

Calendar No. 502

105TH CONGRESS
2D SESSION**S. 314****[Report No. 105-269]**

To require that the Federal Government procure from the private sector the goods and services necessary for the operations and management of certain Government agencies, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1997

Mr. THOMAS (for himself, Mr. HAGEL, Mr. KYL, Mr. ENZI, Mr. BROWNBACK, Mr. CRAIG, Mr. HUTCHINSON, Mr. BURNS, Mr. FAIRCLOTH, Mr. SHELBY, Mr. HELMS, Mr. GRAMS, Mr. ALLARD, Mr. MACK, Mr. WYDEN, Mr. COCHRAN, and Mr. ABRAHAM) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

JULY 28, 1998

Reported by Mr. THOMPSON, with an amendment and an amendment to the title

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To require that the Federal Government procure from the private sector the goods and services necessary for the operations and management of certain Government agencies, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Freedom From Gov-
3 ernment Competition Act of 1997”.

4 **SEC. 2. FINDINGS.**

5 Congress finds and declares that—

6 (1) private sector business concerns, which are
7 free to respond to the private or public demands of
8 the marketplace, constitute the strength of the
9 American economic system;

10 (2) competitive private sector enterprises are
11 the most productive, efficient, and effective sources
12 of goods and services;

13 (3) government competition with the private
14 sector of the economy is detrimental to all busi-
15 nesses and the American economic system;

16 (4) government competition with the private
17 sector of the economy is at an unacceptably high
18 level, both in scope and in dollar volume;

19 (5) when a government engages in entre-
20 preneurial activities that are beyond its core mission
21 and compete with the private sector—

22 (A) the focus and attention of the govern-
23 ment are diverted from executing the basic mis-
24 sion and work of that government; and

25 (B) those activities constitute unfair gov-
26 ernment competition with the private sector;

1 (6) current laws and policies have failed to ad-
2 dress adequately the problem of government com-
3 petition with the private sector of the economy;

4 (7) the level of government competition with the
5 private sector, especially with small businesses, has
6 been a priority issue of each White House Con-
7 ference on Small Business;

8 (8) reliance on the private sector is consistent
9 with the goals of the Government Performance and
10 Results Act of 1993 (Public Law 103-62);

11 (9) reliance on the private sector is necessary
12 and desirable for proper implementation of the Fed-
13 eral Workforce Restructuring Act of 1994 (Public
14 Law 103-226);

15 (10) it is in the public interest that the Federal
16 Government establish a consistent policy to rely on
17 the private sector of the economy to provide goods
18 and services that are necessary for or beneficial to
19 the operation and management of Federal Govern-
20 ment agencies and to avoid Federal Government
21 competition with the private sector of the economy;
22 and

23 (11) it is in the public interest for the private
24 sector to utilize employees who are adversely af-
25 fected by conversions to use of private sector entities

1 for providing goods and services on behalf of the
2 Federal Government.

3 **SEC. 3. RELIANCE ON THE PRIVATE SECTOR.**

4 (a) GENERAL POLICY.—Notwithstanding any other
5 provision of law, except as provided in subsection (c), each
6 agency shall procure from sources in the private sector all
7 goods and services that are necessary for or beneficial to
8 the accomplishment of authorized functions of the agency.

9 (b) PROHIBITIONS REGARDING TRANSACTIONS IN
10 GOODS AND SERVICES.—

11 (1) PROVISION BY GOVERNMENT GEN-
12 ERALLY.—No agency may begin or carry out any ac-
13 tivity to provide any products or services that can be
14 provided by the private sector.

15 (2) TRANSACTIONS BETWEEN GOVERNMENTAL
16 ENTITIES.—No agency may obtain any goods or
17 services from or provide any goods or services to any
18 other governmental entity.

