or separate decisions by the relevant agency. Our initial review of the selected inventories suggests that questions can be raised about how agencies decided whether or not a commercial activity could be subject to competition, particularly when an agency reports that relatively few of its commercial activities could be considered for competition.

EPA's Activities

Out of a total of 829 FTEs performing commercial activities listed in EPA's FAIR Act inventory, about 30 FTEs (about 3.6 percent) were listed in commercial activities that could be considered for competition. These activities were listed under six function codes, including (1) nonmanufacturing operations (such as mapping and charting or printing and reproduction activities); (2) maintenance, repair, alteration, and minor construction of real property; (3) regulatory management and support services; (4) installation services; (5) administrative support for environmental activities; and (6) other selected functions.

EPA listed about 24 FTEs, or about 3 percent of the total of the commercial activities listed, as performing activities that are exempt from competition because of actions by Congress, Executive Order, or OMB. Most of these FTEs provide support for two function codes—research, development, testing, and evaluation; or administrative support for environmental activities.

Overall, however, EPA's inventory shows that EPA has decided that most of its commercial activities are exempt from competition. This includes about 775 FTEs or over 93 percent of the total number of FTEs performing commercial activities at EPA. The function codes with FTEs listed as exempt include environmental activities; research, development, testing, and evaluation support; automated data processing; and finance and accounting. According to EPA, it has exempted a number of FTEs from competition because it needs to retain a core staff capability. In its July 1, 1999, letter to OMB, EPA stated that the majority of the functions on its FAIR Act inventory represent commercial core capability that should be retained in house. EPA's letter cited its need to maintain appropriate in-

house expertise to effectively apply and enforce the nation's environmental laws in fulfilling its mission and meeting emergency requirements. For example, EPA's Deputy CFO told us that the agency exempted selected positions requiring scientific expertise in its research and development office in order to oversee the work produced by laboratories run by contractors.

GSA's Activities

Out of a total of 7,249 FTEs GSA determined were providing commercial activities, it listed 4,556 FTEs (63 percent) who perform commercial activities that could be subject to competition. Almost half of these FTEs were involved in the maintenance, repair, or minor construction of real property. GSA also listed 874 FTEs (12 percent of the total commercial activities identified) as exempt from competition—more than half of these FTEs also perform activities involved with the maintenance, repair, or minor construction of real property.

According to GSA's FAIR Act inventory, 1,819 FTEs (25 percent of its FTEs performing commercial activities) should be retained in-house because the activities are being "reinvented."[5] GSA plans to reassess the activities for possible recategorization once reinvention efforts are completed. The FTEs are devoted to various activities, including financial and payment services, information and telecommunication program management, and security and protection.

What Processes Did Agencies Use to Develop Their FAIR Act Inventories?

Agencies used a variety of approaches to develop their FAIR Act inventories. For example, a number of agencies used their "Raines inventories" as a basis for their FAIR Act inventories.[6] The Raines inventories were developed as part of a 1998 effort led by OMB under which agencies were to identify commercial and other activities and provide that information to OMB. Specifically, agencies were asked to list agency functions and positions supporting activities that were

- inherently governmental;
- commercial, but specifically exempt from the cost comparison requirements of OMB Circular A-76;
- commercial and should be competed; and
- commercial, but must be retained in-house (including the reason why).

[5] GSA's FAIR Act inventory also reported that 7,029 FTEs performed inherently governmental activities.

[6] Then-OMB Director Franklin D. Raines issued a memorandum on May 12, 1998, requesting agencies review their full time and part time positions and develop a preliminary inventory. According to the memorandum, agencies were to use their inventories to establish opportunities for generating reinvention and competition savings.

Officials from the Department of Commerce said that Commerce based its FAIR Act inventory almost entirely on the information from its Raines inventory. The Department asked its component organizations to update the information that previously had been prepared for OMB as part of its Raines inventory. According to Commerce officials, these organizations made only minor changes for the FAIR Act inventory.

GSA described its approach as starting from the top and working down, with agency management forming a team to develop its FAIR Act inventory. GSA's team was composed of one or two staff members from each of GSA's service divisions and regional offices. GSA officials said that this team held lengthy discussions about GSA's core mission and about which of its functions should be considered inherently governmental. In addition, a contractor was hired to train staff and to facilitate discussions on the topic of inherently governmental activities. GSA officials said that making the training as inclusive as possible was important to address the staff's apprehensions about privatization.

EPA delegated the responsibility for developing its inventory to its 10 regional offices because it decided that the regional officials closest to the work should make determinations about specific activities. EPA headquarters reviewed and compared the submissions from its regions and offices and worked to resolve any discrepancies. EPA's Deputy CFO said that he does not expect the percentage of activities EPA identifies as commercial to remain static. He predicted that it would increase in the future, although he also emphasized that EPA is already very reliant on contractor support to fulfill its mission.

How Useful Are the FAIR Act Inventories?

The inventories now being released represent the first time that agencies have produced inventories under the FAIR Act. Thus, it is not surprising that a variety of different reporting formats are being used. It will likely take several reporting cycles before a documented set of best practices emerges that meets the needs of Congress and other interested parties. Also, it is not surprising that these inventories will become more useful as they become clearer and more complete.

The Department of Commerce's list provides an example of a submission that could be clearer and more complete. The Department used the format of its Raines list with the "reason codes" to be used for the FAIR Act inventory. As a result, many of the inventory's entries are contradictory or ambiguous. In one case, five different entries, totaling 177 FTEs involved in mapping and charting activities, are listed as "commercial competitive"—that is, commercial activities that could be subject to

competition. However, Commerce also assigned these same entries a "reason code" indicating that these activities are "prohibited from conversion to contract because of legislation." Thus, the information reported does not appear to be consistent. In addition, Commerce did not assign any "reason codes" for a substantial number of FTEs listed throughout its FAIR Act inventory, so it is not clear how Commerce is characterizing these commercial activities.

Officials in agencies we spoke to generally found that the A-76 codes needed additional refinement. Officials from the Department of Commerce noted that the function codes were oriented toward military activities and needed to be augmented to more fully capture the range of activities undertaken by civilian agencies. In response to concerns such as Commerce's, OMB allows agencies to develop new function codes to better meet their needs. Commerce, EPA, and GSA are among the agencies that are using additional function codes. While such flexibility is important to accurately reflect the diversity of the types of specific activities that individual agencies perform, it also needs to be balanced against the need for comparisons of the types of activities that are common across agencies.

What Supplemental Information Can Be Included to Increase the Usefulness of Inventories?

Beyond the requirements of the FAIR Act, some agencies are including information with their inventories that can provide additional perspective on the contracting and management issues confronting agencies. In the inventories that we have examined, we found that, in some cases, the agencies included supplemental information that was helpful, such as

- listing inherently governmental activities,
- describing the scope of activities currently under contract, and
- discussing how listed activities contribute to agencies' strategic and annual performance.

Including information about an agency's inherently governmental activities (such as was provided to OMB as part of the Raines inventories) helps provide a fuller perspective about all of an agency's activities, not just those the agency considers commercial. For example, although not required to do so, GSA's FAIR Act inventory included inherently governmental activities. Such information can help provide Congress and other interested parties with a more complete picture of GSA's activities and allows for more informed judgments about whether an activity currently characterized as inherently governmental should be considered commercial.

Similarly, describing the scope of activities that an agency has already outsourced can provide an important perspective on and context for the agency's operations. In their letters or other documents submitting their FAIR Act inventories to OMB, for example, GSA, EPA, and Commerce all describe their current levels of contracting. Commerce's letter said that its service contracting outlays increased by 36 percent from 1996 through 1998. GSA stated that nearly 94 percent of its budget is spent for contractors. EPA's letter estimates the amount of resources currently contracted outside of EPA translates into 11,000 to15, 000 FTE had it retained the work inside of the agency.

Finally, it is important to recognize how an agency's strategies, including any plans to contract for services, contributes to the achievement of the agency's mission and its programmatic goals. In its introduction to its FAIR Act inventory, GSA states that its strategic plan provides the road map for achieving its mission and the context within which it developed this inventory, citing four goals, such as one to "create loyal customers by providing excellence in customer service." EPA's FAIR Act inventory links each commercial activity with 1 or more of EPA's 10 strategic goals—such as linking the administrative support activities in the Office of Water with EPA's strategic goal of ensuring clean and safe water.

The FAIR Act inventories, then, can provide valuable information about the role of contracting in an agency's efforts to provide cost-effective products and services. OMB has encouraged agencies to understand and use a variety of tools and strategies to make sound business decisions and enhance federal performance through competition and choice. Efforts under the FAIR Act can best be understood within the context of other initiatives, such as the Government Performance and Results Act, performance-based organizations, and franchise funds, as part of a package of ways agencies can improve services and reduce costs. FAIR Act inventories that provide information and perspective on how various initiatives are being used together can be helpful to congressional and other decisionmakers in assessing the economy, efficiency, and effectiveness of an agency.

In summary, Mr. Chairman, most agencies' FAIR Act inventories have been submitted to OMB for review and consultation, and the first group of inventories is now publicly available. Clearly, executive agencies and OMB still have plenty of work ahead to implement the FAIR Act, including the public release of more inventories and the resolution of any challenges. Nevertheless, our initial review of selected inventories raise some

questions about the efforts thus far which we will be reviewing for the Subcommittee. These questions include the following:

- What decisions did agencies make about whether or not activities were eligible for competition and what were the reasons for those decisions?
- What processes did agencies use to develop their FAIR Act inventories?
- How useful are the FAIR Act inventories?
- What supplemental information can be included to increase the usefulness of inventories?

By enacting the FAIR Act, Congress has increased the visibility of agencies' commercial activities. Continuing congressional interest in the FAIR Act process is needed in order to maintain serious agency attention to developing and using the FAIR Act inventories. Oversight hearings, such as today's hearing, send clear messages to agencies that Congress is serious about improving the efficiency and effectiveness of government operations and the effective implementation of the FAIR Act. We look forward to continuing to work with you and other Members of Congress as your oversight efforts continue.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or other Members of the Subcommittee may have.

Contacts and Acknowledgements

For further contacts regarding this testimony, please contact J. Christopher Mihm at (202) 512-8676. Individuals making key contributions to this testimony included Steven G. Lozano, Thomas M. Beall, Susan Michal-Smith, Susan Ragland, and Jerome T. Sandau.

Mr. HORN. Well, thank you very much. As you know, we wait until the full panel has presented their particular arguments. I appreciate that study that you're doing, and we've got about four more studies in mind. So I don't want to wear you all out. But we have a long series of spring hearings coming up.

Mr. MIHM. Thank you. Looking forward to it.

Mr. HORN. Thank you. That's the spirit. There's the Hill, and Lieutenant Mihm and the squad charge it.

We now go to Ms. Deidre Lee, the Acting Deputy Director for Management, Office of Management and Budget.

Ms. LEE. Mr. Chairman, good to see you. Mr. Chairman, members of the committee, I had a schedule conflict so that's probably how this got confused. We were able to make some adjustments, so thank you for understanding.

Mr. Chairman, members of the committee, I'm here to discuss with you today the implementation of the Federal Activities Inventory Reform Act, we all call it the FAIR Act. Today we face the challenge of managing in the new balanced budget environment. That challenge is to provide a government that, through empowered employees, adopts better business practices, provides better service, and costs less.

Over the last several years, the Congress and the administration have developed a range of management tools and strategies that have encouraged us to save, redirect, and extend limited resources. Like the Government Performance and Results Act of 1993, the FAIR Act was designed to focus government attention on what we are getting for the money we're spending.

The Federal Government seeks to achieve economy, enhance productivity, improve the quality of services, and obtain the best service at least cost to the taxpayer through competition. This policy has been provided by OMB Circular A–76, the Performance of Commercial Activities. And the FAIR Act codified some of this guidance in law. In particular, the act codified the definition of inherently governmental function and required agencies to inventory their activities and make these inventories public.

This inventory process has proven to be both a significant administrative effort and a massive data collection effort. The FAIR Act inventory is the first inventory of commercial activities that has been required by law, and it is the first that has ever been prepared for release to the Congress or the public. It is also the first inventory where agency decisions about what are inherently governmental activities are subject to administrative challenge and appeal by outside parties. Not surprisingly, the initial inventory submissions have taken longer to prepare and have required more analysis on the part of agencies and OMB than previous A–76 activities.

As a matter of policy and now as a matter of law, an inherently governmental function is one that is so intimately related to the exercise of the public interest as to mandate performance by Federal employees. We've been working with the agencies to help them apply this guidance. Not all functions may be performed by contractors. Just as it is clear that certain functions such as the negotiation of foreign policy should not be contracted, it is also clear that other functions such as building maintenance or food services

may be contracted. The OFPP policy letter, which is a precursor to this, actually provides other examples of inherently governmental and governmental functions and activities. The difficulty is in applying the general test to activities that fall between these extremes.

That said, we must balance the emphasis on the business opportunities identified by the FAIR Act and the need to maintain core agency functions, such as the right level of skilled people to manage our business relationships, something that Mr. Kucinich talked about, and also the management of financial expenditures. We also need to provide smart buyers. We'll see of that in EPA's testimony that we need a level of technical expertise to make sure that what we're outsourcing or spending our money on we're doing correctly and right. So there's a balance between that need for internal knowledge and the outsourcing or the management of those contracts.

Agencies also have to be prepared to meet research and development needs, emergency capabilities, and related work loads. So we're trying to find and strike that balance.

A great deal of work and debate has gone into these inventories both on the part of OMB and each agency. As with any new program, there continues to be some difficulties in gaining complete agency understanding of the specific requirement of the FAIR Act; and, in some cases, there were questions as to whether the FAIR Act even applied to an agency.

In those cases, determinations have been made on a case by case basis. By tomorrow, OMB will have released two groups of agency inventories prepared under the FAIR Act. The initial group covered about 320,000 Federal employees working in 52 agencies, and over 120,000 were listed as potentially commercial in nature. The second group which is scheduled for release tomorrow covered 120,000 Federal employees working in approximately 42 agencies with an additional 35,000 employees listed as potentially commercial.

Mr. HORN. Just to interrupt for a minute to make sure I understand those, and there's no use waiting until the end on this, that adds up to 475,000 or is there overlap?

Ms. LEE. That's a cumulative number, you add them together. We still have more to go. We still have approximately 25 more releases to go.

Mr. HORN. So roughly half a million. OK. Thank you.

Ms. LEE. We will continue the process and, Mr. Sessions said, we anticipate probably one or two more releases, and hope to get them all out by December. There are additional 25 releases including some independently submitted IG offices. Major agencies yet to be released include Justice, Transportation, State, Treasury, Veterans Affairs and the Department of Defense which you can imagine is quite large.

As Mr. Sessions noted, and as clearly discussed here previously there's some work to be done. I don't in any way shape or form say this process was perfect the first go round. We recognize the need to do some more work. We are actually anxious to get the first group of inventories out and then immediately begin having meetings with the Congress, the staff, the GAO, the Federal employee groups themselves and to say how can we do this better next time

and what issues do we need to approach. So we are absolutely open to that, and what we're looking for now is to try to get ourselves through this and learn from that. It's already time to start queing up because the next inventories are due next June.

One piece that OMB has done is to require for next year when the agencies do their inventories due in June to also have something we've kind of added in the spirit of the law. They need to tell us what actions have been taken against the previous inventory. So we will begin to see a record of what we released in these inventories, and here's what we've done with them.

Mr. Chairman, I will reiterate we are open to working with folks. We know we need to continue to work this process and try to make these inventories quickly available and absolutely usable and user friendly, and we've got a ways to go on that. Thank you.

[The prepared statement of Ms. Lee follows:]

STATEMENT OF

DEIDRE A. LEE
ACTING DEPUTY DIRECTOR FOR MANAGEMENT
OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE
HOUSE SUBCOMMITTEE ON
GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY

REGARDING
"THE FEDERAL ACTIVITIES INVENTORY REFORM ACT"

10/28/99

INTRODUCTION

Mr. Chairman, I am here to discuss with you today the implementation of the "Federal Activities Inventory Reform (FAIR) Act of 1998" (P.L.105-270), "a bill to provide a process for identifying the functions of the Federal Government that are not inherently governmental, and for other purposes." The FAIR Act established a number of new statutory requirements for the Executive Branch, with one objective - to improve performance and thereby achieve better program results.

The process of deciding what is inherently governmental or commercial and possibly available for competition with the private sector and other public offerors is an integral component of the Administration's reinvention and restructuring effort. This component has now been codified by the FAIR Act.

OMB IMPLEMENTATION GUIDANCE ISSUED

The FAIR Act directs Federal agencies to prepare each year an inventory of their commercial activities performed by Federal employees. OMB is required to review each agency's Commercial Activities Inventory and consult with the agency regarding its content. Upon the completion of this review and consultation, each agency must transmit a copy of the inventory to Congress and make it available to the public.

The FAIR Act also establishes an administrative appeals process under which an interested party may challenge the omission or the inclusion of a particular activity on an agency's inventory. Finally, the FAIR Act requires agencies to review the activities on the inventory. Each time that the head of an executive agency considers contracting with a private sector source for the performance of an activity on the list, the head of the agency shall use a competitive process. When conducting cost comparisons, agencies "shall ensure that all costs ... are considered and that the costs considered are realistic and fair."

In passing the FAIR Act, Congress did not alter or otherwise displace longstanding Executive Branch policy regarding the performance of commercial activities or the conduct of public-private competitions. The Federal Government seeks to achieve economy, enhance productivity, improve the quality of services and obtain the best service at least cost to the taxpayer, through competition. This policy has been provided by OMB Circular A-76,

"Performance of Commercial Activities." The FAIR Act codified some of this guidance in law. In particular, the Act codified the requirement for agencies to inventory their commercial activities and the definition of an "inherently governmental function."

