September 8, 2020

The Honorable James Comer, Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives
Washington, DC 20515

Dear Ranking Member Comer:

The Business Coalition for Fair Competition (BCFC) is a national coalition of businesses, associations, taxpayer organizations, and think tanks that are committed to reducing all forms of unfair government created, sponsored, and provided competition with the private sector. BCFC believes the free enterprise system is the most productive and efficient provider of goods and services and strongly supports the Federal government utilizing the private sector for commercially available products and services to the maximum extent possible.

In response to your inquiry of the business community in identifying job killing regulations to roll back, BCFC urges your oversight and investigation into **unfair government competition with the private sector.**

Specifically, *we offer three regulations for your review and oversight*:

1) The March 4, 2009 Obama Administration memo on "Government Contracting" (FR Doc. E9-4938);
2) The September 12, 2011 Final Policy Letter on Performance of Inherently Governmental and Critical Functions (76 FR 56227); and
3) OMB Circular A-76 (USC 48 CFR 7.3).

History

As far back as 1932, a Special Committee of the House of Representatives expressed concern over the extent to which the government engaged in activities which might be more appropriately performed by the private sector. The first and second Hoover Commissions expressed similar concern in the 1940's and recommended legislation to prohibit government duplication of private enterprise. However, there was no formal policy until 1955, when the House passed, and the Senate Committee reported legislation to require the Executive Branch to increase its reliance on the private sector. Final action was dropped only upon assurance from the Eisenhower Administration that the Executive Branch would implement the policy administratively. Bureau of the Budget Bulletin 55-4 was issued in 1955 prohibiting agencies from carrying on any commercial activities which could be provided by the private sector. Exceptions were permitted only when it could be clearly demonstrated in specific cases that the use of the private sector would not be in the public interest.

Issued January 15, 1955, that policy directive stated: "the Federal Government 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". President Eisenhower's policy has remained on the

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books for almost 50 years and endorsed by Republican and Democratic Administrations, in Office of Management Budget Circular A-76, until it was removed by President George W. Bush in 2003.

Each time Congress has authorized a White House Conference on Small Business (1980, 1986, and 1995) – a convention of small business men and women who adopt a platform of issues for action by Congress and the executive Branch – unfair government competition with and duplication of the private sector has been a top concern.

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.

Not since the President Reagan created a Commission on Privatization has there been a focus on reducing the size of government and transferring to the private sector those Federal activities that are commercially available. The Report of the President's Commission on Privatization, "Privatization: Toward More Effective Government, April 1988, laid a strong foundation, but since it was issued at the end of Reagan's second term, little action was taken. The Small Business Administration's Office of Advocacy conducted a series of hearings and issued a report, "Government Competition: A Threat to Small Business", (March 1980), and "Unfair Competition by Nonprofit Organizations With Small Business: An Issue for the 1980s" (June, 1984). It offered testimony, when requested by the House and Senate Small Business Committees, in 1988 and 1996 and conducted some research on non-profit competition in 1999.

In 1998, Congress enacted the Federal Activities Inventory Reform (FAIR) Act, Public Law 105-270. First implemented by President Clinton, agencies identified were required to conduct an annual inventory of activities that are "commercial" in nature – perform a Yellow Pages Test. The first inventory found more than 850,000 Federal employee positions are commercial, out of a total Federal workforce (not including Postal Service or uniformed military personnel) of 1.8 million. As of FY2013, there were 1.12 Million Federal employee positions that are commercial in nature. Some 50 percent of the Federal workforce is in commercial activities operated by a Federal executive agency which provides a product or service that could be obtained from a commercial source; including such activities as mapping, computer programming, laboratory accreditation, landscaping, photography, construction, laundry services, printing, auto repair, and engineering.

These are activities performed by Federal employees in Federal government agencies that duplicate and compete with the private sector, including small business, found in the Yellow Pages on Main Street, USA.

In his first term, President George W. Bush made a good start with his "competitive sourcing" initiative. This activity, a key part of the President's Management Agenda, required Federal agencies to subject commercial activities of the government to market-based competition. 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 have been 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.