19 (c) EXCEPTIONS.—Subsections (a) and (b) do not
20 apply to goods or services necessary for or beneficial to
21 the accomplishment of authorized functions of an agency
22 under the following conditions:

23 (1) Either—

1 ~~(A) the goods or services are inherently~~
 2 ~~governmental in nature within the meaning of~~
 3 ~~section 6(b); or~~

4 ~~(B) the Director of the Office of Manage-~~
 5 ~~ment and Budget determines that the provision~~
 6 ~~of the goods or services is otherwise an inher-~~
 7 ~~ently governmental function.~~

8 ~~(2) The head of the agency determines that the~~
 9 ~~goods or services should be produced, provided, or~~
 10 ~~manufactured by the Federal Government for rea-~~
 11 ~~sons of national security.~~

12 ~~(3) The Federal Government is determined to~~
 13 ~~be the best value source of the goods or services in~~
 14 ~~accordance with regulations prescribed pursuant to~~
 15 ~~section 4(a)(2)(C).~~

16 ~~(4) The private sector sources of the goods or~~
 17 ~~services, or the practices of such sources, are not~~
 18 ~~adequate to satisfy the agency's requirements.~~

19 **SEC. 4. ADMINISTRATIVE PROVISIONS.**

20 ~~(a) REGULATIONS.—~~

21 ~~(1) OMB RESPONSIBILITY.—The Director of~~
 22 ~~the Office of Management and Budget shall pre-~~
 23 ~~scribe regulations to carry out this Act.~~

24 ~~(2) CONTENT.—~~

1 (A) PRIVATE SECTOR PREFERENCE.—Con-
 2 sistent with the policy and prohibitions set forth
 3 in section 3, the regulations shall emphasize a
 4 preference for the provision of goods and serv-
 5 ices by private sector sources.

6 (B) FAIRNESS FOR FEDERAL EMPLOY-
 7 EES.—In order to ensure the fair treatment of
 8 Federal Government employees, the regula-
 9 tions—

10 (i) shall not contravene any law or
 11 regulation regarding Federal Government
 12 employees; and

13 (ii) shall provide for the Director of
 14 the Office of Management and Budget, in
 15 consultation with the Director of the Office
 16 of Personnel Management, to furnish in-
 17 formation on relevant available benefits
 18 and assistance to Federal Government em-
 19 ployees adversely affected by conversions to
 20 use of private sector entities for providing
 21 goods and services.

22 (C) BEST VALUE SOURCES.—

23 (i) STANDARDS AND PROCEDURES.—
 24 The regulations shall include standards
 25 and procedures for determining whether it

1 is a private sector source or an agency that
 2 provides certain goods or services for the
 3 best value.

4 (ii) FACTORS CONSIDERED.—The
 5 standards and procedures shall include re-
 6 quirements for consideration of analyses of
 7 all direct and indirect costs (performed in
 8 a manner consistent with generally accept-
 9 ed cost-accounting principles); the quali-
 10 fications of sources; the past performance
 11 of sources; and any other technical and
 12 noncost factors that are relevant.

13 (iii) CONSULTATION REQUIREMENT.—
 14 The Director shall consult with persons
 15 from the private sector and persons from
 16 the public sector in developing the stand-
 17 ards and procedures.

18 (D) APPROPRIATE GOVERNMENTAL ACTIVI-
 19 TIES.—The regulations shall include a meth-
 20 odology for determining what types of activities
 21 performed by an agency should continue to be
 22 performed by the agency or any other agency.

23 (b) COMPLIANCE AND IMPLEMENTATION ASSIST-
 24 ANCE.—

1 ~~(1) OMB CENTER FOR COMMERCIAL ACTIVITIES.—~~The Director of the Office of Management
 2 ~~and Budget shall establish a Center for Commercial~~
 3 ~~Activities within the Office of Management and~~
 4 ~~Budget.~~

6 ~~(2) RESPONSIBILITIES.—~~The Center—

7 ~~(A)~~ shall be responsible for the implemen-
 8 ~~tation of and compliance with the policies,~~
 9 ~~standards, and procedures that are set forth in~~
 10 ~~this Act or are prescribed to carry out this Act;~~
 11 ~~and~~

12 ~~(B)~~ shall provide agencies and private sec-
 13 ~~tor entities with guidance, information, and~~
 14 ~~other assistance appropriate for facilitating con-~~
 15 ~~versions to use of private sector entities for pro-~~
 16 ~~viding goods and services on behalf of the Fed-~~
 17 ~~eral Government.~~