Taken together, the FAIR Act and Circular A-76 have established a comprehensive set of principles and analytic requirements to ensure that the Government achieves best value in the performance of its commercial support activities. Implementing the FAIR Act through OMB Circular A-76 permitted OMB to provide the agencies with prompt and comprehensive guidance on how to implement the Act within the short time-frames available. This approach also permitted the agencies to build on the information and staffing systems already available to ensure that the agencies fully implement the Act's requirements, without confusion or delays caused by uncertainty about the applicability of other more detailed guidance. For this year's initial submission, OMB gave agencies needed discretion to format the inventory as they believed most useful to them, so long as the inventory included each of the data elements required by the FAIR Act and OMB Circular A-76.

A SIGNIFICANT EFFORT IS REQUIRED

The inventories required by the FAIR Act represent a significant workload. Unless specifically exempted by the FAIR Act itself, OMB's guidance requires that all Executive Branch agencies, regardless of their size, submit either a compliant inventory or a letter

indicating that all of their Federal Full-Time Equivalents (FTE) are inherently governmental. It is a massive data collection effort. The FAIR Act inventory is the first inventory of commercial activities that has been required by law and is the first that has ever been prepared for release to the Congress or the public. Each function and, in many cases, each function at any given location, has been associated with a point of contact who can address questions regarding that function. It is also the first inventory where agency decisions as to what is inherently governmental are subject to administrative challenge and appeal by outside parties. Not surprisingly, the initial inventory submissions have taken longer to prepare and have required more analysis on the part of OMB than previous A-76 inventories. It is our hope that next year's inventories (due June 30, 2000) will require less effort on the part of the agencies since they will be able to build on the substantial efforts they have made this year in developing their initial inventories.

INHERENTLY GOVERNMENTAL ACTIVITIES

At this point, it might be worth taking time to review what is meant by an inherently governmental function; one that is not subject to the inventory requirements of the FAIR Act or the cost comparison requirements of Circular A-76. As a matter of policy and as a matter of law at Section 5, paragraph 2, of the FAIR Act, an inherently governmental function is one that is so intimately related to the exercise of the public interest as to mandate performance by Federal employees. The Office of Federal Procurement Policy (OFPP) Policy Letter 92-1,

dated September 23, 1992 (*Federal Register*, September 30, 1992, page 45096), provides additional guidance on the identification of inherently Governmental functions and notes that inherently governmental functions are those that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. We have been working with the agencies to help them understand how to apply this guidance.

Just as it is clear that certain functions, such as the negotiation of foreign policy, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The OFPP Policy Letter provides other examples of inherently governmental functions and commercial activities. The difficulty is in applying the general test to functions and activities that fall between these extremes. The application of the definition is, however, more art than science. What may be clear in some cases, may also require the exercise of sound judgment on the part of the agency in others. Not all functions may be performed by contractors. Also, a function that is inherently governmental in the context of one agency's activities may be commercial in the context of another agency; this results from the general test, which asks each agency to determine whether a particular function "is so intimately related to the public interest as to require performance by Federal Government employees."

As a part of our review and consultation process, we have also been concerned that agencies not associate their inherently governmental mission with the performance of mission

support functions. While administrative support is largely considered commercial, the definition of an inherently governmental function, as provided by Office of Federal Procurement Policy Letter 92-1, or the FAIR Act does not limit commercial functions to these types of activities. The context of the function and its size are important in the determination that mission requirements may also be accomplished through contract support, subject to competition.

That said, we must also recognize the need to weigh the business opportunities identified by the FAIR Act against the need to maintain core agency functions, e.g., the need to retain a minimum level of technical and engineering competencies, flexibility to meet research and development needs, emergency capabilities and related workloads.

FINDINGS

A great deal of work and debate went into these inventories, both on the part of OMB and each agency. As with any new program, there continue to be some difficulties in gaining complete agency understanding of the specific requirements of the FAIR Act and, in some cases, there were questions as to whether the FAIR Act even applied to an agency or to specified FTE. In any case, determinations have been made on a case-by-case basis.

On July 12, 1999, OMB issued Budget Procedures Memorandum No. 829. This

memorandum, which went to all OMB staff, outlined the responsibilities of OMB's Resource Management Offices (RMOs) and OMB's Budget Review Division (BRD), which is responsible for implementing the FAIR Act and OMB Circular A-76. To ensure comprehensiveness within an agency and consistency across agencies, each agency inventory has been reviewed by the Budget Review Division and by each agency's individual budget examiner.

To date, OMB has released two groups of potentially commercial Federal activities prepared under the FAIR Act. The initial group covered 320,000 Federal employees working in 52 agencies. Over 120,000 were listed as commercial in nature. The second group, scheduled for publication in the *Federal Register* tomorrow (Friday), covers 120,000 Federal employees working in an additional 43 agencies. An additional 35,000 employees are being listed as potentially commercial.

By the end of the year, other releases will be made upon the completion of OMB's statutory review and consultation process. We expect to release approximately 25 additional inventories for a total of 120 agency inventories, including inventories submitted independently by agency Inspectors General. Additional releases will include the Justice Department, Transportation Department, State Department, Treasury Department, the Department of Veterans Affairs, the Department of Defense, and several independent agencies.

NEXT STEPS

OMB has taken the additional step of requiring agencies to submit annual reports that will discuss the implementation, status, and results of the FAIR Act process. We are open to simplifying the FAIR Act process. Once we have had a chance to see the process through this first year and to seek comments and recommendations from the Congress, agencies and interested parties, OMB will consider whether implementation changes or other guidance are warranted for next year's effort.

The Federal Government is a big operation and agencies provide a vast array of services to internal and external customers as well as directly to the public at large. We too are eager to ensure that the Government improves its performance and operates as efficiently as possible. Our guiding principle for determining when the Government engages in commercial activities and when it considers restructuring, direct outsourcing, privatization or competition is to ensure that we get the best deal possible for the taxpayer. Competition encourages and empowers employees to reinvent themselves to become more competitive, to reduce costs and to meet generally recognized performance standards. This effort alone results in better contract offers as more viable, responsive and cost-effective competitors come to the table. Indeed, experience here and abroad has shown that the use of public-private competition can reduce costs by 20% or more.

Mr. Chairman, the FAIR Act can improve how we view mission and mission support resources and can help make us more accountable to the American public for how we spend their tax dollars. These changes will not be accomplished overnight, but we have made a good start with this year's FAIR Act commercial activities inventories. From this beginning, the path to a useful linkage of resources and performance can be realized in the months ahead, and we intend to work hard to bring about that linkage. We seek to create appropriate incentives to improve performance and reduce cost by continuing to permit competition on a fair and level playing field.

Mr. Chairman, that concludes my statement. I would be happy to address any questions that you might have.

VERBAL TESTIMONY OF

DEIDRE A. LEE
ACTING DEPUTY DIRECTOR FOR MANAGEMENT
OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE
HOUSE SUBCOMMITTEE ON
GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY

REGARDING
"THE FEDERAL ACTIVITIES INVENTORY REFORM ACT"

10/28/99

INTRODUCTION

Mr. Chairman, I am here to discuss with you today the implementation of the "Federal Activities Inventory Reform (FAIR) Act of 1998" (P.L.105-270), "a bill to provide a process for identifying the functions of the Federal Government that are not inherently governmental, and for other purposes."

With your permission I will make a few summary remarks and ask that my full statement be included in the record.

OMB IMPLEMENTATION GUIDANCE ISSUED

Today, we face the challenge of managing in the new balanced budget environment. That challenge is to provide a Government that empowers its employees, adopts better business practices and costs less. Over the last several years, the Congress and the Administration have developed a range of management tools and strategies that have encouraged us to save, redirect and extend limited resources. Like the Government

Performance and Results Act of 1993, the FAIR Act was designed to focus Government on what we are getting for the money we are spending. In enacting the FAIR Act, Congress did not alter or otherwise displace longstanding Executive Branch policy regarding the performance of commercial activities or the conduct of public-private competitions. The Federal Government seeks to achieve economy, enhance productivity, improve the quality of services and obtain the best service at least cost to the taxpayer, through competition. This policy has been provided by OMB Circular A-76, "Performance of Commercial Activities." The FAIR Act codified some of this guidance in law. In particular, the Act codified the requirement for agencies to inventory their commercial activities and the definition of an "inherently governmental function."

Implementing the FAIR Act through OMB Circular A-76 permitted OMB to provide the agencies with prompt and comprehensive guidance on how to implement the Act within the short time-frames available. This approach also permitted the agencies to build on the information and staffing systems already available to ensure that the agencies fully implement the Act's requirements without confusion or delays caused by uncertainty about the applicability of other more detailed guidance.

A SIGNIFICANT EFFORT IS REQUIRED

We are incorporating competition into our budgets, into our financial management and accounting systems and in our other management approaches to improved service delivery. The inventory of commercial activities is an integral component of this effort.

It has proven to be both a significant administrative effort and a massive data collection effort. The FAIR Act inventory is the first inventory of commercial activities that

has been required by law and is the first that has ever been prepared for release to the Congress or the public. It is also the first inventory where agency decisions as to what is inherently governmental are subject to administrative challenge and appeal by outside parties. Not surprisingly, the initial inventory submissions have taken longer to prepare and have required more analysis on the part of OMB than previous A-76 inventories.

INHERENTLY GOVERNMENTAL ACTIVITIES

As a matter of policy and now as a matter of law, an inherently governmental function is one that is so intimately related to the exercise of the public interest as to mandate performance by Federal employees. We have been working with the agencies to help them understand how to apply this guidance.

Not all functions may be performed by contractors. Just as it is clear that certain functions, such as the negotiation of foreign policy may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The OFPP Policy Letter provides other examples of inherently governmental and commercial functions and activities. The difficulty is in applying the general test to activities that fall between these extremes.

That said, we must also avoid placing too much emphasis on the business opportunities identified by the FAIR Act and not enough on the need to maintain core agency functions, such as the need to retain a minimum level of technical and engineering competencies, flexibility to meet research and development needs, emergency capabilities and related workloads.

FINDINGS

A great deal of work and debate went into these inventories, both on the part of OMB and each agency. As with any new program, there continues to be some difficulties in gaining complete agency understanding of the specific requirements of the FAIR Act and, in some cases, there were questions as to whether the FAIR Act even applied to an agency or to specified FTE. In any case, determinations have been made on a case-by-case basis.

On July 12, 1999, OMB issued Budget Procedures Memorandum No. 829. This memorandum, which went to all OMB staff, outlined the responsibilities of OMB's Resource Management Offices (RMOs) and OMB's Budget Review Division (BRD), which is responsible for implementing the FAIR Act and OMB Circular A-76. To ensure comprehensiveness within an agency and consistency across agencies, each agency inventory has been reviewed by staff of our Budget Review Division and by each agency's individual budget examiner.

By tomorrow, OMB will have released two groups of agency inventories prepared under the FAIR Act. The initial group covered 320,000 Federal employees working in 52 agencies. Over 120,000 were listed as potentially commercial in nature. The second group, scheduled for release tomorrow (Friday), covers 120,000 Federal employees working in an additional 43 agencies. An additional 35,000 employees are being listed as potentially commercial.

Other releases will be made upon completion of OMB's statutory review and consultation process. By the end of the year, we expect to release approximately 25 additional inventories, including inventories submitted independently by agency Inspectors General. These additional releases will include the Justice Department, Transportation Department, State Department, the Treasury Department, the Department of Veterans Affairs, the

Department of Defense and several independent agencies.

We are open to simplifying the FAIR Act process. Once we have had a chance to see the process through this first year and to seek comments and recommendations from the Congress, agencies and other interested parties, OMB will consider whether implementation changes or other guidance are warranted for next year's effort.

Mr. Chairman, that concludes my statement. I would be happy to address any questions that you might have.

Mr. HORN. Before I call on Mr. Ose to begin the questioning this one, I want—one little thing here on page 6, you say, "On July 12, 1999, OMB issued Budget Procedures Memorandum No. 829. This memorandum, which went to all OMB staff, outlined the responsibilities of OMB's Resource Management Offices and OMB's Budget Review Division which is responsible for implementing the FAIR Act and OMB Circular A–76." if you wouldn't mind I would like in the record at this point to have Budget Procedures Memorandum 829 just so we have——

Ms. LEE. We'll provide it for the record.

[The information referred to follows:]

July 12, 1999

BUDGET PROCEDURES MEMORANDUM NO. 829

TO: PROGRAM ASSOCIATE DIRECTORS
DEPUTY DIRECTOR FOR MANAGEMENT
EXECUTIVE ASSOCIATE DIRECTOR
PROGRAM DEPUTY ASSOCIATE DIRECTORS -
DEPUTY CONTROLLER, OFFICE OF FEDERAL FINANCIAL MANAGEMENT
ASSISTANT DIRECTOR FOR LEGISLATIVE REFERENCE

FROM: Richard P. Emery, Jr.
Assistant Director for Budget

SUBJECT: OMB Review and Consultation With Agencies On The Content of Inventories of Commercial Activities Submitted Under The Federal Activities Inventory Reform Act of 1998.

1. Purpose. This memorandum provides guidance to Resource Management Offices (RMOs) on implementing the Commercial Activities Inventory Review and Consultation Process required by the Federal Activities Inventory Reform Act of 1998 (FAIR Act). Subsequent guidance will be issued, as needed, to address other OMB oversight responsibilities concerning agency management of the performance of commercial activities and annual reporting requirements.

2. Timing. Agency Commercial Activities Inventories required by the FAIR Act for fiscal year 1999 were due to OMB on June 30th. The OMB review and consultation process is targeted to be completed within 60 days of the receipt of an agency's inventory submission. By Thursday, July 15th, RMOs will transmit a spreadsheet listing via e-mail attachment to BRD (David Childs), whether or not the agency inventory has been received by that time, using the format provided (see section 6.b.(1) below).

3. Background. The Federal Activities Inventory Reform Act of 1998, P.L.105-270, requires *all* Federal agencies not specifically exempt by the Act to submit to OMB, by June 30th of each year, inventories of their commercial activities performed by Federal employees (including encumbered or vacant positions and military personnel). There is no *de minimus* threshold for this reporting requirement. *Thus, all (nonexempt) agenices, regardless of size, must submit an inventory of commercial activities performed by Federal employees.* The FAIR Act explicitly excludes activities that are "inherently Governmental." The Act's definition of inherently Governmental functions is a codification of existing OMB

guidance, which is contained in OFPP Policy Letter 92-1 (see Attachment 2). OMB's statutory responsibilities under the Act are to review the inventories and consult with agencies on their content prior to transmittal of the inventories to Congress and release to the public.

4. Additional Agency Responsibilities. Upon the completion of the OMB review and consultation process, each agency must transmit a copy of the inventory (as revised by that process) to Congress and make it available to the public. After OMB publishes a *Federal Register* notice indicating an agency's inventory is now available to the public, an administrative challenge and appeals period begins. An interested party (as defined in the Act) may submit a challenge (and appeal an initial adverse decision) to the agency regarding an activity's omission from or inclusion in the inventory. The Act does not require agencies to compete or contract out any commercial activities. The Act requires each agency to review its inventory within a reasonable time, and, each time that the agency considers contracting with a private sector source for the performance of an activity included on the inventory, a competitive process must be used to determine who should perform the work. Starting next year, agencies will be required to report to OMB annually on their management of the performance of commercial activities, in general, and on their implementation of the FAIR Act and use of information inherent in their Commercial Activities Inventories.

5. OMB Guidance to Agencies. Circular A-76 sets forth the principles and procedures for agencies to manage the acquisition of recurring commercial activities. OMB issued final guidance to the agencies for implementation of the FAIR Act through revisions to Circular A-76 and its Supplemental Handbook on June 14th. The inventory submission requirements established to comply with the FAIR Act are provided by Appendix 2 of the Supplemental Handbook and are provided here as Attachment 1. Updated versions of the complete Circular and Handbook, as well as the Transmittal Memorandum (No. 20) issuing this guidance, are available on OMB's external web site at:

http://www.whitehouse.gov/OMB/circulars/index-procure.html

6. Actions Required. The statutory due date for submitting inventories to OMB is June 30th, and OMB has set a target date of 60 days after receipt of an inventory to complete its review and consultation. To meet OMB's responsibilities to review agency inventory submissions and consult with the agencies on the inventory contents, BRD staff will work closely with RMO staff to coordinate the inventory review process, review the inventories for consistency across agencies, and answer questions regarding the requirements of the Act. In reviewing each agency's inventory, OMB will seek to ensure comprehensiveness and consistency within an agency and across the Government. However, OMB will not be seeking to confirm, or validate, each and every element of the detailed information contained in the agencies' inventories. The FAIR Act provides for such a detailed

review to take place in the agencies' development of their inventories and in the revisions that may result from any challenges and appeals. In preparing its FAIR Act submission, each agency needs to assess its operations to identify which are commercial and which are inherently Governmental in accordance with OFPP Policy Letter 92-1. RMO and BRD responsibilities are detailed below. Upon completion of the review and consultation for an agency, the RMO will notify the agency by memorandum and BRD will coordinate the publication of a notice in the *Federal Register* stating that the inventory is publicly available from the agency.

a. BRD Responsibilities in OMB's Review and Consultation.

