



BCFC Comment to SBA-OMB-DOC Task Force – June 30, 2010

Unfair government-sponsored competition has been a top issue at every White House Conference on Small Business.

In 1980, the first White House Conference on Small Business made unfair competition one of its highest-ranked issues. It said, "The Federal Government shall be required by statute to contract out to small business those supplies and services that the private sector can provide. The government should not compete with the private sector by accomplishing these efforts with its own or non-profit personnel and facilities."

In 1986, the second White House Conference made this one of its top three issues. It said, "Government at all levels has failed to protect small business from damaging levels of unfair competition. At the federal, state and local levels, therefore, laws, regulations and policies should ... prohibit direct, government created competition in which government organizations perform commercial services ... New laws at all levels, particularly at the federal level, should require strict government reliance on the private sector for performance of commercial-type functions. When cost comparisons are necessary to accomplish conversion to private sector performance, laws must include provision for fair and equal cost comparisons. Funds controlled by a government entity must not be used to establish or conduct a commercial activity on U.S. property."

And the 1995 White House Conference again made this a priority issue when its plank read, "Congress should enact legislation that would prohibit government agencies and tax exempt and anti-trust exempt organizations from engaging in commercial activities in direct competition with small businesses." That was among the top 15 vote getters at the 1995 Conference and was number one among all the procurement-related issues in the final balloting.

However, the unfair government-sponsored competition issue has not been a top priority for Congress, or the White House (under either party), for several years.

Since the enactment of the Federal Activities Inventory Reform (FAIR) Act in 1998, and the implementation of "competitive sourcing" by the Bush Administration, (OMB Circular A-76, revised May 29, 2003), the focus on a broader, philosophical issue of government not competing with its citizens has been lost in favor of the narrower attention to A-76.

Issue Background

Today, the Federal government owns and operates hundreds of activities that are commercial in nature. They are functions that are not inherent or unique to government, but rather they can be found in the Yellow Pages from small businesses on Main Street in virtually every town in America.

In his first term, President Bush made a good start with his "competitive sourcing" initiative. This activity, a key part of the President's Management Agenda, requires Federal agencies to subject commercial activities of the government to market-based competition. Under the FAIR Act, first implemented by President Clinton in 1998, agencies identified more than 850,000 Federal employee positions that are "commercial" in nature. These commercial activities – those operated by a Federal executive agency and which provides a product or service that could be obtained from a commercial source, include such positions as mapping, computer programming, landscaping, photography, construction, laundry services,

printing, auto repair and engineering. Competitive sourcing required agencies to compete these functions against the private sector, with the provider offering the best value to the taxpayer – regardless of whether that provider is the government employees or a private firm – getting to do the work. Since the government's in-house incumbent had to modernize and economize in order to beat the private sector, the taxpayer wins regardless of whether the work stayed in-house or got contracted.

Competitive sourcing should be an arrow in the private sector's quiver – not the entire arsenal. Even the modest Bush program has been thwarted by Congress, with restrictions on the FAIR Act and A-76 competitions. The Obama Administration is moving in the wrong direction – it is “in-sourcing” work from private enterprise to government employee performance and broadening the definition of inherently governmental functions, candidly called “**Work Reserved for Performance by Federal Government Employees**”.

BCFC favors direct conversion contracting out, vouchers, asset sales and leases, public-private partnerships, privatization, divestiture, and other instruments to transfer activities from the government to the private sector should be implemented. For a comprehensive list of such strategies and instruments, see the General Accounting Office publication, “Terms Related to Privatization Activities and Processes”, GAO/GGD-97-121, July 1997.)

BCFC recommends renewal of a little-used policy of the government that dates to the Eisenhower Administration. That policy, prior to 2003, provided that –

in the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs ... The Federal Government shall rely on commercially available sources to provide commercial products and services ... the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

While the Bush Administration took a significant step toward efficiency through competitive sourcing, a broader look at government agencies, programs and activities is needed to identify those that have outlived their usefulness, have lingered despite achieving their original goals, or should no longer be part of the government funding – irrespective of whether they are performed by contractors or government employees. The aforementioned policy was *eliminated* from OMB Circular A-76 by the Bush Administration in 2003.

How Does the Government Compete or Facilitate Unfair Competition?

The following is a summary of just a few of the ways in which the Federal Government creates or supports unfair government-sponsored competition with the private sector.