18 **SEC. 5. STUDY AND REPORT ON COMMERCIAL ACTIVITIES**
 19 **OF THE GOVERNMENT.**

20 ~~(a) ANNUAL PERFORMANCE PLAN.—~~Section 1115(a)
 21 ~~of title 31, United States Code, is amended—~~

22 ~~(1)~~ by striking “and” at the end of paragraph
 23 ~~(5);~~

24 ~~(2)~~ by striking the period at the end of para-
 25 ~~graph (6) and inserting “; and”; and~~

1 ~~(3)~~ by adding at the end the following:

2 ~~“(7) include—~~

3 ~~“(A) the identity of each program activity~~
 4 ~~that is performed for the agency by a private~~
 5 ~~sector entity in accordance with the Freedom~~
 6 ~~From Government Competition Act of 1997;~~
 7 ~~and~~

8 ~~“(B) the identity of each program activity~~
 9 ~~that is not subject to the Freedom From Gov-~~
 10 ~~ernment Competition Act of 1997 by reason of~~
 11 ~~an exception set forth in that Act, together with~~
 12 ~~a discussion specifying why the activity is deter-~~
 13 ~~mined to be covered by the exception.”.~~

14 ~~(b) ANNUAL PERFORMANCE REPORT.—Section~~
 15 ~~1116(d)(3) of title 31, United States Code, is amended—~~

16 ~~(1) by striking “explain and describe,” in the~~
 17 ~~matter preceding subparagraph (A);~~

18 ~~(2) in subparagraph (A), by inserting “explain~~
 19 ~~and describe” after “(A)”;~~

20 ~~(3) in subparagraph (B)—~~

21 ~~(A) by inserting “explain and describe”~~
 22 ~~after “(B)”;~~ and

23 ~~(B) by striking “and” at the end;~~

24 ~~(4) in subparagraph (C)—~~

1 (A) by inserting “explain and describe”
2 after “infeasible,”; and

3 (B) by inserting “and” at the end; and
4 (5) by adding at the end the following:

5 “(D) in the case of an activity not performed
6 by a private sector entity—

7 “(i) explain and describe whether the activ-
8 ity could be performed for the Federal Govern-
9 ment by a private sector entity in accordance
10 with the Freedom From Government Competi-
11 tion Act of 1997; and

12 “(ii) if the activity could be performed by
13 a private sector entity, set forth a schedule for
14 converting to performance of the activity by a
15 private sector entity;”.

16 **SEC. 6. DEFINITIONS.**

17 (a) AGENCY.—As used in this Act, the term “agency”
18 means the following:

19 (1) EXECUTIVE DEPARTMENT.—An executive
20 department as defined by section 101 of title 5,
21 United States Code.

22 (2) MILITARY DEPARTMENT.—A military de-
23 partment as defined by section 102 of such title.

1 ~~(3) INDEPENDENT ESTABLISHMENT.—An inde-~~
 2 ~~pendent establishment as defined by section 104(1)~~
 3 ~~of such title.~~

4 ~~(b) INHERENTLY GOVERNMENTAL GOODS AND~~
 5 ~~SERVICES.—~~

6 ~~(1) PERFORMANCE OF INHERENTLY GOVERN-~~
 7 ~~MENTAL FUNCTIONS.—For the purposes of section~~
 8 ~~3(c)(1)(A), goods or services are inherently govern-~~
 9 ~~mental in nature if the providing of such goods or~~
 10 ~~services is an inherently governmental function.~~

11 ~~(2) INHERENTLY GOVERNMENTAL FUNCTIONS~~
 12 ~~DESCRIBED.—~~

13 ~~(A) FUNCTIONS INCLUDED.—For the pur-~~
 14 ~~poses of paragraph (1), a function shall be con-~~
 15 ~~sidered an inherently governmental function if~~
 16 ~~the function is so intimately related to the pub-~~
 17 ~~lic interest as to mandate performance by Fed-~~
 18 ~~eral Government employees. Such functions in-~~
 19 ~~clude activities that require either the exercise~~
 20 ~~of discretion in applying Federal Government~~
 21 ~~authority or the making of value judgments in~~
 22 ~~making decisions for the Federal Government,~~
 23 ~~including judgments relating to monetary trans-~~
 24 ~~actions and entitlements. An inherently govern-~~
 25 ~~mental function involves, among other things,~~