(1) BRD has the responsibility for coordinating the OMB inventory review and consultation process as part of its continuing responsibility for Circular A-76. BRD will provide additional advice, as needed, to RMOs and agencies (through the agency A-76 points of contact) on the requirements of the Act, including the definition of inherently Governmental and commercial functions, and provide assistance as noted below. However, the RMOs are ultimately responsible for assuring that inventories contain the requisite data elements and accurately reflect the agencies' commercial activities that are performed by Federal employees.

(2) Agencies are required to submit an electronic copy and 2 hard copies of their FAIR Act inventories to OMB. BRD will distribute one hard copy to the appropriate RMO and will make the electronic copy available as requested. BRD will also provide RMOs with copies of their agencies' submission of a summary inventory (including inherently Governmental activities) required under OMB Memorandum M-98-10 (issued May 12, 1998, also known as the Raines Inventory).

(3) BRD will establish a tracking system for the status of agency submissions and OMB's review. BRD will review the agency submissions from a Governmentwide perspective for consistency by functional area across agencies (consulting with RMOs regarding any inconsistencies).

(4) BRD will compare each agency's inventory submission with the agency's OMB Memorandum M-98-10 Inventory submission. BRD will seek clarification (through the RMOs) from those agencies regarding any questions that arise during its review.

(5) When the RMO and BRD agree that the review is complete and any necessary revisions to an agency's inventory have been

received, the RMO will prepare a memorandum to the agency as noted below, and BRD will prepare, for clearance by the relevant DAD(s) and PAD(s) and transmittal by the Associate Director for Administration, a notice for the *Federal Register* in which OMB will announce that the inventory is publicly available (this notice may announce the availability of several agencies' inventories).

b. Resource Management Office (RMO) Responsibilities

(1) By **Thursday, July 15th**, each RMO will transmit to BRD, via e-mail attachment, a Lotus spreadsheet (using the format provided on the J: Drive under J:\Bpm_fair\fairtrak.wk4) containing the names of all the RMO's agencies along with the associated examiner's name and phone extension. (In case of current staff vacancies or vacancies known to be occurring prior to September 30, also provide the name of the Branch Chief or the staff who will be backstopping for the vacant position.) For each agency whose inventory has been received by the RMO, place the date the inventory was received in the appropriate column. BRD will combine the spreadsheets to create a master tracking system for the process. The master listing will be provided to the RMOs whenever requested throughout the process.

(2) Each RMO will assure that all of its agencies subject to FAIR have submitted their annual inventories. Each RMO will review the agency submissions for comprehensiveness (to assure that all organizational units have included all commercial activities and that all requisite data elements have been provided) and for consistency (to assure that the definitions of inherently Governmental and commercial activities have been applied appropriately and uniformly across the agency, and, with BRD assistance, across the Government -- see the attached OFPP Policy Letter 92-1 on Inherently Governmental Activities). Each RMO will review its agencies' inventories against known operational requirements and practices. Each program and operational area within an agency should be represented in its inventory, except in the case of an area that is composed entirely of inherently Governmental positions.

(3) Each RMO should compare the agency's inventory submission against the agency's OMB Memorandum M-98-10 Inventory Summary (M-98-10, dated May 12, 1998). The OMB Memorandum M-98-10 inventory provides a comprehensive overview of each agency's breakdown of activities between commercial and inherently Governmental. The comparison of the

two inventory submissions will focus on the consistency of the detailed FAIR Act inventory with the corresponding aggregated data in the OMB Memorandum M-98-10 inventory.

(4) When the RMO and BRD agree that the review is complete and any necessary revisions to an agency's inventory have been received, the RMO will prepare a memorandum to the agency for signature by their Program Associate Director notifying the agencies that the review process is completed and reminding them of the requirement to forward a copy of the inventory (as revised) to the Congress and to make the inventory available to the public. A copy of the signed memorandum will be provided to BRD as an indication that it can prepare the requisite *Federal Register* notice.

6. Inquiries. Questions concerning these instructions should be addressed to David Childs (ext. 5-6104).

Attachments

Attachment 1

Appendix 2 from OMB Circular No. A-76, Revised Supplemental Handbook

Commercial Activities Inventory

A. Annual Inventory Submission.

In accordance with the FAIR Act, Circular A-76 and this Handbook, each agency must submit to OMB, by June 30 of each year, a detailed Commercial Activities Inventory of all commercial activities performed by in-house employees, including, at a minimum, the following:

a. Organization unit.
b. State(s).
c. Location(s).
d. FTE.
e. Activity function code.
f. Reason code.
g. Year the activity first appeared on FAIR Act Commercial Activities Inventory (initial value will be 1999).
h. Name of a Federal employee responsible for the activity or contact person from whom additional information about the activity may be obtained.
i. Year of cost comparison or conversion (if applicable).
j. CIV/FTE savings (if applicable).
k. Estimated annualized Cost Comparison dollar savings (if applicable).
l. Date of completed Post-MEO Performance Review (if applicable).

Agencies have the discretion to automate and to structure the initial submission of the detailed inventory as they believe most appropriate, so long as the inventory includes each of these data elements. Agencies must transmit an electronic version of the inventory to OMB as well as two paper copies. The electronic version should be in a commonly used software format (commercial off-the-shelf spreadsheet, database or word processing format). OMB anticipates issuing additional guidance on the structure and format of future inventory submissions, based on the experience gained from the first annual review and consultation process.

B. Reporting

The above is public information. The data may be summarized into reports for the Congress, the General Accounting Office (GAO), agency officials, OMB or the public.

C. FTE.

Enter the number of authorized full-time employees or FTE (as applicable) in the commercial activity function or functions as of the date of the inventory. Employees performing inherently Governmental activities are not reported in the Commercial Activities Inventory.

D. A-76 Commercial Activity Functional Codes

The Department of Defense has developed a comprehensive list of function codes for use in their A-76 inventory system. In applying these function codes Government-wide, the codes standardize the functional descriptions of activities and facilitate the aggregation of activities Government-wide and by agency.

E. Reason Codes

The following reason codes will be used

in the Commercial Activities Inventory. Agencies may add additional sub-groupings (A1, A2 for example) within any reason code, as deemed necessary.

CODE	EXPLANATION
A	Indicates that the function is performed by Federal employees and is specifically exempt by the agency from the cost comparison requirements of the Circular and this Supplement.
B	Indicates that the activity is performed by Federal employees and is subject to the cost comparison or direct conversion requirements of the Circular and this Supplement.
C	Indicates that the activity is performed by Federal employees, but is has been specifically made exempt from the provisions of the Circular and this Supplement by Congress, Executive Order or OMB.
D	Indicates that the function is currently performed by in-house Federal employees and is in the process of being cost compared or converted directly to contract or interservice support agreement performance.
E	Indicates that the function is retained in-house as a result of a cost comparison.
F	Indicates the function is currently being performed by Federal employees, but a review is pending force restructuring decisions (i.e., base closure, realignment, consolidation, etc.).
G	Indicates that the function is prohibited from conversion to contract because of legislation.
H	Waiver issued.
I	Indicates the function is being performed in-house as a result of a cost comparison resulting from a decision to convert from contract to in-house performance.

F. Maintenance of Aggregate Data

Agencies should maintain aggregate program implementation data by fiscal year, to include: total number of studies, FTE and dollar savings by conversion to contract, conversion to in-house or otherwise retained in-house. Agencies should also track total FTE studied and MEO savings generated.

G. Inventory Review and Publication; Challenges and Appeals

1. Review and Publication: In accordance with Section 2 of the FAIR Act, OMB will review the agency's Commercial Activities Inventory and consult with the agency regarding its content. After this review is completed, OMB will publish a notice in the *Federal Register* stating that the inventory is are available to the public. Once the notice is published, the agency will transmit a copy of the detailed Commercial Activities Inventory to Congress and make the materials available to the public through its Washington, D.C. or headquarters offices.

2. Challenges and Appeals: Under Section 3 of the FAIR Act, an agency's decision to include or exclude a particular activity from the Commercial Activities Inventory is subject to administrative challenge and, then, possible appeal by an "interested party." Section 3(b) of the FAIR Act defines "interested party" as:

a. A private sector source

that (A) is an actual or prospective offeror for any contract or other form of agreement to perform the activity; and (B) has a direct economic interest in performing the activity that would be adversely affected by a determination not to procure the performance of the activity from a private sector source.

b. A representative of any business or professional association that includes within its membership private sector sources referred to in a. above.

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

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

3. An interested party may submit to an executive agency an initial challenge to the inclusion or exclusion of an activity within 30 calendar days after publication of OMB's *Federal Register* notice stating that the inventory is available. The challenge must set forth the activity being challenged with as much specificity as possible, and the reasons for the interested party's belief that the particular activity should be reclassified as inherently Governmental (and therefore be deleted from the inventory) or as commercial (and therefore be added to the inventory) in accordance with OFPP Policy Letter 92-1 on inherently Governmental functions (see Appendix 5) or as established by precedent (such as when other agencies have contracted for the activity or undergone competitions for this or similar activities).

4. The agency head may delegate the responsibility to designate the appropriate official(s) to receive and decide the initial challenges. As mandated by the FAIR Act, the deciding official must decide the initial challenge and transmit to the interested party a written notification of the decision within 28 calendar days of receiving the challenge. The notification must include a discussion of the rationale for the decision and, if the decision is adverse, an explanation of the party's right to file an appeal.

5. An interested party may appeal an adverse decision to an initial challenge within 10 working days after receiving the written notification of the decision. The agency head may delegate the responsibility to receive and decide appeals to the official identified in paragraph 9.a of the Circular (or an equivalent senior policy official), without further delegation. Within 10 working days of receipt of the appeal, the official must decide the appeal and transmit to the interested party a written notification of the decision together with a discussion of the rationale for the decision. The agency must also transmit to OMB and the Congress a copy of any changes to the inventory that result from this process, make the changes available to the public and publish a notice of public availability in the *Federal Register*.

H. Agency Review and Use of Inventory.

Section 2(d) of the FAIR Act requires that each agency, within a reasonable time after the publication of the notice that its inventories are publicly available, review the activities on the detailed commercial activities inventory. Agencies will report to OMB on this process as part of the Report on Agency Management of Commercial Activities required under Paragraph I, below. In addition, Section 2(d)-(e) of the FAIR Act provides that, each time the head of the executive agency considers contracting with a private-sector source for the performance of an activity included on the inventory, the agency must use a competitive process to select the source and must ensure that, when a cost comparison is used or otherwise required for the comparison of costs, all costs are considered and the costs considered are realistic and fair. In carrying out

these requirements, agencies must rely on the guidance contained in Circular A-76 and this Supplemental Handbook to determine if cost comparisons are required and what competitive method is appropriate. All competitive costs of in-house and contract performance are included in the cost comparison, when such comparison is required, including the costs of quality assurance, technical monitoring, liability insurance, retirement benefits, disability benefits and overhead that may be allocated to the function under study or may otherwise be expected to change as a result of changing the method of performance.

I. Annual Report on Agency Management of Commercial Activities.

As part of ongoing agency responsibility to manage their performance of commercial activities and ongoing OMB oversight, OMB will require agencies to report annually on such management. The content of the reports is likely to vary depending upon the progress made by each agency in reviewing their inventory and on the experience OMB gains from the first round of inventory submissions, review, challenges and appeals mandated by the FAIR Act. OMB anticipates issuing subsequent guidance if it determines that supplemental reports or other information is needed for future inventory submissions to assure that agencies have correctly implemented all of the provisions of the FAIR Act and taken advantage of the management information inherent in the detailed Commercial Activities Inventory.

A-76 Commercial Activity Functional Codes

G - Social Services

G001 - Care of Remains of Deceased Personnel & Funeral Services
G008 - Commissary Store Operation
G009 - Clothing Sales Store Operations
G010 - Recreational Library Services
G011 - Morale, Welfare, and Recreation Services
G012 - Community Services
G900 - Chaplain Activities and Support Services
G901 - Housing Administrative Services
G904 - Family Services
G999 - Other Social Services

H - Health Services

H101 - Hospital Care
H102 - Surgical Care
H105 - Nutritional Care
H106 - Pathology Services
H107 - Radiology Services
H108 - Pharmacy Services
H109 - Physical Therapy
H110 - Materiel Services
H111 - Orthopedic Services
H112 - Ambulance Services
H113 - Dental Care
H114 - Dental Laboratories
H115 - Clinics and Dispensaries
H116 - Veterinary Services
H117 - Medical Records
H118 - Nursing Services
H119 - Preventive Medicine
H120 - Occupational Health
H121 - Drug Rehabilitation
H999 - Other Health Services

J - Intermediate, Direct or General Repair and Maintenance of Equipment

J501 - Aircraft Maintenance
J502 - Aircraft Engine Maintenance
J503 - Missiles
J504 - Vessels
J505 - Combat Vehicles
J506 - Noncombat Vehicles
J507 - Electronic and Communication Equipment Maintenance
J510 - Railway Equipment
J511 - Special Equipment
J512 - Armament
J513 - Dining Facility Equipment
J514 - Medical and Dental Equipment
J515 - Containers, Textile, Tents, and Tarpaulins

J516 - Metal Containers
J517 - Training Devices and Audiovisual Equipment
J519 - Industrial Plant Equipment
J520 - Test, Measurement and Diagnostic Equipment
J521 - Other Test, Measurement and Diagnostic Equipment
J522 - Aeronautical Support Equipment
J999 - Maintenance of Other Equipment

K - Depot Repair, Maintenance, Modification, Conversion or Overhaul of Equipment

K531 - Aircraft
K532 - Aircraft Engines
K533 - Missiles
K534 - Vessels
K535 - Combat Vehicles
K536 - Noncombat Vehicles
K537 - Electronic and Communication Equipment
K538 - Railway Equipment
K539 - Special Equipment
K540 - Armament
K541 - Industrial Plant Equipment
K542 - Dinning and Facility Equipment
K543 - Medical and Dental Equipment
K544 - Containers, Textile, Tents, and Tarpaulins
K545 - Metal Containers
K546 - Test, Measurement and Diagnostic Equipment
K547 - Other Test, Measurement and Diagnostic Equipment
K548 - Aeronautical Support Equipment
K999 - Other Depot Repair, Maintenance, Modification, Conversion or Overhaul of Equipment

P - Base Maintenance/Multifunction Contracts

P100 - Installation Operation Contracts (Multi-function)

R - Research, Development, Test, and Evaluation (RDT&E) Support

R660 - RDT&E Support

S - Installation Services

S700 - Natural Resource Services
S701 - Advertising and Public Relations
S702 - Financial and Payroll Services
S703 - Debt Collection
S706 - Bus Services
S708 - Laundry and Dry Cleaning
S709 - Custodial Services
S710 - Pest Management
S712 - Refuse Collection and Disposal Services
S713 - Food Services
S714 - Furniture Repair
S715 - Office Equipment Maintenance and Repair
S716 - Motor Vehicle Operation

S717 - Motor Vehicle Maintenance
S718 - Fire Prevention and Protection
S719 - Military Clothing
S724 - Guard Service
S725 - Electrical Plants and Systems Operation and Maintenance
S726 - Heating Plants and Systems Operation and Maintenance
S727 - Water Plants and Systems Operation and Maintenance
S728 - Sewage and Waste Plants Operation and Maintenance
S729 - Air Conditioning and Refrigeration Plants
S730 - Other Utilities Operation and Maintenance
S731 - Supply Operations
S732 - Warehousing and Distribution of Publications
S740 - Transportation Management Services
S750 - Museum Operations
S760 - Contractor-Operated Parts Stores & Civil Engineering Supply Stores
S999 - Other Installation Services

T - Other NonManufacturing Operations

T800 - Ocean Terminal Operations
T801 - Storage and Warehousing
T802 - Cataloging
T803 - Acceptance Testing
T804 - Architect-Engineering
T805 - Operation of Bulk Liquid Storage
T806 - Printing and Reproduction
T807 - Visual Information
T808 - Mapping and Charting
T809 - Administrative Telephone Services
T810 - Air Transportation Services
T811 - Water Transportation Services
T812 - Rail Transportation Services
T813 - Engineering and Technical Services
T814 - Aircraft Fueling Services
T815 - Scrap Metal Operation
T816 - Telecommunication Centers
T817 - Other Communications and Electronics Systems
T818 - Systems Engineering and Installation of Communications Systems
T819 - Preparation and Disposal of Excess and Surplus Property
T820 - Administrative Support Services
T821 - Special Studies and Analysis
T900 - Training Aids, Devices, and Simulator Support
T999 - Other NonManufacturing Operations

U - Education and Training

U100 - Recruit Training
U200 - Officer Acquisition Training
U300 - Specialized Skill Training
U400 - Flight Training
U500 - Professional Development Training
U510 - Professional Military Education
U520 - Graduate Education, Fully Funded, Full-time

U530 - Other Full-time Education Programs
U540 - Off-Duty (Voluntary) and On-Duty Education Programs
U600 - Civilian Education and Training
U700 - Dependent Education
U800 - Training Development and Support
U999 - Other Training Functions

W - Automatic Data Processing

W824 - Data Processing Services
W825 - Maintenance of ADP Equipment
W826 - Systems Design, Development and Programming Services
W827 - Software Services
W999 - Other ADP Functions

X - Products Manufactured and Fabricated In-House

X931 - Ordnance Equipment
X932 - Products Made From Fabric or Similar Materials
X933 - Container Products and Related Items
X934 - Preparation of Food and Bakery Products
X935 - Liquid, Gaseous and Chemical Products
X936 - Rope, Cordage, and Twine Products; Chains and Metal Cable Products
X937 - Logging and Lumber Products
X938 - Communications and Electronic Products
X939 - Construction Products
X940 - Rubber and Plastic Products
X941 - Optical and Related Products
X942 - Sheet Metal Products
X943 - Foundry Products
X944 - Machined Parts
X999 - Other Products Manufactured and Fabricated In-House

Z - Maintenance, Repair, Alteration, and Minor Construction of Real Property

Z991 - Maintenance and Repair of Family Housing Buildings and Structures
Z992 - Maintenance and Repair of Buildings and Structures Other Than Family Housing
Z993 - Maintenance and Repair of Grounds and Surfaced Areas
Z997 - Maintenance and Repair of Railroad Facilities
Z998 - Maintenance and Repair of Waterways
Z999 - Other Maintenance, Repair, Alteration, and Minor Construction of Real Property

Attachment 2

Office of Federal Procurement Policy (OFPP) Policy Letter 92-1,
"Inherently Governmental Functions"

September 23, 1992

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Inherently Governmental Functions.