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 – More than 1,200,000 Federal employees are engaged in occupations that are commercial in nature. According to research conducted by Dr. Ron Utt of The Heritage Foundation, Director of President Reagan's Office of Privatization, if market-based competition were applied to all 1,120,000 positions, some $27 billion, and perhaps more, could be saved annually for five years.

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, as well as nonprofit health and life insurance companies, 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." (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. The FIRST STEP Act of 2018 expanded the markets FPI can expand, and a July 2020 GAO Report outlined such expansion. It should also be noted that Chairwoman Carolyn Maloney (D-NY) has been a long-time advocate for reforming FPI having most recently cosponsored the Small Business Protection Act (H.R. 4671) with Rep. Bill Huizenga (R-MI) in the 114th Congress.

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.

Bailouts & Government Corporations - The American voter has become angered at the conduct of government-sponsored enterprises and corporations, as well as a variety of bailouts of the private sector. The view that America is a nation based on free market principles is becoming blurred. Whether it is bailouts of the auto industry, insurance companies and banks, or government-run corporations such a Fannie Mae, Freddie Mac, the Corporation for Public Broadcasting, or the Postal Service, to government takeover of student loans and health care, the American people see billions of dollars in losses that make the debt and deficit worse and unsustainable.

Insourcing

On March 4, 2009, the Obama Administration issued a memo on "Government Contracting" (FR Doc. E9-4938), which began the recent "insourcing" policy – the conversion of work currently performed by private sector contractor firms to performance by Federal government employees. The memo stated:

> "Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition. However, the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when

> outsourcing is and is not appropriate. … Finally, the Federal Government must ensure that those functions that are inherently governmental in nature are performed by executive agencies and are not outsourced. … I further direct the Director of OMB, in collaboration with the aforementioned officials and councils, and with input from the public, to develop and issue by September 30, 2009, Government-wide guidance to: … (4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note)."

In August 2010, Defense Secretary Robert Gates said, "We weren't seeing the savings we had hoped from insourcing." ("Insourcing failed, DOD's Gates says. Now what?" *Federal Computer Week,* August 10, 2010.)

This shift to government performance of commercial activities not only hinders the private sector, including small and minority owned business, but places additional costs on taxpayers during a lengthened period of a steep decline in the nation's economy, a staggering national debt, and a high national rate of unemployment. The government intrusion and competition in the private market that insourcing brings is having a detrimental effect on capital investment and job creation. Insourcing not only impacts private firms, including small and minority owned firms which have lost jobs or have jobs threatened by the insourcing of Federal contracts, but the policy also increases private sector unemployment and shrinks state and local tax revenues.

Since 2009, Congress has enacted a series of prohibitions on contracting with the private sector in general and OMB Circular A-76 in particular. See the Congressional Research Service report at: https://fas.org/sgp/crs/misc/R40854.pdf. These moratoria have cost taxpayers hundreds of millions of dollars and stifled private sector job creation, while wasting tax dollars. Congress should repeal each of these provisions of law and reinstate A-76.

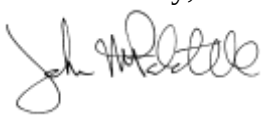
Increased utilization of the private sector has been endorsed by various Inspectors General, the Government Accountability Office (GAO), the Congressional Budget Office, the Grace Commission, and many other independent organizations.

Conclusion

We suggest your committee work to reverse these trends, advocate an immediate moratorium on insourcing, develop a clear and objective metric for justifying and determining cost-effectiveness of government performance of commercial activities to protect the interest of taxpayers, eliminate bailouts and government performance of activities best left to the private sector, and end direct and indirect government subsidies that impede the ability of a competitive private market to flourish, create jobs, and contribute to society and the quality of life for all Americans.

Finally, your committee should roll back these job killing regulatory policies (FR Doc. E9-4938 and USC 48 CFR 7.3), repeal the A-76 limitations and moratoria, and help return to the Federal policy, beginning in 1955, that recognizes that real economic growth and job creation is in the private sector, and emphasizes that government should not compete with its citizens, but should rely on the private sector to the maximum extent possible.

Sincerely,



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