1 the interpretation and execution of the laws of
2 the United States so as to—

3 (i) bind the United States to take or
4 not to take some action by contract, policy,
5 regulation, authorization, order, or other-
6 wise;

7 (ii) determine, protect, and advance
8 its economic, political, territorial, property,
9 or other interests by military or diplomatic
10 action, civil or criminal judicial proceed-
11 ings, contract management, or otherwise;

12 (iii) significantly affect the life, lib-
13 erty, or property of private persons;

14 (iv) commission, appoint, direct, or
15 control officers or employees of the United
16 States; or

17 (v) exert ultimate control over the ac-
18 quisition, use, or disposition of the prop-
19 erty, real or personal, tangible or intangi-
20 ble, of the United States, including the
21 control or disbursement of appropriated
22 and other Federal funds.

23 (B) FUNCTIONS EXCLUDED.—For the pur-
24 poses of paragraph (1), inherently governmental
25 functions do not normally include—

(i) gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials;

(ii) any function that is primarily ministerial or internal in nature (such as building security, mail operations, operation of cafeterias, laundry and house-keeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or other routine electrical or mechanical services);
or

(iii) any good or service which is currently or could reasonably be produced or performed, respectively, by an entity in the private sector.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Federal Activities Inventory Reform Act of 1998”.

**SEC. 2. ANNUAL LISTS OF GOVERNMENT ACTIVITIES NOT
INHERENTLY GOVERNMENTAL IN NATURE.**

(a) LISTS REQUIRED.—Not later than the end of the third quarter of each fiscal year, the head of each executive agency shall submit to the Director of the Office of Management and Budget a list of activities performed by Federal

1 *Government sources for the executive agency that, in the*
 2 *judgment of the head of the executive agency, are not inher-*
 3 *ently governmental functions. The entry for an activity on*
 4 *the list shall include the following:*

5 (1) *The fiscal year for which the activity first*
 6 *appeared on a list prepared under this section.*

7 (2) *The number of full-time employees (or its*
 8 *equivalent) that are necessary for the performance of*
 9 *the activity by a Federal Government source.*

10 (3) *The name of a Federal Government employee*
 11 *responsible for the activity from whom additional in-*
 12 *formation about the activity may be obtained.*

13 (b) *OMB REVIEW AND CONSULTATION.—The Director*
 14 *of the Office of Management and Budget shall review the*
 15 *executive agency's list for a fiscal year and consult with*
 16 *the head of the executive agency regarding the content of*
 17 *the final list for that fiscal year.*

18 (c) *PUBLIC AVAILABILITY OF LISTS.—*

19 (1) *PUBLICATION.—Upon the completion of the*
 20 *review and consultation regarding a list of an execu-*
 21 *tive agency—*

22 (A) *the head of the executive agency shall*
 23 *promptly transmit a copy of the list to Congress*
 24 *and make the list available to the public; and*

1 (B) the Director of the Office of Manage-
2 ment and Budget shall promptly publish in the
3 Federal Register a notice that the list is avail-
4 able to the public.

5 (2) CHANGES.—If the list changes after the pub-
6 lication of the notice as a result of the resolution of
7 a challenge under section 3, the head of the executive
8 agency shall promptly—

9 (A) make each such change available to the
10 public and transmit a copy of the change to Con-
11 gress; and

12 (B) publish in the Federal Register a notice
13 that the change is available to the public.