1. Purpose. This policy letter establishes Executive Branch policy relating to service contracting and inherently governmental functions. Its purpose is to assist Executive Branch officers and employees in avoiding an unacceptable transfer of official responsibility to Government contractors.

2. Authority. This policy letter is issued pursuant to subsection 6(a) of the Office of Federal Procurement Policy (OFPP) Act, as amended, codified at 41 U.S.C. 405(a).

3. Exclusions. Services obtained by personnel appointments and advisory committees are not covered by this policy letter.

4. Background. Contractors, when properly used, provide a wide variety of useful services that play an important part in helping agencies to accomplish their missions. Agencies use service contracts to acquire special knowledge and skills not available in the Government, obtain cost effective services, or obtain temporary or intermittent services, among other reasons.

Not all functions may be performed by contractors, however. Just as it is clear that certain functions, such as the command of combat troops, may not be contracted, it is also clear that other functions, such as building maintenance and food services, may be contracted. The difficulty is in determining which of these services that fall between these extremes may be acquired by contract. Agencies have occasionally relied on contractors to perform certain functions in such a way as to raise questions about whether Government policy is being created by private persons. Also, from time to time questions have arisen regarding the extent to which de facto control over contract performance has been transferred to contractors. This policy letter provides an illustrative list of functions, that are, as a matter of policy, inherently governmental (see Appendix A), and articulates the practical and policy considerations that underlie such determinations (see para. 7).

As stated in paragraph 9, however, this policy letter does not purport to specify which functions are, as a legal matter, inherently governmental, or to define the factors used in making such legal determination. Thus, the fact that a function is listed in Appendix A, or a factor is set forth in paragraph 7(b), does not necessarily mean that the function is inherently governmental as a legal matter or that the factor would be relevant in making the legal determination.

5. Definition. As a matter of policy, an "inherently governmental function" is a function that is so

intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of value judgements in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlement.

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

(a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(c) significantly affect the life, liberty, or property of private persons;

(d) commission, appoint, direct, or control officers or employees of the United States; or

(e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

Inherently governmental functions do not normally include gathering information for or providing
advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services.

The detailed list of examples of commercial activities found as an attachment to Office of Management and Budget (OMB) Circular No. A-76 is an authoritative, nonexclusive list of functions that are not inherently governmental functions. These functions therefore may be contracted.

6. Policy.

(a) Accountability. It is the policy of the Executive Branch to ensure that Government action is taken as a result of informed, independent judgments made by Government officials who are ultimately accountable to the President. When the Government uses service contracts, such informed, independent judgment is ensured by:

(1) prohibiting the use of service contracts for the performance of inherently governmental functions (See Appendix A);

(2) providing greater scrutiny and an appropriate enhanced degree of management oversight (see subsection 7(f)) when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see Appendix B);

(3) ensuring, in using the products of those contracts, that any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of agency officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and

(4) ensuring that reasonable identification of contractors and contractor work products is made whenever there is a risk that the public, Congress, or other persons outside of the Government might confuse them with Government officials or with Government work products, respectively.

(b) OMB Circular No. A-76. This policy letter does not purport to supersede or otherwise effect any change in OMB Circular No. A-76, Performance of Commercial Activities.

(c) Drafting of congressional testimony, responses to congressional correspondence, and agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity. While the approval of a Government document is an inherently governmental function, its drafting is not necessarily such a function. Accordingly, in most situations the drafting of a document, or portions thereof, may be contracted, and the agency should review and revise the draft document, to the extent necessary, to ensure that the final document expresses the agency's views and advances the public interest. However, even though the drafting function is not necessarily an inherently governmental function, it may be inappropriate, for various reasons, for a private party to draft a document in particular circumstances. Because of the appearance of private influence with respect to documents that are prepared for Congress or for law enforcement or oversight agencies and that may be particularly sensitive, contractors are not to be used for the drafting of congressional testimony; responses to congressional correspondence; or agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity.

7. Guidelines. If a function proposed for contract performance is not found in Appendix A, the following guidelines will assist agencies in understanding the application of this policy letter, determining whether the function is, as a matter of policy, inherently governmental and forestalling potential problems.

(a) The exercise of discretion. While inherently governmental functions necessarily involve the exercise of substantial discretion, not every exercise of discretion is evidence that such a function is involved. Rather, the use of discretion must have the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist (e.g., purchasing a minicomputer rather than a mainframe computer, hiring a statistician rather than an

economist, supporting proposed legislation rather than opposing it, devoting more resources to prosecuting one type of criminal case than another, awarding a contract to one firm rather than another, adopting one policy rather than another, and so forth).

A contract may thus properly be awarded where the contractor does not have the authority to decide on the course of action to be pursued but is rather tasked to develop options to inform an agency decision maker, or to develop or expand decisions already made by Federal officials. Moreover, the mere fact that decisions are made by the contractor in performing his or her duties (e.g., how to allocate the contractor's own or subcontract resources, what techniques and procedures to employ, whether and whom to consult, what research alternatives to explore given the scope of the contract, what conclusions to emphasize, how frequently to test) is not determinative of whether he or she is performing an inherently governmental function.

(b) Totality of the circumstances. Determining whether a function is an inherently governmental function often is difficult and depends upon an analysis of the facts of the case. Such analysis involves consideration of a number of factors, and the presence or absence of any one is not in itself determinative of the issue. Nor will the same emphasis necessarily be placed on any one factor at different times, due to the changing nature of the Government's requirements.

The following factors should be considered when deciding whether award of a contract might effect, or the performance of a contract has effected, a transfer of official responsibility:

(1) Congressional legislative restrictions or authorizations.

(2) The degree to which official discretion is or would be limited, i.e., whether the contractor's involvement in agency functions is or would be so extensive or his or her work product is so far advanced toward completion that the agency's ability to develop and consider options other than those provided by the contractor is restricted.

(3) In claims adjudication and related services, (i) the finality of any contractor's action affecting individual claimants or applicants, and whether or not review of the contractor's own is de novo (i.e., to be effected without the appellate body's being bound by prior legal rulings or factual determinations) on appeal of his or her decision to an agency official;

(ii) the degree to which contractor activities may involve wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures;

(iii) the degree to which matters for decision by the contractor involve recurring fact patterns or unique fact patterns; and

(iv) The contractor's discretion to determine an appropriate award or penalty.

(4) The contractor's ability to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the

contractor's need to resort to force in support of a police or judicial function; whether force, especially deadly force, is more likely to be initiated by the contractor or by some other person; and the degree to which force may have to be exercised in public or relatively uncontrolled areas. (Note that contracting for guard, convoy security, and plant protection services, armed or unarmed, is not proscribed by these policies.)

(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons.

(6) Whether the function in question is already being performed by private persons, and the circumstances under which it is being performed by them.

(c) Finality of agency determinations. Whether or not a function is an inherently governmental function, for purposes of this policy letter, is a matter for agency determination. However, agency decisions that a function is or is not an inherently governmental function may be reviewed, and, if necessary, modified by appropriate OMB officials.

(d) Preaward responsibilities. Whether a function being considered for performance by contract is an inherently governmental function is an issue to be addressed prior to issuance of the solicitation.

(e) Post-award responsibilities. After award, even when a contract does not involve performance of an inherently governmental function, agencies must take steps to protect the public interest by playing an active, informed role in contract administration. This ensures that contractors comply with the terms of the contract and that Government policies, rather than private ones, are implemented. Such participation should be appropriate to the nature of the contract, and should leave no doubt that the contract is under the control of Government officials. This does not relieve contractors of their performance responsibilities under the contract. Nor does this responsibility to administer the contract require Government officials to exercise such control over contractor activities as to convert the contract, or portion thereof, to a personal service contract.

In deciding whether Government officials have lost or might lose control of the administration of a contract, the following are relevant considerations: the degree to which agencies have effective management procedures and policies that enable meaningful oversight of contractor performance, the resources available for such oversight, the actual practice of the agency regarding oversight, the duration of the contract, and the complexity of the tasks to be performed.

(f) Management controls. When functions described in Appendix B are involved, additional management attention to the terms of the contract and the manner of performance is necessary. How close the scrutiny or how extensive or stringent the management controls need to be is for agencies to determine. Examples of additional control measures that might be employed are:

(1) developing carefully crafted statements of work and quality assurance plans, as described in OFPP Policy Letter 91-2, Service Contracting, that focus on the issue of Government oversight

(2) establishing audit plans for periodic review of contracts by Government auditors;

(3) conducting preaward conflict of interest reviews to ensure contract performance in accordance with objective standards and contract specifications;

(4) physically separating contractor personnel from Government personnel at the worksite; and

(5) requiring contractors to (a) submit reports that contain recommendations and that explain and rank policy or action alternatives, if any, (b) describe what procedures they used to arrive at their recommendations, summarize the substance of their deliberations, (d) report any dissenting views, (e) list sources relied upon, and/or (f) otherwise make clear the methods and considerations upon which their recommendations are based.

(g) Identification of contractor personnel and acknowledgment of contractor participation. Contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties must be required to identify themselves as such to avoid creating an impression in the minds of members of the public or the Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. All documents or reports produced by contractors are to be suitably marked as contractor products.

(h) Degree of reliance. 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 manage Government programs properly. The greater the degree of reliance on contractors the greater the need for oversight by agencies. What number of Government officials is needed to oversee a particular contract is a management decision to be made after analysis of a number of factors. These include, among others, the scope of the activity in question; the technical complexity of the project or its components; the technical capability, numbers, and workloads of Federal oversight officials; the inspection techniques available; and the importance of the activity. Current contract administration resources shall not be determinative. The most efficient and cost effective approach shall be utilized.

(I) Exercise of approving or signature authority. Official responsibility to approve the work of contractors is a power reserved to Government officials. It should be exercised with a thorough knowledge and understanding of the contents of documents submitted by contractors and a recognition of the need to apply independent judgment in the use of these work products.

8. Responsibilities.

(a) Heads of agencies. Heads of departments and agencies are responsible for implementing this policy letter. While these policies must be implemented in the Federal Acquisition Regulation (FAR), it is expected that agencies will take all appropriate actions in the interim to develop implementation strategies and initiate staff training to ensure effective implementation of these

policies.

(b) Federal Acquisition Regulatory Council. Pursuant to subsections 6(a) and 25(f) of the OFPP Act, as amended, 41 U.S.C. 405(a) and 421(f), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 210 days from the date this policy letter is published in the Federal Register. Issuance of final regulations within this 210-day period shall be considered issuance "in a timely manner" as prescribed in 41 U.S.C. 405(b).

(c) Contracting officers. When requirements are developed, when solicitations are drafted, and when contracts are being performed, contracting officers are to ensure:

(1) that functions to be contracted are not among those listed in Appendix A of this letter and do not closely resemble any functions listed there;

(2) that functions to be contracted that are not listed in Appendix A, and that do not closely resemble them, are not inherently governmental functions according to the totality of the circumstances test in subsection 7(b), above;

(3) that the terms and the manner of performance of any contract involving functions listed in Appendix B of this letter are subject to adequate scrutiny and oversight in accordance with subsection 7(f), above; and

(4) that all other contractible functions are properly managed in accordance with subsection 7(e), above.

(d) All officials. When they are aware that contractor advice, opinions, recommendations, ideas, reports, analyses, and other work products are to be considered in the course of their official duties, all Federal Government officials are to ensure that, they exercise independent judgment and critically examine these products.

9. Judicial review. This policy letter is not intended to provide a constitutional or statutory interpretation of any kind and it is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. It is intended only to provide policy guidance to agencies in the exercise of their discretion concerning Federal contracting. Thus, this policy letter is not intended, and should not be construed, to create any substantive or procedural basis on which to challenge any agency action or inaction on the ground that such action or inaction was not in accordance with this policy letter.

10. Information contact. For information regarding this policy letter contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202) 395-7209. (UPDATED 8/1995--contact the Budget Analysis and Systems Division, Office of Management and Budget, 725 17th Street, N.W., Washington, DC 20503. Telephone (202) 395-6104.)

11. Effective date. This policy letter is effective 30 days after the date of publication.

Signed by

ALLAN V. BURMAN

Administrator

Appendix A to OFFP Policy Letter 92-1

The following is an illustrative list of functions considered to be inherently governmental functions:\1\

1. The direct conduct of criminal investigations.

2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).

3. The command of military forces, especially the leadership of military personnel who are members of the combat, combat support or combat service support role.

4. The conduct of foreign relations and the determination of foreign policy.

5. The determination of agency policy, such as determining the content and application of regulations, among other things.

6. The determination of Federal program priorities or budget requests.

7. The direction and control of Federal employees.

8. The direction and control of intelligence and counter-intelligence operations.

9. The selection or nonselection of individuals for Federal Government employment.

10. The approval of position descriptions and performance standards for Federal employees.

11. The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).12. In Federal procurement activities with respect to prime contracts,

(a) determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(b) participating as a voting member on any source selection boards;

(c) approval of any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(d) awarding contracts;

(e) administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

(f) terminating contracts; and (g) determining whether contract costs are reasonable, allocable, and allowable.

13. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

14. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.

15. The approval of Federal licensing actions and inspections.

16. The determination of budget policy, guidance, and strategy.

17. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:

(a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques, and

(b) routine voucher and invoice examination.

18. The control of the treasury accounts.

19. The administration of public trusts.

\1\With respect to the actual drafting of congressional testimony, of responses to congressional

correspondence, and of agency responses to audit reports from an Inspector General, the General Accounting Office, or other Federal audit entity, please see special provisions in subsection 6.c of the text of the policy letter, above.

Appendix B to OFFP Policy Letter 92-1

The following list is of services and actions that are not considered to be inherently governmental functions. However, they may approach being in that category because of the way in which the contractor performs the contract or the manner in which the Government administers
contractor performance. When contracting for such services and actions, agencies should be fully aware of the terms of the contract, contractor performance, and contract administration to ensure that appropriate agency control is preserved.

This is an illustrative listing, and is not intended to promote or discourage the use of the following types of contractor services:

1. Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

2. Services that involve or relate to reorganization and planning activities.

3. Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

4. Services that involve or relate to the development of regulations.

5. Services that involve or relate to the evaluation of another contractor's performance.

6. Services in support of acquisition planning.

7. Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

8. Contractors' providing technical evaluation of contract proposals.

9. Contractors' providing assistance in the development of statements of work.

10. Contractors' providing support in preparing responses to Freedom of Information Act requests.

11. Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the Defense Industrial Security Program described in FAR 4.402(b)).

12. Contractors' providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

13. Contractors' participating in any situation where it might be assumed that they are agency employees or representatives.

14. Contractors' participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

15. Contractors' serving as arbitrators or providing alternative methods of dispute resolution.

16. Contractors' constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

17. Contractors' providing inspection services.

18. Contractors' providing legal advice and interpretations of regulations and statutes to Government officials.

19. Contractors' providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

Mr. HORN. And also there's been no change in Circular A–76, I take it.

Ms. LEE. There have been changes over the years but not as of this event.

Mr. HORN. So what we have in the record already, we don't have to worry about. The gentleman from California, Mr. Ose.

Mr. OSE. Mr. Chairman, are we going to hear from the other three witnesses first?

Mr. HORN. Sorry on that. You're able to stay; right?

Ms. LEE. Yes, sir.

Mr. HORN. I thought you had a problem there. But Ms. Harper then is next with the Environmental Protection Agency, CFO.

Ms. HARPER. Thank you, Mr. Chairman. Mr. Chairman and members of the subcommittee, as Chief Financial Officer of the Environmental Protection Agency, my office is responsible for EPA's implementation of the Federal Activities Inventory Reform Act, the FAIR Act. Let me begin by thanking you for this opportunity to discuss our work in connection with the FAIR Act. I share your commitment to effective and efficient government service and I will pleased to be able to describe for you EPA's approach to the FAIR Act compliance. OMB's early guidance and support helped us to make a quick, informed start on an inventory of functions characterized as commercial under the FAIR Act. To satisfy the spirit and intent of the act, we set out to produce a comprehensive inventory of all commercial functions and activities and the full-time equivalents or FTE performing them.

We decided that "at bottom-up approach" would yield more accurate information. So we assigned responsibility for the inventory to EPA's 22 major organizational units or national program offices at headquarters and our regional offices. We convened an agency-wide work group with representatives from each of the organizational units as well as from our unions. Our purpose was to reinforce a common understanding of the criteria outlined in FAIR and in OMB Circular A–76 and to emphasize the importance of linking the inventory and activity function codes to EPA's strategic goals. This work group approach, along with staff oversight and review of the draft inventories, further assured the quality and consistency of the information we gathered.