Government Competition/Utilization of the Private Sector – Since the first Hoover Commission in the 1940s, and through each White House Conference on Small Business in the 1980s-1990s, government duplication of and competition with the private sector has been a major public policy issue for government (Federal, as well as state and local), and has had a particularly severe impact on small business. The issue, however, has lost its visibility and priority. Most attention to the issue has been limited to cost-comparisons under OMB Circular A-76 and the Bush Administration's “competitive sourcing” initiative (see below). The foundation principle of the Eisenhower Administration's landmark 1955 Bureau of the Budget Bulletin 55-4, that it is the policy of “the Federal Government that it will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels,” should be the fundamental tenet of

Federal policy. The high moral and philosophical ground should be taken on this principle, and A-76 and competitive sourcing should be implemented as one (but not the only) tool to accomplish this goal.

Competitive Sourcing - The Bush Administration's "competitive sourcing" program (implemented by OMB Circular A-76) is under attack. The Bush revisions to the Circular have been stopped by numerous provisions added to appropriations bills and the Defense Authorization bill. A provision in the FY10 Omnibus Appropriations bill effectively placed a moratorium on such public-private competitions. Moreover, according to OMB's most current data, 91 percent of competitions were won by the Federal employees. About half of all competitions did not attract a private sector offer. Private sector confidence in the revised A-76 evaporated.

Non-Profit Competition – Nonprofit organizations unfairly compete with private, for-profit businesses by engaging in commercial activities, but not paying taxes. This also denies the government revenue. Then-Senate Finance Chairman Grassley and House Ways and Means Chairman Thomas both investigated abuses by non-profit and tax exempt organizations in the 109th Congress, but there was no legislative remedy. From YMCA's competing with private health clubs to credit unions competing with banks to rural electric and telephone cooperatives competing with investor-owned utilities, nonprofit organizations, provided special tax status under sec. 501(c) of the Internal Revenue Code, unfairly compete with the private sector. Their special "exempt" treatment is clearly intended for "governmental" activities, rather than commercial. A report by the tax-writing Committee on Ways and Means of the U.S. House of Representatives noted:

"The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds and by the benefits resulting from promotion of the general welfare."

Source: (Unfair Competition: The Profits of Nonprofits, James T. Bennett, Thomas H. DiLorenzo, Hamilton Press, 1989, p. 26)

Policies that prevent nonprofit organizations from engaging in unfair competition (via the tax code) with the private sector should be implemented.

Prison Industries - Federal Prison Industries unfairly compete with the private sector. Provisions in Defense Authorizations bills and Appropriations bills have curbed FPI's mandatory source status. Comprehensive reform passed the House in the 108th Congress (a vote of 350 to 65, November 2003, H.R. 1829, and a bill was reported by the Senate Governmental Affairs Committee, S. 346). In the 109th Congress, the bills are H.R. 2965 and S.749; the House bill passed 362-57 on September 14, 2006). Federal and State prison industries are also opening the commercial market for inmate services. Enactment of FPI reform legislation, create a level competitive playing field, eliminate unfair prison industry advantages, and a prohibit prison industry participation in the commercial market should be a priority.

Universities - Schools of higher education are increasingly venturing away from their core missions of teaching and conducting basic research. Financial pressures, ranging from reduced government funding to pressures to limit tuition increases have led university presidents to transform academicians into entrepreneurs. Universities are generating revenues from commercial activities to supplement their budgets. Universities enjoy significant advantages over for-profit companies. They are eligible for billions of dollars in grants from Federal and State governments. They often have the ability to secure non-competitive, sole source contracts with government agencies. They pay no taxes. Their overhead – buildings, electricity, even equipment, is already paid for and is provided for "free". Their student labor force is either unpaid or compensated at well below prevailing market wages. They carry no professional liability insurance, do not have to pay unemployment compensation and in many cases are exempt from social security contributions. When universities enter into contracts to perform services, they usually insist on "best effort" clauses, which absolve them of ever completely finishing a project. They are also recipients of millions of dollars in free or discounted hardware and software, donated from vendor firms so

that students will learn on their systems, be proficient in their use upon graduation and instill a consumer loyalty that will translate into sales once these students move up in the ranks of their private sector employers. The advantages universities bring to the market make it virtually impossible for private firms to compete. Policies that restrict universities to their education and research missions and prevent unfair competition with the private sector should be enacted.

Conclusion

In order to organize the private sector community, the Business Coalition for Fair Competition (BCFC) urges the task force to implement policies wherein the government utilizes the private sector, including small business, to the maximum extent possible; fights unfair competition with and duplication of the private sector by government, universities, nonprofits and prison industries; and recommends policies and legislation to assure that the U.S. Government supports, rather than impede, growth in the small business community. We urge a moratorium on insourcing and the withdrawal of the OMB/OFPP inherently governmental/ Work Reserved for Performance by Federal Government Employees proposal.

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