14 (d) COMPETITION REQUIRED.—Within a reasonable
15 time after the date on which a notice of the public availabil-
16 ity of a list is published under subsection (c), the head of
17 the executive agency concerned shall review the activities
18 on the list. Each time that the head of the executive agency
19 considers contracting with a private sector source for the
20 performance of such an activity, the head of the executive
21 agency shall use a competitive process to select the source
22 (except as may otherwise be provided in a law other than
23 this Act, an Executive order, regulations, or any Executive
24 branch circular setting forth requirements or guidance that
25 is issued by competent executive authority). The Director

1 *of the Office of Management and Budget shall issue guid-*
 2 *ance for the administration of this subsection.*

3 *(e) REALISTIC AND FAIR COST COMPARISONS.—For*
 4 *the purpose of determining whether to contract with a*
 5 *source in the private sector for the performance of an execu-*
 6 *tive agency activity on the list on the basis of a comparison*
 7 *of the costs of procuring services from such a source with*
 8 *the costs of performing that activity by the executive agency,*
 9 *the head of the executive agency shall ensure that all costs*
 10 *(including the costs of quality assurance, technical monitor-*
 11 *ing of the performance of such function, liability insurance,*
 12 *employee retirement and disability benefits, and all other*
 13 *overhead costs) are considered and that the costs considered*
 14 *are realistic and fair.*

15 **SEC. 3. CHALLENGES TO THE LIST.**

16 *(a) CHALLENGE AUTHORIZED.—An interested party*
 17 *may submit to an executive agency a challenge of an omis-*
 18 *sion of a particular activity from, or an inclusion of a par-*
 19 *ticular activity on, a list for which a notice of public avail-*
 20 *ability has been published under section 2.*

21 *(b) INTERESTED PARTY DEFINED.—For the purposes*
 22 *of this section, the term “interested party”, with respect to*
 23 *an activity referred to in subsection (a), means the follow-*
 24 *ing:*

25 *(1) A private sector source that—*

1 (A) is an actual or prospective offeror for
 2 any contract, or other form of agreement, to per-
 3 form the activity; and

4 (B) has a direct economic interest in per-
 5 forming the activity that would be adversely af-
 6 fected by a determination not to procure the per-
 7 formance of the activity from a private sector
 8 source.

9 (2) A representative of any business or profes-
 10 sional association that includes within its member-
 11 ship private sector sources referred to in paragraph
 12 (1).

13 (3) An officer or employee of an organization
 14 within an executive agency that is an actual or pro-
 15 spective offeror to perform the activity.

16 (4) The head of any labor organization referred
 17 to in section 7103(a)(4) of title 5, United States Code,
 18 that includes within its membership officers or em-
 19 ployees of an organization referred to in paragraph
 20 (3).

21 (c) *TIME FOR SUBMISSION.*—A challenge to a list shall
 22 be submitted to the executive agency concerned within 30
 23 days after the publication of the notice of the public avail-
 24 ability of the list under section 2.

1 (d) *INITIAL DECISION.*—*Within 28 days after an execu-*
 2 *utive agency receives a challenge, an official designated by*
 3 *the head of the executive agency shall—*

4 (1) *decide the challenge; and*

5 (2) *transmit to the party submitting the chal-*
 6 *lenge a written notification of the decision together*
 7 *with a discussion of the rationale for the decision and*
 8 *an explanation of the party's right to appeal under*
 9 *subsection (e).*

10 (e) *APPEAL.*—

11 (1) *AUTHORIZATION OF APPEAL.*—*An interested*
 12 *party may appeal an adverse decision of the official*
 13 *to the head of the executive agency within 10 days*
 14 *after receiving a notification of the decision under*
 15 *subsection (d).*

16 (2) *DECISION ON APPEAL.*—*Within 10 days after*
 17 *the head of an executive agency receives an appeal of*
 18 *a decision under paragraph (1), the head of the execu-*
 19 *tive agency shall decide the appeal and transmit to*
 20 *the party submitting the appeal a written notifica-*
 21 *tion of the decision together with a discussion of the*
 22 *rationale for the decision.*

1 **SEC. 4. APPLICABILITY.**

2 (a) *EXECUTIVE AGENCIES COVERED.*—*Except as pro-*
3 *vided in subsection (b), this Act applies to the following*
4 *executive agencies:*

5 (1) *EXECUTIVE DEPARTMENT.*—*An executive de-*
6 *partment named in section 101 of title 5, United*
7 *States Code.*

8 (2) *MILITARY DEPARTMENT.*—*A military depart-*
9 *ment named in section 102 of title 5, United States*
10 *Code.*