EPA's inventory, completed on June 30, 1999, showed that approximately 5 percent of the agency's work force or 829 FTE are involved primarily with activities characterized as commercial under FAIR. Most functions identified in EPA's inventory represent, in our judgment, core capabilities that should be retained in house. In our evaluation, we considered several factors including the nature and the function, the degree of discretion exercised in performing that function, the sensitivity and the confidentiality of information required to perform the function, and the significance to the core agency activities. EPA's regulatory role is unique and important. To meet our statutory mandates and emergency requirements, we must maintain the in-house expertise and staff capabilities we need to effectively apply and enforce the Nation's environmental laws.

Although a FAIR "commercial" characterization of 5 percent of EPA's work force may, at first glance, appear low; it is important

to understand the context in which it is based. Historically, EPA's dependency on contractors has raised some special concerns. During the decade preceding 1995, the Agency's contract resources increased at 10 times the rate of EPA's staff. You may recall that the agency was severely criticized by the Congress, the GAO, and our own Inspector General for an overreliance on contractor support. Over time, we lost critical in-house scientific expertise and, in some cases, improperly contracted functions that are inherently governmental.

In 1995, Congress approved the Agency's request to realign resources and convert 900 work years of contractor support to Federal work years. Currently, about 75 percent of EPA's budget or $5.7 billion supports extramural work, work performed outside of the Agency by contractors, States, universities, outside researchers and others. It was against this backdrop that the EPA inventory was performed.

I submitted our inventory to OMB on July 1, 1999. OMB subsequently completed their review and consultation on our inventory and the availability of the inventory was published in the Federal Register on September 30, 1999. This started the 30-day clock running for interested parties to submit their challenges. To date, we have received 22 requests for the inventory and one challenge.

I should also add that the General Accounting Office which is represented here today is reviewing our inventory process. My understanding is, as Chris has testified, that they will be performing a thorough analysis of the similarities and differences among the several agency inventories. I welcome this effort and think it will improve our future inventories at EPA.

I would like to take a moment to emphasize how useful we found it at EPA to link our FAIR inventories with structures we have put in place under the Government Performance and Results Act. We associated each FTE identified as "commercial" with one of the agency's strategic goals. This can contribute to more informed work force planning and budgeting by highlighting among each goal activity any opportunities for cost effective public private partnership.

I want to thank the subcommittee for this opportunity to testify on our implementation of FAIR. We appreciate your interest in EPA's work and count on your continued support. I would be happy to respond to any questions that the chairman and subcommittee may have.

[The prepared statement of Ms. Harper follows:]

STATEMENT OF SALLYANNE HARPER
CHIEF FINANCIAL OFFICER
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
GOVERNMENT, MANAGEMENT, AND INFORMATION TECHNOLOGY SUBCOMMITTEE
U.S. HOUSE OF REPRESENTATIVES

OCTOBER 28, 1999

Mr. Chairmen and Members of the Subcommittee:

Good afternoon. My name is Sallyanne Harper. I am Chief Financial Officer of the Environmental Protection Agency. My office is responsible for implementation of the Federal Activities Inventory Reform (FAIR) Act in EPA.

I especially appreciate this opportunity to testify today because I believe that EPA has developed a sound and workable means of complying with the FAIR Act. Let me briefly explain.

First, we received very helpful early guidance and support from OMB in conducting the inventory. This made a big difference in getting a quick and informed start.

To satisfy the spirit and intent of FAIR, we wanted our inventory to represent a comprehensive survey of all commercial functions and activities and the Full Time Equivalents (FTE) performing them. Next, we decided at the outset to do a "bottom up inventory" of our commercial activities. This was accomplished by identifying 22 reporting entities in the agency's organization. These entities were assigned responsibility for conducting the inventory within their respective organizations.

We convened an agency-wide workgroup of these entities, including our unions, to emphasize the importance of assessing each function and activity based on criteria in FAIR and OMB Circular A-76. Another point we stressed was to link the inventory and the activity function codes to strategic goals of the agency. We met with the workgroup several times, primarily to make sure everyone understood what the FAIR Act requirements were and to assure as much as possible a reasonable consistency in how each entity approached its inventory. I think we achieved that objective.

One important question that arose concerned the same position series, such as secretaries or analysts, found in most or all of the reporting entities. It was clear that while the position title may be the same, it was often the case that the people performing the work were carrying out different functions. This reality made a bottom up inventory all the more essential.

My staff reviewed draft agency inventories as they came in and requested in several instances that the entity take another look at the numbers as well as consulting with other offices. I think this kind of oversight was vital to quality assurance of the inventory.

While the inventory was underway, my staff prepared background information on how we would handle challenges and appeals. We also introduced a delegation process that would allow us to review and act on challenges and appeals in an efficient and cost-effective manner.

We completed the inventory on June 30, 1999. The overall result was that approximately 5

percent of the agency's workforce or 829 FTE were involved primarily with commercial activities. The majority of functions shown on the inventory represent, in our judgment, commercial core capability and therefore represent FTE that should be retained in-house. Factors considered in the evaluation process included the nature of the function, the degree of discretion exercised in performing the function, the sensitivity and confidentiality of the information required to perform the function, and the significance to core agency activities.

Just as important is our unique regulatory role. In that regard, we considered the need to maintain appropriate in-house expertise and staff capabilities to effectively apply and enforce the nations's environmental laws in meeting our statutory mandates and emergency requirements.

While fundamentally a matter of judgment, the inventory helps illustrate several important facts of EPA life. The agency is already heavily contracted out to a point where we estimate conservatively that another 11,000 to 15,000 employees would have to be hired if we did not receive contractor funding. About 75 percent of our total budget funds extramural work; work performed by outside entities including contractors, states, universities, and others.

Historically, EPA's dependency on contractors has raised some special concerns. During the decade preceding 1995, the Agency's contract resources increased at ten times the rate of EPA staff. The Agency was roundly criticized, both by its own IG and by the Congress, for having become too dependant on its contractors. The over-reliance on contract support had led to a depletion of the Agency's ability to carry out its mission because of a loss of critical in-house

scientific expertise. Equally important, the Agency had lessened its capacity to manage its resources effectively and in some cases had improperly contracted inherently governmental functions. In 1995, to address these concerns, the Agency requested, and the Congress approved a substantial realignment of Agency resources authorizing the conversion of 900 workyears of contractor support to Federal employees.

I submitted our inventory to Mr. Lew, Director of OMB on July 1, 1999. OMB subsequently completed their review and consultation of our inventory, publishing a notice of its availability on September 30, 1999. This started the 30 day clock running for interested parties to submit a challenge. As of Tuesday, we have received 21 requests for the inventory. No challenges have been received to date.

All challenges from interested parties will first be referred to the EPA entity providing that part of the inventory. Where more than one office is involved, the one with the most FTE listed on the inventory will take the lead. The other offices affected by the challenge will provide input to the lead office regarding the activities they reported on the inventory.

The appropriate agency office will respond to all challenges within 28 calendar days of their submittal. The designated official will submit the draft challenge decision to my office and to the Office of General Counsel for review. Once a consensus has been reached, the challenge decision will be given to the interested party.

If the challenge is denied, the interested party has 10 working days to appeal after receiving written notification of the challenge decision. As the Chief Financial Officer, I will rule on all appeals within 10 working days of their filing, including the rationale for the decision.

As required under FAIR, if our inventory changes as a result of a challenge, we will transmit to OMB and the Congress a copy of any changes to the inventory and make the changes available to the public through publishing a notice in the Federal Register.

I should also add that the General Accounting Office, which is represented here today, is reviewing our inventory process. My understanding is that they are preparing an analysis of similarities and differences among several agency inventories. I welcome this effort and think that it will improve future inventories.

I would like to take a final moment to suggest an improvement related to the implementation of FAIR. I would recommend that there be an explicit linkage of the FAIR inventories to the Government Performance and Results Act. We associated each FTE identified as commercial with one of the agency's strategic goals. This helps with workforce planning and budgeting, and it reveals those goals where opportunities might exist for cost-effective public-private partnerships.

I want to thank the Subcommittee for this opportunity to testify on our implementation of FAIR. I would be happy to respond to any questions that you may have.

Mr. HORN. Thank you. We'll proceed with Mr. William Early, the Chief Financial Officer of the General Services Adiminstration.

Mr. EARLY. Thank you, Mr. Chairman, I'm pleased to be here today to share the experiences and perspectives of the GSA with regard to the development of our 1999 FAIR Act inventory. GSA is unique among Federal agencies in that it is our mission to provide commerical goods and services to the Federal community. GSA has a long and continuing history of successfully using various management tools to reduce its size and cost while continuing to meet its mission requirements. In 1989, GSA's employment was 19,000. Today it's 14,000, a 27 percent reduction.

GSA has used OMB's Circular A–76, delegations of authority to our customers, GSA's Federal Operations Review Model [FORM], process reengineering and other reinvention initiatives stemming from the national performance review. We are continually reviewing and improving our operations, implementing the best delivery method for our customers and the taxpayer. We are nonmandatory and customer funded. Therefore, we are controlled by the marketplace and must be aware of commercial prices for our products.

In the spring of 1998, OMB issued a data call for a complete functional inventory. We took that requirement very seriously. We were aware of pending legislation—the FAIR Act—and developed an inventory using the full GSA management team. The inventory we released on September 30 under the FAIR Act requirements is the result of those efforts. Our basic set of principles was to one, develop an accurate inventory of all our functions; two, review and reflect an accurate assessment of each function without any preconceived notion about its nature—such as inherently governmental or commercial—and, three, support each assessment with factual information.

We took the following steps to develop the inventory: We used a core team with representation from each of our services. This organizational approach led to the comprehensive organized involvement of the entire agency. We recognized that to produce the inventory, we needed an updated working knowledge of the pending legislation—the FAIR Act—and the latest issuance of OMB's Circular A–76 and its supplemental handbook. To acquire that knowledge, training was identified, tailored to meet GSA's specific needs, and conducted onsite exclusively for GSA personnel.

After achieving a working knowledge of the requirement, the core team developed agency guidelines and further refined our training to emphasize the inventory requirement. GSA then trained hundreds of GSA personnel, representing all levels and organizations within the agency. In concert with our Office of Communications, we conducted a campaign to keep everyone informed. This included letters from the administrator as well as establishment of an Internet site that made available all pertinent documents available to all employees.

Union representatives participated in our training and were included as potential team members within the various organizations. We conducted briefings of union representatives, and they received a copy of the final draft of the inventory before it was released to all GSA employees or to OMB. Even though heads of services and staff offices were involved from the outset in develop-

ing their respective inventories, an agency-wide inventory still needed to be created. Therefore, we contracted for professional facilitation services at an offsite location and convened a meeting consisting of leadership and management representatives from all areas, including our chief of staff and general counsel. We desired an open and frank dialog to surface, evaluate, and incorporate suggested alterations to our plan while ensuring that we were producing an inventory that was consistent, accurate, and responsive to the requirement.

On September 30, 1999, GSA posted its entire inventory on its CFO Internet site, and used it as the inventory's primary method of distribution. Inquiries on inventory content were coordinated centrally. GSA has a single point of contact for inquiries, challenges and appeals which are logged and routed to all members of our core team for research and comment. I, as the Chief Financial Officer, will be issuing replies to challenges, and the Administrator will issue replies to any subsequent appeals.

This process, in conjunction with performance measures, can lead agencies to improving the effectiveness of in-house functions or to contracting out those functions that can be performed more efficiently by the private sector. GSA has already achieved many such efficiencies through process reenginering, A–76 competitions, and bench marking. These efforts have improved the productivity of our in-house work force as we strive to ensure that GSA operations meet or exceed commercial standards.

At GSA, we have always found that self-knowledge has value, and have shown a historical commitment to, and success with, the A–76, FORM, and FAIR Act processes. GSA has undertaken many initiatives to either improve the way we conduct business or to find better alternatives to meet government needs. We look for both low cost and best value. Our diligence and our review of the GSA's FAIR Act inventory will be guided by those same values. This completes my prepared testimony, and I look forward to answering your questions.

[The prepared statement of Mr. Early follows:]

TESTIMONY ON THE GENERAL SERVICES ADMINISTRATION'S 1999 FAIR ACT INVENTORY

BEFORE THE
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY
COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

OCTOBER 28, 1999

Good afternoon.

My name is Bill Early, and I am the Chief Financial Officer of the General Services Administration (GSA). I am pleased to be here today to share the experiences and perspectives of the GSA with regard to the development of our 1999 FAIR Act Inventory.

GSA is unique among Federal Agencies in that our mission is to provide commercial goods and services to the Federal community. We are therefore very familiar with the concept of an inventory, and we understand its value as well.

GSA has a long and continuing history of successfully using various management tools – old and new – to reduce its size and cost while continuing to meet its mission requirements. In 1989 GSA's full time equivalent employment was 19,295; today it is 14,150, a 27% reduction. Among those tools for reduction, GSA has used OMB's Circular A-76, delegations of authority to our customers, GSA's Federal Operations Review Model (FORM), process re-engineering and other reinvention initiatives stemming from the National Performance Review. We are continually reexamining and improving our operations, implementing the best delivery method for our customers and the taxpayer.

GSA's efforts with regard to the preliminary OMB (Raines) data call and the FAIR Act that followed were built upon a simple set of principles:

1) Develop an accurate inventory of all of our functions.

2) Review each function without any preconceived notions about its nature; i.e. inherently governmental or commercial.

3) Reflect an accurate assessment of each function within the parameters established by the Office of Federal Procurement Policy defining "Inherently Governmental Functions," and the additional guidance provided by OMB Circular A-76 , the Raines Data Call, and,

4) Support each assessment with factual information.

In short, our inventory would be simply that, an inventory. With that goal in sharp focus, GSA took the following steps to achieve it:

1) Involve the Entire Agency. GSA identified a core team. Led by a member of the Office of the Chief Financial Officer, it included representation from each of our Services, as well as a representative for all of the Staff Offices. Each of those core team representatives in turn developed additional teams within their areas of responsibility. This approach led to a comprehensive, organized involvement of the entire Agency.

2) Develop and Provide Training. GSA recognized the need to ensure that those tasked to produce the inventory had an up-to-date working knowledge of the pending legislation (FAIR Act), and the latest issuance of OMB Circular A-76 and its Supplemental Handbook. Training was identified, tailored to GSA's specific needs, and conducted on-site exclusively for GSA personnel.

3) Develop Initial Plan. After achieving a working knowledge of the requirement, the core team developed guidelines that all participants were to follow. They also further refined the training requirement to emphasize the skills needed to develop an inventory. GSA subsequently trained hundreds of GSA personnel from all levels and organizations within the agency.

4) Communication. Although comprehensive participation of GSA organizations had been achieved, it was recognized that each and every employee had a need to know what was underway. Accordingly, the Office of Communications orchestrated a campaign to keep everyone informed. This included issuances by the Administrator, as well as establishment of a web site that made available all pertinent documents. In addition, briefings were conducted by the core team leader, team members and senior management.

5) Union Involvement. Union representatives participated in training, and were included as potential team members within the various organizations. CFO management and core team members participated in briefings of union representatives with the coordination and support of GSA's Labor Relations personnel. Union representatives received a copy of the final draft of the Inventory before it was released to all GSA employees or to OMB.

6) Review by Senior Management. Heads of Services and Staff Offices (HSSO's) were involved from the outset in the development of their organizations' respective inventories. As an Agency inventory began to take shape, the Office of the CFO contracted for professional facilitation services at an off-site location, and convened a meeting consisting of representatives from the HSSO's, Regional Administrators, and Assistant Regional Administrators, and other key personnel (GSA's Chief of Staff and General Counsel). The objectives were to (1) make sure that we were

pursuing our individual objectives in concert with the overriding objective of producing a GSA inventory that was consistent, accurate and responsive to the requirement, and (2) to surface, evaluate and, when appropriate, incorporate suggested alterations to our plan. Additional meetings were held at various milestones, and concluded with a conference call just prior to our delivery of the inventory to OMB.

7) Post Inventory Submission. GSA continued to be actively involved as OMB reviewed the Inventory submissions. GSA was invited to participate on a subcommittee of the President's Management Council, as well as on a working group under that council to review the contents of all submissions.

8) OMB Review and Consultation. GSA discussed the submission with OMB, supplied clarification where requested, and answered questions relative to content.

9) Inventory Distribution. GSA posted its entire inventory submission on its CFO's Web Site (http://cfo.gsa.gov/), and directed those seeking a copy to that site as our prime method of distribution. This has been very successful, and no other means of distribution has been necessary or employed. Inquiries on inventory content are coordinated centrally.

10) Challenges and Appeals. GSA has a single point of contact for the entire agency. Challenges and appeals are immediately logged, and routed to all members of the core team for research and comment. The Chief Financial Officer will issue replies to challenges should we receive any. The Administrator will issue replies to appeals of challenge decisions.

The exercise of producing the inventory caused GSA to re-examine all existing functions and to consider whether or not we are performing them in the most effective manner. The process of re-examination can lead to agencies improving the efficiencies of in-house functions, as well as, contracting-out functions which can be performed more efficiently by the private sector. GSA has already achieved many such efficiencies through the A-76 program and process re-engineering. Both A-76 and reinvention efforts, such as benchmarking, have improved the productivity of our in-house workforce as we strive to ensure that GSA operations meet or exceed commercial standards.

As for GSA, we have always found that self-knowledge has value. Our historical commitment to, and success with, the A-76, FORM and FAIR Act processes evidence this, as previously noted. GSA has undertaken a great many initiatives to either improve the way we conduct business, or to find better alternatives to meet the Government's needs. Our diligence in our review of GSA's FAIR Act inventory will be guided by those same values.

Mr. HORN. Thank you very much. Our last witness is Ms. Linda Bilmes, the Acting Assistant Secretary for Administration and the Acting Chief Financial Officer, Department of Commerce.

Ms. BILMES. I thank you. Good afternoon, Mr. Chariman and members of the subcommittee. I appreciate the opportunity to appear before you today to discuss private sector contracting with the Department of Commerce and, more specifically, the Department's implementation of the FAIR Act.

Secretary Daley and the Department of Commerce are committed to the principles embodied by the FAIR Act; that is, we believe as a Department covering a great deal of the Nation's business that private sector firms should, to the greatest extent possible, have the opportunity to compete with Federal entities to carry out commercial activities.

As the acting CFASA, as we call the Chief Financial Officer and Assistant Secretary for Administration, I am responsible for policymaking and oversight for a broad range of administrative functions. I consider the FAIR Act to be an important tool in our management portfolio available to help us serve the American public.

We are also improving our performance by vigorously implementing the CFO Act, the Clinger-Cohen Act, the Federal Acquisition Streamlining Act, and, in particular, the Government Performance and Results Act. In fact, in the past year, we have expended a great deal of effort to increase the effectiveness and use within our agency of GPRA, in particular in the Annual Performance Plan, which this year received a score of 86 from Congress, the highest in government.

Commerce also has an aggressive and innovative acquisition program. Over the past 11 years, the funds expended on contracts has more than doubled from just over $500 million in 1987 to more than $1.1 billion in 1998. Our use of A–76 has been helpful in this regard with contract wins in many areas. Three examples include: PTO's work in providing copies of patents, which had cost the Department $1.5 million annually and required 78 FTE; NOAA's library and information services, which had cost the Department $722,000 annually and required 28 FTE; and the Office of the Secretary's activity in providing mail and messenger service, which had cost the Department 400,000 annually and required 8 FTE.

The decennial census accounts for another billion plus dollars in procurements. We estimate that contracts in our core programs save the Department from directly employing somewhere between 5,000 and 7,000 FTEs.

As part of our procurement innovations, we established the Commerce Information Technology Solutions, COMMITS, which is the first ever GWAC, Government-Wide Acquisition Contract, reserved exclusively for small, minority and women-owned firms. Over the next 5 years, this unique initiative is expected to make up $1.5 billion in Federal technology contracts available to the 29 participants.

In the past 6 years, Commerce has increased its service contracting by approximately 15 percent and reduced its FTE by roughly 7 percent. During this time, we also reduced the number of managers and supervisors, placed greater staff on the front lines, and improved service delivery to our customers. Under Secretary

Daley's leadership, we continued to explore opportunities for streamlining and improving Commerce management.

Now, I'd like to discuss the process that we used to classify our activities and develop our A–76 inventory in 1998. We used a similar process this year to develop our FAIR inventory. First, we used the OMB-provided definitions and template; and we requested each bureau to develop and submit an inventory of all their activities. We met with bureau representatives and worked closely with them to ensure adherence to OMB guidance. We identified cross-functional activities, such as the classification of FTE assigned to human resource management and procurement, to develop and ensure consensus and a consistent approach throughout the Department.

When we reviewed the bureaus' information, we met with them and clarified through dialog with our bureau contacts inventory where we had questions.

Finally, we reconciled the Democrat's data with the official payroll information maintained by the National Finance Center.

As a result of this process, we were happy to meet OMB's October 31, 1998, deadline; and to be the first department in government to submit its A–76 inventory to OMB under the Raines guidelines.

Since the passage of the FAIR Act, we used essentially the same model to develop our inventory this year. Using OMB-provided advice and formatting guidelines, we tasked the bureaus to review and update their portions of the inventory. We reviewed their input with the bureaus and used the same methods to reconcile the cross-cutting areas.

Following this process, we were again among the first to transmit the Department's submission, delivering it to OMB on July 9th of this year. On September 30th of this year, OMB published a notice in the Federal Register that our inventory, along with 51 other agencies, was available to the public. Since then, we've received 34 requests for copies of the inventory and one challenge received just this morning having to do with coding.

As reflected in the current inventory, 27 percent of our work force is involved in commercial activities. Of this, 13 percent has been classified as exempt, 11 percent has been classified in core activities not open to competition, leaving 3 percent in commercial competitive activities.

We have reviewed this 3 percent in detail, and we believe it is reasonable because of the factors mentioned earlier: Extensive A–76 activity during the 1980's, the restructuring and 7 percent downsizing of the Commerce Department during the 1990's, and an aggressive contracting program. All of which have contributed significantly to reducing that portion of the Department's activity that remains available for contracting.

During fiscal year 1998 the last year for which we have complete data, the Department expended 28 percent of its discretionary funding on procurements. This is an increase over the past 15 years of 11 percent. In addition, we spent $1.1 billion in direct grants. This limits the universe for additional contracting opportunities to 44 percent of our discretionary budget authority.

Over the past 2½ years since Secretary Daley took office, the Department has used A–76 and the FAIR Act to provide valuable baseline data. We are currently assessing several new opportunities for outsourcing. These include substantial aspects of our information technology management and the administration of the Workers' Compensation program.

During the last year, we have redirected staff resources and continued to build on our existing in-house expertise to implement the FAIR Act. We have also, just this summer, added an additional person to work full time on FAIR Act implementation.

We will continue to review the Department's inventory in detail and to work closely with our bureaus to ensure that private sector firms have every opportunity to compete with Federal agencies.

Let me just add that this is a new program. I believe that the feedback we have received and will continue to receive from GAO, OMB, and from you will prove helpful in this effort. I certainly look forward to receiving GAO's report on its findings as well as hearing how my colleagues in other departments are implementing the FAIR Act. Thank you again for the opportunity to appear before you today.

[The prepared statement of Ms. Bilmes follows:]

STATEMENT OF LINDA J. BILMES
ACTING CHIEF FINANCIAL OFFICER AND
ASSISTANT SECRETARY FOR ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY

October 28, 1999 - 2:00 p.m.

Introduction

Good afternoon, Mr. Chairman and members of the subcommittee. I am Linda Bilmes and, since February 1999, I have been serving as the Acting Chief Financial Officer and Assistant Secretary for Administration for the Department of Commerce. Previously, I held the position of Deputy Assistant Secretary for Administration for approximately one and a half years.

I appreciate the opportunity to appear before you today to discuss private sector contracting with the Department of Commerce and, more specifically, the Department's implementation of the Federal Activities Inventory Reform Act of 1998, which goes hand-in-hand with the policies established in OMB Circular A-76. As the Acting Chief Financial Officer and Assistant Secretary for Administration, acquisition management in general and the FAIR Act and OMB Circular A-76 specifically fall within my purview.

Secretary Daley and the Department of Commerce are committed to the principles embodied by the FAIR Act. That is, we believe that private sector firms should, to the greatest extent possible, have the opportunity to compete with Federal entities to carry out commercial activities.

As the Acting CFO/ASA, I am responsible for policy-making and oversight for a broad range of administrative functions. I consider the FAIR Act to be an important and useful tool in the portfolio available to help us serve the American public more efficiently. Over the span of President Clinton's Administration, we have made notable management improvements through the deployment of various re-engineering efforts coinciding with significant downsizing of the Department as a whole. We routinely examine new activities to determine their suitability for outsourcing before FTE are allocated to carry them out.

We believe the FAIR Act is an important contribution in the options available for management improvements. We are also improving our performance by vigorously implementing the CFO Act, Clinger-Cohen Act, Federal Acquisition Streamlining Act, and the Government Performance and Results Act. In this last category, we have expended considerable effort to increase the effectiveness of our Annual Performance Plan. In fact, this year our Plan received a score of 86 from Congress - one of the highest in government.

Commerce has an aggressive, innovative acquisition program. Over the past eleven years, the funds expended on contracts has more than doubled

from just over $500 million in 1987 to more than $1.1 billion in 1998. Our use of A-76 has been helpful in this regard, with contract wins in many areas, including:

- PTO's work in providing copies of patents, which had cost the Department $1.5 million annually and required 78 FTE,

- NOAA's library and information services, which had cost the Department $722,000 annually and required 28 FTE, and

- The Office of the Secretary's activity in providing mail and messenger service, which had cost the Department $400,000 annually and required 8 FTE.

The decennial census accounts for another billion-plus dollars in procurements. We estimate that contracts in our core programs save the Department from directly employing between 5,000 and 7,000 FTEs.

As part of our procurement innovations, we established the Commerce Information Technology Solutions (COMMITS) - the first ever government-wide acquisition contract (GWAC) reserved exclusively for small, minority and women-owned firms. Over the next five years, this unique initiative is expected to make up to $1.5 billion in Federal technology contracts available to the 29 participants.

From FY 1992 through FY 1998, Commerce increased its service contracting by approximately 15 percent and reduced its FTE by roughly 7 percent. During this time we also reduced the number of managers and supervisors, placed greater staff power on the front lines, and improved service delivery to our customers. Under Secretary Daley's leadership, we continue to explore fresh opportunities for streamlining and improving Commerce operations.

1998 A-76 Inventory

Now I'd like to discuss the extensive process we used to classify our activities and develop our A-76 inventory in 1998.

- Using the OMB-provided definitions and template, we requested the bureaus to develop and submit an inventory of all of their activities.

- We met with bureau representatives and worked closely with them to ensure adherence to OMB's guidance.

- We identified cross functional activities, such as the classification of FTE assigned to human resources management, to develop and ensure a consensus and consistent approach throughout the Department.

- Upon receipt of the bureaus' information, we reviewed and clarified

any questioned areas, through dialogue with our bureau contacts, revising the inventory as appropriate.

- Finally, we reconciled all Departmental data with official payroll information maintained by the National Finance Center.

As a result of this rigorous process, we were very pleased to meet OMB's October 31, 1998 deadline and to be the first in government to submit its A-76 inventory to OMB under the revised Raines guidelines.

FAIR Act Implementation

In October of last year, as you know, the FAIR Act was signed into law. The comprehensive strategy that we used to first develop our inventory in 1998 well-positioned the Department to respond to the requirements under the new legislation for annual updates. To accomplish this, we followed the same model that served us well in 1998.

- Based on OMB-provided advice and formatting guidelines, we tasked the bureaus with reviewing and updating their portions of the overall inventory.

- We reviewed their input, used the same methods to reconcile it as discussed earlier, and entered into discussions for any needed clarification or revisions.

- Following this process, we were again among the first to transmit the Department's submission - delivering it to OMB on July 9.

On September 30, 1999, OMB published a notice in the *Federal Register* that our inventory, along with 51 other agencies, was available to the public. Since then, we have received 34 requests for copies of the inventory, and one challenge, received just this morning.

As reflected in the current inventory, 27 percent of our workforce is involved in commercial activities. Of this, 13 percent has been classified as exempt and 11 percent has been classified in core activities not open to competition - leaving 3 percent in commercial competitive activities. We have reviewed this 3 percent in detail and believe it is reasonable because of factors mentioned earlier:

- Extensive A-76 activity during the 1980s,

- Restructuring and downsizing in the 1990s, and

- Aggressive contracting.

All of which have contributed significantly to reducing that portion of the Department's activity that remains available for contracting.

Current Activities

During FY 1998, the Department expended 28 percent of its discretionary funding on procurements. This is an increase over the past 15 years of 11 percent. In 1998, we spent an additional $1.1 billion in direct grants. This results in limiting our universe for additional contracting opportunities to 44 percent of our discretionary budget authority.[1]

Over the two and a half years since Secretary Daley took office, the Department has used A-76 and the FAIR Act to provide valuable baseline data. We are currently assessing several new opportunities for outsourcing. These include aspects of our information technology management and the administration of the Workers Compensation Program.

During the last year, we have redirected staff resources and continued to build upon our existing expertise to aggressively implement the FAIR Act throughout the Department. We will continue to review the Department's inventory in detail, and work closely with our bureaus to ensure that private sector firms have every opportunity to compete with Federal agencies.

I believe the feedback we have received and will continue to receive from

[1] Discretionary budget authority is budgetary resources provided in appropriations acts.

OMB and GAO will prove helpful in this effort, and I look forward to receiving GAO's report on its findings.

Thank you again for the opportunity to appear before you today. I would be glad to address any questions you may have at this time.

Mr. HORN. It is difficult to get it nicely timed in the 5-minute modules. We appreciate every one of your statements. They have given us perspective on this. Now Mr. Ose, the gentleman from California, will begin the questioning.

Mr. OSE. Thank you, Mr. Chairman. I think the first question I would have is perhaps to ask for a little guidance from you. If I understand the purpose of the FAIR Act, it was to identify those folks within government currently, the tasks of which might be convertible to a private contractor basis? I mean this was the first step, identifying what we could do and then there would be general legislation. Am I—I'm serious. I'm asking for guidance here. Is that what——

Mr. HORN. This was tried in the Eisenhower administration. I was then Assistant to the Secretary of Labor, and I remember he griped about the contract employees all the time. He said, "They aren't like the civil service employees. This place is still dusty." So it didn't go too far then with some of the cabinet to say the least. And what we're trying to do here is in this round see first, how the agencies respond in terms of that commercial governmental bit. And then it's just an experiment. You've got to try it; people can challenge it if they don't like it. And we'll get into union participation and so forth on that.

Mr. OSE. Do I——

Mr. HORN. In other words, if you see a big gap in the existing law, please feel free to fill it.

Mr. OSE. I'm trying to get to what the intent starting this process was. And if I understand correctly, it is to try and find those functions that could, for instance, be bid on by private contractors.

Mr. HORN. That's correct.

Mr. OSE. First step being identifying and then subsequently——

Mr. HORN. Right.

Mr. OSE. That does bring me to just a quandry that I have and that is that having started down this process through the legislative channels, the other branches of the government might be working in a different direction. And I bring that up because I have serious concerns about the implementation through our efforts to open up these job opportunities or what have you to private bidding if the administration is pursuing a different tact, in effect changing the FAR regs such as to make it far more difficult for companies not only to bid but to retain the jobs that they otherwise might successfully be awarded. I specifically—I'm sorry, I don't have the——

Mr. HORN. Well I think Mrs. Lee can answer what the plan is down the line. We're just, at this point, identifying the ones that would be eligible. And then what kind of administrative guidance do you have next?

Mr. OSE. That does bring me to my question. Because Ms. Lee and I have had a meeting previously. We had the benefit of having Mr. Davis and Mr. Moran join us regarding the proposed regulations to the FAR. And I don't want to see these proposed regulations which can be adopted from a regulatory standpoint completely obviate our ability legislatively to pursue this track that was clear in Congress's intent. I want to explore that a little bit if with Ms. Lee, if I may.

Mr. HORN. Right. In other words, administrative regulations are supposed to carry out the will of Congress. But administrations, regardless of party, if they didn't like something, tried to work their way around it. Or if we put something in and we had a euphemism because maybe the Senate didn't agree to it and we put the euphemism in and nobody knows quite which direction that goes, and they tear their hair out in good faith saying, hey what do these people mean? So that's what you are fishing for.

Mr. OSE. Correct. And the euphemism I'm referring to is the issue of black listing. You knew I was going to get to it.

Ms. LEE. Yes, sir one way or another.

Mr. OSE. The question I have and you were very kind, I mean someone, I think Ms. Gore, responded to our questions in the meeting in the Capitol about the statutory authority under which the regs were being promulgated and the case law has been cited dating from 1928, 1934 and 1940, but the question arises subsequent to those, to that case law there have been instances where Congress has expressed a clear intent, in particular, as it relates to this. And the net result of which is a determination that an agency cannot promulgate regulations which conflict with a clear expression of congressional intent.

And that's why I asked the chairman the questions about this FAIR Act and what the intent was. And if I heard him correctly, it was to establish a process whereby certain jobs that currently exist in the Federal agencies could be bid out whether in house or otherwise for private contracting. And yet I see the standards that are currently out for comment closing a door that we're trying to open because of the full, nebulous nature of the criteria, that being worker training or worker retention, standards that really don't have much to do with what our challenge is right now.

And specifically, I want to just get into the record a couple things. Congress has in fact—in line with what some call the black listing proposals, Congress has, in fact, twice considered and rejected efforts to add a provision to the National Labor Relations Act, first being in 1977 and the second in 1997, both of which were ultimately rejected. That would prohibit the award of a Federal contract to any entity that was found to have committed a willful violation of the act.

In other words, Congress considered that as a piece of legislation and rejected its application. That was in 1977. In 1997, Senator Simon sponsored an amendment to amend the National Labor Relations Act to include a debarment remedy based, in part, on the results of the 1995 GAO study, and again Congress rejected that amendment. So I have great trouble with the various criteria that are proposed for amendment within the FAR as currently defined especially as they relate to nebulous things. I'm scrambling here—oh, here we are. Never mind.

Ms. LEE. Substantial noncompliance.

Mr. OSE. Yeah, as to the definition of substantial noncompliance. Thank you. She knows where I'm going. I could be in deep trouble here.

Mr. HORN. Now you know who runs the government.

Mr. OSE. So I would appreciate any input you have. Because I am not yet comfortable with the proposed changes to the regula-

tions. So if you would care to offer any comment, I would be happy to entertain it.

Ms. LEE. That's a long one, Mr. Ose. I will try to make it very succinct for this group. We obviously are working on some issues regarding a proposed amendment. A proposed rule to the FAR is out for public comment. We're expecting public comments. It would be an understatement to say this is an issue of great interest, and we've got some issues to work on that.