11 (3) *INDEPENDENT ESTABLISHMENT.*—*An inde-*
12 *pendent establishment, as defined in section 104 of*
13 *title 5, United States Code.*

14 (b) *EXCEPTIONS.*—*This Act does not apply to or with*
15 *respect to the following:*

16 (1) *GENERAL ACCOUNTING OFFICE.*—*The Gen-*
17 *eral Accounting Office.*

18 (2) *GOVERNMENT CORPORATION.*—*A Government*
19 *corporation or a Government controlled corporation,*
20 *as those terms are defined in section 103 of title 5,*
21 *United States Code.*

22 (3) *NONAPPROPRIATED FUNDS INSTRUMENTAL-*
23 *ITY.*—*A part of a department or agency if all of the*
24 *employees of that part of the department or agency*
25 *are employees referred to in section 2105(c) of title 5,*
26 *United States Code.*

1 (4) *CERTAIN DEPOT-LEVEL MAINTENANCE AND*
 2 *REPAIR.*—*Depot-level maintenance and repair of the*
 3 *Department of Defense (as defined in section 2460 of*
 4 *title 10, United States Code).*

5 **SEC. 5. DEFINITIONS.**

6 *In this Act:*

7 (1) *FEDERAL GOVERNMENT SOURCE.*—*The term*
 8 *“Federal Government source”, with respect to per-*
 9 *formance of an activity, means any organization*
 10 *within an executive agency that uses Federal Govern-*
 11 *ment employees to perform the activity.*

12 (2) *INHERENTLY GOVERNMENTAL FUNCTION.*—

13 (A) *DEFINITION.*—*The term “inherently*
 14 *governmental function” means a function that is*
 15 *so intimately related to the public interest as to*
 16 *require performance by Federal Government em-*
 17 *ployees.*

18 (B) *FUNCTIONS INCLUDED.*—*The term in-*
 19 *cludes activities that require either the exercise of*
 20 *discretion in applying Federal Government au-*
 21 *thority or the making of value judgments in*
 22 *making decisions for the Federal Government,*
 23 *including judgments relating to monetary trans-*
 24 *actions and entitlements. An inherently govern-*
 25 *mental function involves, among other things, the*

1 *interpretation and execution of the laws of the*
 2 *United States so as—*

3 *(i) to bind the United States to take or*
 4 *not to take some action by contract, policy,*
 5 *regulation, authorization, order, or other-*
 6 *wise;*

7 *(ii) to determine, protect, and advance*
 8 *United States economic, political, terri-*
 9 *torial, property, or other interests by mili-*
 10 *tary or diplomatic action, civil or criminal*
 11 *judicial proceedings, contract management,*
 12 *or otherwise;*

13 *(iii) to significantly affect the life, lib-*
 14 *erty, or property of private persons;*

15 *(iv) to commission, appoint, direct, or*
 16 *control officers or employees of the United*
 17 *States; or*

18 *(v) to exert ultimate control over the*
 19 *acquisition, use, or disposition of the prop-*
 20 *erty, real or personal, tangible or intangi-*
 21 *ble, of the United States, including the col-*
 22 *lection, control, or disbursement of appro-*
 23 *priated and other Federal funds.*

24 *(C) FUNCTIONS EXCLUDED.—The term does*
 25 *not normally include—*

- 1 (i) gathering information for or pro-
 2 viding advice, opinions, recommendations,
 3 or ideas to Federal Government officials; or
 4 (ii) any function that is primarily
 5 ministerial and internal in nature (such as
 6 building security, mail operations, oper-
 7 ation of cafeterias, housekeeping, facilities
 8 operations and maintenance, warehouse op-
 9 erations, motor vehicle fleet management
 10 operations, or other routine electrical or me-
 11 chanical services).

12 **SEC. 6. EFFECTIVE DATE.**

13 *This Act shall take effect on October 1, 1998.*

Amend the title so as to read: “A bill to provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes.”.

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105TH CONGRESS
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[Report No. 105-269]

A BILL

To require that the Federal Government procure from the private sector the goods and services necessary for the operations and management of certain Government agencies, and for other purposes.

JULY 28, 1998

Reported with an amendment and an amendment to the title