If I could jump over here for the FAIR Act for a minute, that the FAIR Act inventories are really the first step: Where agencies look and say why do I exist, what do I do, and then they look and say basically what are my people doing. And of those people, how many are doing commercial-like activities. They then look at the commercial-like activities and take the next management decision. And it truly is a management decision because I think we all agree, people say oh, engineers, you know certainly the commercial activity agency can do engineering. But we say we still need some expertise in the agency so you can't totally declare a type or a function to be outsourced. So there's some management decisions that must go on, and the agency must decide how to best conduct their business and how to do that balance.

Once that decision is made, then we go into looking at a public-private competition process whereby we start to go into the procurement arena and we run an A–76 competition which is a private competition. Based on that you select a winner. Based on that you move over here to the most efficient organization whereby the government folks who now do that work are able to business reengineer or whatever, and then you then have a competition among those two.

Wearing my Acting Deputy Director for Management hat in talking about the FAIR Act is one thing. When I really take that off and put on my OFPP hat, the FAIR activity, is of interest to us in the contracting community because that's one community where outsourcing and downsizing truly is an oxymoron. Because the more you downsize your people the fewer there are. But the more you outsource, the more and the more complex business arrangements we have. So there's a need for smart buyers, smart managers so we can spend this money wisely.

So there certainly is a tension there. That's that process. The issue you're talking about does absolutely kick in to when we get into the procurement process; and we are running a private competition, how do we determine who should be considered and their eligibility requirements. And, yes, we are talking about responsibility in trying to further hone that rule, and that's where that fits into this piece here.

Mr. HORN. If I might at this point, so some future Ph.D. Student who studies this will have all the documents in one place, the OMB proposal to amend the Federal Acquisition Regulation beginning with contractors' responsibility. And we will put that in the record at this point without objection.

[The information referred to follows:]

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 31

[FAR Case 99–010]

RIN 9000–AI40

Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify coverage and give examples of suitable contractor responsibility considerations, as well as to make unallowable the costs of attempting to influence employee decisions regarding unionization, and make unallowable those legal expenses related to defense of judicial or administrative proceedings brought by the Federal Government when a contractor is found to have violated a law or regulation, or the proceeding is settled by consent or compromise, except to the extent specifically provided as part of the settlement agreement.

DATES: Comments should be submitted on or before November 8, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035 ATTN: Laurie Duarte Washington, DC 20405.

Address e-mail comments submitted via the Internet to: farcase.99–010@gsa.gov.

Please submit comments only and cite FAR case 99–010 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAR case 99–010.

SUPPLEMENTARY INFORMATION:

A. Background

1. FAR Responsibility Criteria

This proposed rule revises FAR 9.104–1(d) and (e) to clarify coverage concerning contractor responsibility considerations, by adding examples of what falls within the existing definition of "an unsatisfactory record of integrity and business ethics." The proposed amendment will provide contracting officers with guidance concerning general standards of contractor compliance with applicable laws when making pre-award responsibility determinations.

A prospective contractor's record of compliance with laws and regulations promulgated by the Federal Government is a relevant and important part of the overall responsibility determination. This proposed FAR amendment clarifies the existing rule by providing several examples of what constitutes an unsatisfactory record of compliance with laws and regulations. These examples are premised on the existing principle that the Federal Government should not enter into contracts with contractors who do not comply with the law. For example, the proposed rule clarifies that a prospective contractor's failure to comply with applicable tax laws may be considered by the contracting officer in making a responsibility determination. Similarly, the proposed rule attempts to clarify the fact that an established record of employment discrimination would be a relevant part of the contracting officer's responsibility determination because such a record or pattern is a strong indication of a contractor's overall willingness or capability to comply with applicable laws.

Normally, the contracting officer should base adverse responsibility determinations involving violations of law or regulation upon a final adjudication by a competent authority concerning the underlying charge. However, in some circumstances, it may be appropriate for the contracting officer to base an adverse responsibility determination upon persuasive evidence of substantial noncompliance with a law or regulation (*i.e.*, not isolated or trivial, but repeated and substantial violations establishing a pattern or practice by a prospective contractor. The facts and circumstances in each such case will require close scrutiny and examination.).

An efficient, economical and well-functioning procurement system requires the award of contracts to organizations that meet high standards of integrity and business ethics and have the necessary workplace practices to assure a skilled, stable and productive workforce. This proposal seeks to further the Government's use of best practices by ensuring the Government does business only with high-performing and successful companies that work to maintain a good record of compliance with applicable laws.

2. Cost Principle Changes

This proposed rule revises the cost principle at FAR 31.205–21 to make unallowable those costs relating to attempts to influence employee decisions regarding unionization. This cost principle change is in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes (see FAR Part 22). Some contractors are claiming, as an allowable cost, those activities designed to influence employees with regard to unionization decisions. Inasmuch as a number of cost-based Federal programs have long made these types of costs unallowable as a matter of public policy (*e.g.*, see 29 U.S.C. 1553(c)(1), 42 U.S.C. 1395x(v)(1)(N), 42 U.S.C. 9839(e), and 42 U.S.C. 12634(b)(1)), equity dictates that this same principle be extended to Government contracts as well.

The proposed rule also revises FAR 31.205–47 to make clear that costs relating to legal and other proceedings are unallowable where the outcome is a finding that a contractor has violated a law or regulation, or where the proceeding was settled by consent or compromise (except that such costs may be made allowable to the extent specifically provided as a part of a settlement agreement). At present, the relevant cost principle generally makes unallowable legal and other proceeding costs where, for example, in a criminal proceeding, there is a conviction; or where, for example, in a civil proceeding, there is a monetary penalty imposed. There are a number of civil proceedings brought by the Federal Government each year that do not result in imposition of a monetary penalty (*e.g.*, NLRB or EEOC proceedings), but which do involve a finding or adjudication that a contractor has violated a law or regulation, and where appropriate remedies are then ordered.

Under the proposed rule, the allowability of legal and other proceedings costs would depend on whether or not a contractor is found to have violated a law or regulation rather than on the nature of the remedy imposed. Taxpayers should not have to pay the legal defense costs,associated

with adverse decisions against contractors, especially where the proceeding is brought by an agency of the Federal Government.

3. Additional Considerations

In order to give greater effect to the FAR responsibility clarifications being proposed, please provide comments and suggestions concerning whether the provision appearing at FAR 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, should be amended to provide for enhanced responsibility disclosure relative to this proposal.

This is not a significant regulatory action and, therefore, was not subject to Office of Management and Budget review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities do not involve use of formal responsibility surveys. In addition, most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not require the submission of cost or pricing data or information other than cost or pricing data, and thus do not require application of the FAR cost principles. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR subparts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 99-010), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed FAR changes do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 9 and 31

Government procurement.

Dated: July 1, 1999.

Jeremy F. Olson,

Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 9 and 31 be amended as set forth below:

1. The authority citation for 48 CFR parts 9 and 31 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Amend section 9.104-1 to revise paragraphs (d) and (e) to read as follows:

9.104-1 General standards.

* * * * *

(d) Have a satisfactory record of integrity and business ethics (examples of an unsatisfactory record may include persuasive evidence of the prospective contractor's lack of compliance with tax laws, or substantial noncompliance with labor laws, employment laws, environmental laws, antitrust laws or consumer protection laws);

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a)) and the necessary workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable and productive workforce;

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Revise section 31.205-21 to read as follows:

31.205-21 Labor relations costs.

(a) Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

(b) Costs incurred for activities related to influencing employees' decision regarding unionization are unallowable.

4. In section 31.205-47, redesignate paragraphs (b)(3) through (b)(5) as paragraphs (b)(4) through (b)(6) and add new paragraph (b)(3); and revise redesignated paragraphs (b)(5) and (b)(6) to read as follows:

31.205-47 Costs related to legal and other proceedings.

* * * * *

(b) * * *

(3) In a judicial or administrative proceeding brought by the Government, a finding that the contractor violated a law or regulation;

* * * * *

(5) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b)(1) through (4) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(6) Not covered by paragraphs (b)(1) through (5) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (5) of this subsection.

* * * * *

[FR Doc. 99-17298 Filed 7-8-99; 8:45 am]

BILLING CODE 6820-EP-P

Mr. OSE. Thank you, Mr. Chairman. As always, you're very thorough. What I'm trying to avoid is again have we opened the door for us to, if you will, run the government more efficient. I don't want us to close the door by virtue of these proposed regulations and place us back into this purgatory where we don't know whether we can or we can't. The standards under which or the standards that are under consideration right now, in my mind, will serve to frustrate and prevent our ability to pursue Congress's intent starting in the last session of Congress. And I think if I could just reenforce one thing to Ms. Lee, it would just be that that will not make some of us very happy. Because——

Mr. HORN. Well, the question certainly is is it in the law or isn't it?

Mr. OSE. Correct. And it's clear here from our discussion alone that it's the intent of Congress to examine whether or not we can privitize or run the government more efficiently. And yet the net result of this, Mr. Chairman, with the nebulous nature of these standards is that we will have achieved with one hand an objective that is taken away from the other. That is a serious, serious concern. Whether you talk about IT or real estate or mere supplies or what have you, it is an evisceration of our ability to achieve our goal. With that I yield back.

Mr. HORN. Well, you have a very pertinent point there. And I think it should be taken into account. If it is specifically said in the law somewhere, that's one thing in the regulation. If it isn't, it shouldn't be an undercutting of the basic law that is trying to get government to be more efficient.

And if we take Mayor Goldsmith's view of how he turned Indianapolis around, he had not only the workers but unions also participating in that. And we don't have a lot of—as I understand it, we don't have a lot of criticism on that because he kept—got everybody involved. And I think that's basically what the Congress and, I think, the administration, certainly some of the things the President said before he was President as well as when he has been President, that efficiency and effectiveness are very important.

So I would hope that the two branches of government can agree on that. And then the question is the procedures. And you've made a very good point. Does one set of procedures countermand the overall attempt here to have effectiveness, financial savings, so forth. But what Mr. Kucinich brought up is certainly a realistic question in terms of look at the benefits. And that's what a lot of people would say. Wait a minute, you know, all you're gaining is taking benefits away. So that comes into play.

Mr. OSE. If the proposed changes to the FAR were to come forward legislatively that's a different question, again. But I keep going back to what the intent of Congress was. And that's the thing that I find so frustrating. It's clear to me that the intent of Congress is to move further in the direction as outlined by the FAIR Act from the last session. And yet my antenna, however poorly refined, tell me that this other action will serve to frustrate that. I don't want to lose regulatorily what we achieve legislatively.

Mr. HORN. Well put. And that's the relationship and a question that we could apply to almost every agency where an authorizing committee might do this, the appropriations subcommittee which

isn't supposed to legislate on an appropriations bill, strong rule of the House, but it's waived on every appropriations bill. So pretty soon, you have the appropriations people giving the signals, and the authorization people giving them. And when you've got two bodies, you've got four entities some of which are undercutting the other. So what else is new in 200 years of democracy and efficiency and effectiveness? So Mr. Walden didn't have any questions.

Mr. OSE. I think I drove him out of the room.

Mr. HORN. No, you've got a very pertinent point. Does staff feel we should ask one or two questions, or should we just send it to them and have them file it for the record? Staff feels one question is worth asking.

So the FAIR Act authorizes OMB to review each agency's commercial activities inventory and consult with the agency regarding its content. Describe the guidance and feedback each of you receive from OMB in the development of your inventories. You want to start with the Department of Commerce then go to GSA then go to EPA. You're a cross section of the American executive branch.

Ms. BILMES. We worked closely with OMB on this as with all issues, but basically they send out their instructions in the form of memos. And we supplied our inventory. They subsequently sent us questions.

Which we are in the process of answering at the moment, including questions about our coding and other particular issues. For example, they've asked us about the National Logistics Supply Center which was listed as exempt. There was a question as to why it was listed as exempt. The situation with this one was that it had been through an A–76 process and was contracted out. There was a problem with the contractor, and the activity come back in house, but with the result that we went from originally—pre-FAIR Act—doing this function in house, with 72 people to contraction out, then to it being done once again in the Commerce Department with only 26 people.

I think the question from OMB was basically to explain the situation; the background with this particular entity. I think it was a worthwhile question because the issue was unclear. Then there is a question about one of our codes, R–600, applied research that we have added for NOAA. Obviously this is a new program. There's some teething pain with the coding. One size did not fit all in terms of how you code what every agency does. We didn't feel there was a code that was appropriate for some of the NOAA functions. So, we requested the R–600 series. They've asked us about that. I think you could summarize by saying that we've had a constructive engagement with OMB to try and refine the process. I discussed with Dee that should she convene any kind of interagency group to work on this and refine it further, we would be happy to participate.

Mr. HORN. Let me ask you, the word participation is what I have not asked about. But did you have an opportunity to go and participate at a lower level of the particular civil service group, let's say with GS–5's down so forth, how did that work in Commerce? Did you get them involved in the participation of this process or was it simply trickling down to the management-side of Commerce? Because when you're into a reform thing like this, having been a chief

executive that's reform oriented, you got to make sure that the people at the grass roots understand what's going on. Because there's a lot of fear that's going to come, the rumor mill, the water coolers, and all the rest. And sometimes the water-cooler gossip is right and way ahead of management. But what did you do on that front?

Ms. BILMES. I think that's a very good question, and I take your point exactly in terms of what you're saying. At the Commerce Department as you know, we have numerous bureaus with different tasks. We had decentralized this to each bureau. I am not familiar with what exactly each bureau did. I will submit back to the record the answer on that.

Mr. HORN. The question is did the Commissioner or the Administrator or the Director consult with other people.

Ms. BILMES. No, I understand your question very well.

Mr. HORN. And that includes the employee unions. I mean granted they can represent sometimes, but sometimes it's just worthwhile to get them all in a room and say here's—Congress did this or didn't do this and OMB is doing it now. And here's what this all means.

Ms. BILMES. I would suspect that some bureaus did and some bureaus did not. But I will go back and ask each bureau how exactly they put together the categories.

Mr. HORN. We'll save a place in the record, and without objection it will be put in the record at this point.

[The information referred to follows:]

Questions for Record
from Testimony of Linda J. Bilmes
before the
Subcommittee on Government Management, Information and Technology
regarding
The Federal Activities Inventory Reform Act
October 28, 1999

(Questions are not verbatim)

QUESTION:

In developing the A-76 inventory, did your Bureau heads consult with employees to the GS5 level, with the Unions and other employee groups? Did you discuss why the inventory was being done, provide them with information about the inventory, and ask them to let their ideas percolate on how to improve the jobs being done in their areas?

RESPONSE:

In producing the FAIR Act inventory, the Department of Commerce (DOC) enlisted its Bureau managers to provide individuals or groups of employees who could review the positions currently active in the Department, based on the National Finance Center payroll records, and assign function codes to these positions in accordance with direction from Office of Management and Budget (OMB) in Circular A-76 and its revisions.

In addition, these individuals or groups were to select from information provided in A-76 a code that would provide an explanation for placing the Full Time Equivalents (FTE) in inherently governmental or commercial exempt, competitive or core categories.

As we continue to target activities for cost comparison, employees at all levels involved in those activities will be fully informed as to why the review is being undertaken. They will be involved in providing input to the comparisons. DOC union leaders will also be included in these discussions. Additionally, the CFO of the Commerce Department will request that each bureau fully involve employees at all levels of the organization in these decisions. Each bureau will be asked to submit a plan for accomplishing this involvement - whether by employee panels, partnership council input, or some other means of generating full participation.

QUESTION:

On page 1 of the inventory (FAIR Act Inventory) you have FTEs in both Core and Exempt columns with a B reason code. These seem to conflict. Could you explain why?

In a recent review of the DOC FAIR Act inventory, my staff discovered a computer sort inconsistency that accounts for these conflicts. This inconsistency will be corrected on the next inventory. The sort did not affect the cumulative FTE figures.

Mr. HORN. How about GSA, Mr. Early?

Mr. EARLY. We opened communication with OMB at the beginning of this activity in the spring of 1998, and maintained a dialog with them through the conclusion of the process. Throughout, we kept OMB apprised of our approach. When we had questions, we discussed them with OMB, and factored their input into our action plans. Once we submitted our inventory to OMB, the only feedback we received was a request for additional detail and a few technical questions. We provided the detail requested and answers to their questions, and that concluded our review and consultation process. OMB did not question the identification of our functions.

Mr. HORN. Within GSA, are you aware how far down into the hierarchy the discussion and ideas percolated? GS–5s, for example, did they get talked to and exposed to and had a chance to ask questions?

Mr. EARLY. We did a top-down approach, but when we conducted training, we involved the union with that. We included our regions. We had numerous communication pieces that went out to all employees by letter and by web to keep all employees at all grade levels current with what we were doing, what our approaches were and the processes that we were undertaking. In the political discussions and decisionmaking, I do not believe we had the grade 5 levels involved. We certainly did have 11's, 12's, and 13's, participating in the identification of functional areas and classifications.

Mr. HORN. Having, in a previous incarnation, taken it down right to the groundwork—the janitors, the Secretaries, the Assistants, so forth—I found you got some terrific ideas there. And all I'm saying is I think—don't underestimate what your people know. Because often they say, why doesn't the boss just think of this? And yet they're too shy to go in and say it because they're afraid somebody will put something in some file or something they'll never get promoted.

Mr. EARLY. We thought about that. And when we looked at the assignment of addressing the classification of inventories, we did not go to that level. The discussion that we had during our training was that when we addressed how to do the business, how to contract it out, how to evaluate the cost, the best way of addressing the delivery of services and such organizations, at that time we would include all those people because that's when those ideas are most helpful and would affect the outcome.

Mr. HORN. Well, thank you.

Ms. Harper, how about the EPA?

Ms. HARPER. Mr. Chairman, we also had had extensive consultation with OMB from the prior—A–76 prior year exercise and continued that as we formulated our inventory. We did a bottom-up inventory. We went out to each of the regional locations and each of the national program managers.

On our central work group, a group looking at consistency and defining issues, we did not go down to the GS–5 level. That was usually a management side representative and union representative. At the EPA, the representative function for our workforce belong to the unions; the labor-management partnership, makes it more challenging to reach far down into the organization without full involvement of the unions.

That said in the individual entities, for instance, in a region, they did have to do a bottom-up. So although it was not a centrally managed involvement, there were entities, I believe, that did get that far down, although I wouldn't be able to tell you right now which those were.

The one thing I would say about our OMB consultation and review, it was an interesting and I think very fruitful dialog between the management side of OMB and our budget examiner side of OMB. I think that was one of the benefits of their review and consultation because we were able to have it put in the context of how much we already contract out and give out grants and cooperative agreements. So that was a very helpful thing that OMB did.

Mr. HORN. Director Lee, what do you think on this? Does OMB ever go down and get the grass-roots feeling on what could be improving the government's efficiency and effectiveness?

Ms. LEE. Mr. Chairman, as you know, OMB is a relatively small organization, some 500 people, and——

Mr. HORN. That is not small to most Americans.

Ms. LEE. OMB itself is a very collegial group. People work together, side by side, hand in hand. We certainly have Mr. Childs, who is the A–76 and the FAIR Act expert, but he worked through the resource management offices, the budget examiners, who in turn worked with each of the agencies. So I would say there is a great deal of knowledge and awareness of what we're trying to do, a recognition that this is the first step of an inventory, those tough management decisions, and how do we and when do we outsource? If that's the right answer, what are the next steps?

Mr. HORN. How many people do you have in OMB that are dealing with management, by the way?

Ms. LEE. All the people at OMB deal with management.

Mr. HORN. You must have been here when Mr. Koskinen gave me the same silly answer, because if 540 people are devoting their efforts to management, it means nobody is devoting their efforts to management. He gave me that at his last appearance here before retirement and before reincarnation as the czar of Y2K.

But no, how many seriously spend a lot of time on management? I'm just curious.

Ms. LEE. Seriously, a lot of people, because we've tried to integrate management and the budget better. So the budget people who used to just focus on the budget, they actually do more. In fact, they're doing Director's reviews as we speak here.

The Director's review packages, actually they address GPRA, how did your agency address GPRA? If there were specific management issues identified, and in fact, there were a couple of agencies where we have some issues with the area acquisition system, you actually have the people who are considered the resource management officers, who used to be considered the budget people, have those things in their review package with the Director and the statutory offices participate in those reviews.

Mr. HORN. Well, I'm glad in the annual budget review that management questions come up. That had been my hope. But I've had so many tell me that it hasn't worked for the last 10 years, that we just aren't getting anywhere on major—well, Y2K is a good example—should have been done years before, took a lot of work to

get them to even do it. And they should have been doing it when the Social Security Administration started.

Ms. LEE. I was supposed to be in a review this afternoon, but I told them I would rather spend the afternoon with you.

Mr. HORN. I knew. I'll forget the oath I've administered to you. I wonder if we have a U.S. attorney that can deal with that response. But OK. I know we don't.

So anyhow did the EPA—let me ask you, did EPA and the Department of Commerce go through a similar process to develop a lot of their inventory basically? Has there been comparability between agencies in terms of the use of the inventory, the categories and the inventory, this kind of thing?

Ms. HARPER. Mr. Chairman, we did not—given that this was our first time through the inventory, we did not do broad consultation with the other agencies and departments. We did have, it sounds like, a very similar process to the Department of Commerce; and in terms of the categorizations that we used, we stuck with the A–76 definitions and we stayed very close, as did the Department of Commerce, with the OMB guidance. Although there was a lot of flexibility, we followed the "let's try and keep it as simple and straightforward as possible" rule.

Ms. BILMES. I think we did follow a fairly similar process, although we did not link our inventory into our GPRA and our strategic plan. But I think that is an excellent idea. As we are redoing our strategic plan, we'll certainly consider doing that this year. I think that's a great idea.

Mr. HORN. You are becoming a professional congressional witness when you say words like that. We are very pleased with that. So thank you.

Let me ask you, Mr. Mihm—I don't want to leave you out here this afternoon, and you looked at the analysis, very thoroughly as usual by the General Accounting Office, how would you rate Federal department and agency compliance with the requirements of the FAIR Act? Did you get a nice little matrix somewhere along the line that checked them off?

Mr. MIHM. That's still work to be done, because we're still at such an early stage with many of the agencies. As I mentioned, some of our largest agencies haven't released their inventories to the public.

We still have the challenge process. As Mr. Ose was mentioning, even beyond the challenge process, we have to start getting into the substantive use of these inventories and decide whether or not we're going to contract out or whether or not, if we do go through a competitive process, the Federal Government wins that competitive process.

It is certainly clear that the FAIR Act has moved competition and competitive contracting much higher on agencies' agendas than I think it was under A–76. A–76, especially in civilian agencies, had been relatively dormant. When OMB requested inventories of commercial activities a couple of years ago, those that they got in some cases were a number of years old. There wasn't a lot of effort to update bid inventories. So unquestionably the current effort to develop inventories effort, because of FAIR, knowing that there would be hearings such as this has certainly moved contracting to

a much higher level on the agencies' agendas. Now, of course, as I mentioned, the next step is to keep carrying through to get better in the inventories next time around and to actually start using those inventories substantively to start making decisions.

Mr. HORN. Well, well said. When do you think some of that will be completed?

Mr. MIHM. Well, one important indicator will be the results of the challenges that interested parties are now eligible to make. We'll be looking very closely at the reports that agencies are required—or that OMB is requiring that they submit. And I think that Ms. Lee's decision to require that agencies in their next round of submissions talk about how they're using these inventories, I think is a wonderful idea and an important achievement. So I think all of that will begin to start giving a very rich body of information as to how these inventories are being used.

Mr. HORN. Are there some models, Ms. Lee, that are acceptable across the executive branch? Is there a possibility here to get a uniform type of appeal system? What's the thinking on this?

Ms. LEE. The uniformity right now is the timeframe. In each agency they were to designate someone to handle the initial appeal, and the Secretary is the final appeal. There has been, I know, some cross-agency discussion about how to answer those. But we are saying, address each individual issue and respond to that challenge as appropriate.

Mr. HORN. Now, is OMB leaving that to the agency and is there an appeal beyond the agency to OMB?

Ms. LEE. No, sir. The FAIR Act specifically says initial appeal must be filed within 30 days to whoever is designated in the agency. And I know the agencies have all designated someone.

The agency has 28 days to respond. Then there's 10 more days if the person receiving the response wants to appeal the challenge. They appeal to the Secretary and the Secretary must respond.

Mr. HORN. Is there guidance one way or the other in terms of who does this in an agency? Is it a member of management? Is it a member of the area that is perhaps being contracted out, outsourced, whatever you want to call it; or is it through the administrative law judge approach? What's the thinking on that?

Ms. LEE. It's left up to the agency to designate the appropriate appeal point.

Mr. HORN. OK. So you could have 14 different ways to solve this?

Ms. LEE. Yes, sir.

Mr. HORN. That's fair enough. Maybe we'll learn something from it. And then go and do it another way the next year or something.

I understand, Ms. Lee, some of the interested parties that have had difficulty obtaining the inventories, some inventories were published on agency websites while others were made available in hard copy. For those that wish to challenge the inclusion or exclusion of an activity on the inventories, it is important that they be readily available. So how would OMB suggest making future inventories more accessible? Do you feel there's a need for that?

Ms. LEE. I feel there's a need to make them readily accessible and as user friendly as we can. As Congressman Sessions noted, we plan to go through and get them all out there so people can see the first round and then get together. And I had committed to his

staff or anyone else that's interested that we would work together on that.

It is interesting to note that as we talk about commercial endeavors, as you know, there is a commercial entity that very quickly picked them up and did consolidate the inventories. So it's an interesting question there of government presentation and commercial value added to this process.

Mr. HORN. This might sound like a silly question, but sometimes people worry about words like this: Many of the inventories used the term "exempt" or "competitive" and "core" to classify the commercial activities. Could you give us a definition for these terms or do you leave that to the agencies?

Ms. LEE. No, sir. We actually have some codes that specify. When I did a cursory review myself, I said, if we were looking at these, I would be looking for Bs and Fs because it clearly tells you that the B code says that it's being looked at and the F code indicates that they have to do some further restructuring or decision-making process.

There are reason codes in the A–76 itself.

Mr. HORN. Now, does that go into a computer program at most of the agencies, or is there a common program that they can plug into that when they're totaling it all up as to is this position exempt or competitive or core, as the case may be, I mean, how do we keep reports on that? Or are we not keeping records on that?

Ms. LEE. We haven't provided them a template. They have determined how to do it themselves, and as we move down this path, we'll figure out if those are going to merge or whether there's some common points that we need to deal with.

Mr. HORN. On page 1, Ms. Bilmes, of the Department of Commerce's inventory, you list a number of activities as core and exempt yet you provide a reason code B for these activities. And reason code B, we believe, says that the activity is subject to a cost comparison.

Could you describe how an activity can be listed as core or exempt yet be subject to cost comparisons?

Ms. BILMES. I can't answer that question off the top of my head.

Mr. HORN. Why don't you answer it for the record?

Ms. BILMES. I will answer it for the record.

I would note that we have questioned a number of things that look like apparent discrepancies. For example, we have 177 FTEs in our aeronautical mapping and charting, which were listed as competitive, but then coded with a G which said "prohibited by legislation from being competitive," so that didn't seem to be reconcilable.

When we actually looked back, and I'm familiar with this particular division because they are one of our last to be Y2K compliant, it developed that the reason is they are being transferred. In fact, the money has already been transferred to the Department of Transportation, but the FTE have not been transferred yet, pending the Y2K compliance effort. We didn't have a specific code in which to capture this situation.

When NOAA did the coding, they basically said this group is competitive but were prohibited by legislation from being competed.

Mr. HORN. Which legislation was that, by the way?

Ms. BILMES. It would be the legislation that was transferring them to the Department of Transportation.

Mr. HORN. I see.

Ms. BILMES. Legislation that is completely unrelated to the FAIR Act legislation.

Mr. HORN. You rang a bell way in the back of my head that in the 1950's I remember the fight between the private enterprise on mapping versus the Department of Commerce on mapping. And that was a long night up here of letters back and forth and all the rest of it. So I guess that's still—that little battle is still around. You're saying somebody, some friendly member, put legislation in on that.

Ms. BILMES. It's nice to know—I just came back from maternity leave—that after 12 weeks some things are still around. It must be nice to know after 30 years some things are still around.

Mr. HORN. Same old thing, right.

And, Ms. Lee, there are only about one or two questions more. As I indicated in the opening statement and as GAO testified, the vast majority of activities have been classified as exempt from the A–76 cost comparison process.

What steps has the OMB taken to ensure the thoroughness and accuracy of the FAIR Act inventories?

Ms. LEE. I think Ms. Bilmes actually addressed what's happening as we go through these; we are asking questions, we're dealing with the agencies. Are we going to catch them all first round? No. But as we do the next inventory—and they actually have to say, here's what I reported last year, here's what has been accomplished on that—we'll just continue to work through it.

Mr. HORN. OK. We might send you a few questions for the record and they would be put in the record at this place. And, sorry, I didn't mean to take all that time.

I didn't see you come back into the room.

Mr. OSE. I have been sitting here listening. I'm sitting here listening to your questions.

When you talked about how many folks are at OMB, it spurred a question in my mind and, Ms. Lee, I want to come back to you on this: These proposed regulations that we were talking about earlier, who's preparing them? Who prepared them? Who's in charge of them?

Ms. LEE. The proposed regulation is to—the proposed regulation of the Federal Acquisition Regulation, it is prepared by the FAR Council. The council is made up of—the principals on the council are representatives from the General Services Administration, which is currently Ms. Ida Usted.

Mr. OSE. Would you spell that please?

Ms. LEE. I-d-a U-s-t-e-d. She has been ill. And there is someone acting in her stead. The Deputy—the Administrator for Procurement at NASA, and that is Mr. Tom Luedtke and——

Mr. OSE. Would you spell that. I know how to spell Tom.

Ms. LEE. L-u-e-d-t-k-e, I believe.

Mr. OSE. L-u-e-d-t-k-e.

Ms. LEE. A good Wisconsin man.

And Ms. Eleanor Spectre, who is, you probably know, from the Department of Defense. The makeup of the council is like that be-

cause they basically—DOD Title 10, GSA Title 41 represents civilian agencies, and NASA is sometimes Title 10 and sometimes 41. And that's how that council is made up. Below them, of course, they have a subcouncil made up of working folks who—and I actually have a review with this group probably every other month of all the cases and all the rules that they are promulgating, most of them generating from various pieces of legislation or changes in our system, clarifications that are requested. The FAR, as you know, is actually kind of the working book for the many, many contracting officers out there.

Mr. OSE. Could you tell us the legislation under which Ms. Usted, Mr. Luedtke, and Ms. Spectre are proposing these changes to the FAR? I mean, not the authority, but the—because I got the authority cited, but the legislation driving the change?

Ms. LEE. There is not a specific legislation that I—on this particular activity. As you know, we're proposing to clarify or add a parenthetical under some policy that is already in the FAR. There is a statement currently, right now—I wish I could give you the cite, 9105.4(d) maybe—that says that every offer, before you can do business with the government, you must have—one of the many conditions, you must have a satisfactory record of business ethics and integrity. That is currently in the Federal regulation based on the Office of Federal Procurement Policy regulation, which I couldn't provide you the cite of, but there is a legislative, statutory basis for that.

We're proposing to add the parenthetical under there that further describes what a satisfactory record of business ethics and integrity is.

Mr. OSE. I think that is where the discussion is based.

Ms. LEE. Yes, sir, I think it is.

Mr. OSE. Thank you, Mr. Chairman.

Mr. HORN. Thank you very much.

I guess we could say in summary here that the Federal agencies' Office of Management and Budget still have a lot of work ahead to fully implement the FAIR Act, and that would include the public release of more inventories and the resolution of challenges.

What would be the other big categories that your own feeling is?

Ms. LEE. You clearly articulated the next releases of inventories that everyone is probably familiar with; DOD is a large one. I owe an answer to Congressman Sessions about how we are going to make this some 2,000-page inventory easily and readily available. And that's something we're working on.

After we get those all out—the goal is to get all the inventories out by December—we need to get back together and say what did we learn, what did we learn in the challenge process, what did we learn in the preparation process and what direction and information do we need to get out better information, because it's already almost time to start for next inventories next year. June 30th, they're due.

Mr. HORN. Yeah. Does OMB anticipate making any changes in its guidance for the remaining inventories that are already due out?

Ms. LEE. No, sir. The inventories with three exceptions are in the consultation and review process. The one significant change we

have made. Mr. Childs and another person in our office have called every single number and said, are you ready, do you understand what you're supposed to do when it comes out tomorrow? Because we did have two erroneous phone numbers the last time. So they've been on the phone, making 42 phone calls, checking and double-checking.

Mr. HORN. Well, beyond the ones we've had in this exchange and what you said in your testimony and what you said just now and tomorrow, how do you plan to improve the process for the future? Any other particular plans that we haven't discussed?

Ms. LEE. I don't have the specifics—certainly we are concerned about the timely accessibility because of the short challenge period. And I think we'll need to discuss among the agencies, abd certainly with you and your staffs, any recommendations for that. I've had everything from people who say, put it on a disc and distribute the disc, to put it on the Internet, to make sure we have a method of distribution. And there has been some comment perhaps about more commonality among the inventories themselves.

The other quite valuable comment that I've heard is, to provide more of an explanation on the front of the inventories. We probably missed that because we saw it as a big picture, but yet if you just pull one agency's inventory without the big picture to support it, it can be quite confusing. So maybe we need an instruction to the reader that says, here's what you're seeing, here's what that all means. And that's a possible part of the new package.

Mr. HORN. Well, I think that's a very good idea. I certainly think using the Internet is very good idea. I think we've got to use it a lot more throughout government in just this type of situation. It could save everybody a lot of time once you get the thing working in some sensible way.

And I think we'll be asking the General Accounting Office their thoughts on that. But that's another meeting, shall we say.

And I guess in terms of the other things we might think about is the degree—you mentioned FAR, and the degree to which the Clinger-Cohen Act has made a difference. And you've got obviously a very fine set of people on there that deal with those. And you dealt with those as a member in NASA, didn't you?

Ms. LEE. Yes, sir.

Mr. HORN. So we'll be holding a hearing in a few months on the Clinger-Cohen thing and streamlining the acquisition process, if it's happening. If it isn't, why, then why not—that sort of thing.

So thank you all for coming. I am now going to thank the staff for its work in putting this together. And most of you know the staff director, J. Russell George, chief counsel; Randy Kaplan is on my left, your right, who set up the immediate hearing; Bonnie Heald is director of communications down there at the end, professional staff member; Chip Ahlswede, clerk for the subcommittee. And then we've got Rob Singer, a staff assistant; P.J. Caceres, an Intern; and Deborah Oppenheim, an intern—they're both giving all of us great help.

Minority Staff: Trey Henderson, professional staff member; and Jean Gosa, minority staff assistant.

And Julia Thomas has been today's court reporter.

Thank you very much, all. And with that, we're adjourned.

[Whereupon, at 4:45 p.m., the subcommittee was adjourned.]

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