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CONTRACTING REFORM: EXPERT RECOMMENDATIONS AND PENDING BILLS

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

FEBRUARY 27, 2007

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CONTRACTING REFORM: EXPERT RECOMMENDATIONS AND PENDING BILLS

WEDNESDAY, FEBRUARY 27, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
ORGANIZATION, AND PROCUREMENT,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2154, Rayburn House Office Building, Hon. Edolphus Towns (chairman of the subcommittee) presiding.

Present: Representatives Towns, Maloney, Murphy, Welch, Davis of Virginia, Platts, and Duncan.

Staff present: Michael McCarthy, staff director; Velvet Johnson, counsel; Kwane Drabo, clerk; Earley Green, chief clerk; Mark Stevenson, professional staff member; Larry Halloran, minority staff director; Keith Ausbrook, minority general counsel; Mason Alinger, minority legislative director; John Brosnan, minority senior procurement counsel; Benjamin Chance, minority clerk; and Ali Ahmad, minority deputy press secretary.

Mr. TOWNS. Today's hearing is focused on one of the most important parts of the subcommittee's oversight jurisdiction, the acquisition of goods and services by the Federal Government.

As stewards of taxpayer dollars, we owe American citizens no less than full transparency and accountability over the Federal Government's operations. We need to be certain that Federal assets are protected from loss or misuse.

Today we will examine the recommendations made by the Services Acquisition Advisory Panel for improving Federal Government acquisition practices. We will also get input in three bills related to contracting reform.

The Federal Government is the largest buyer of goods and services in the world. Between 2000 and 2006, spending on Government contracts has grown from almost $219 billion to $415 billion. That is an astounding 89 percent increase in the past 6 years.

Anyone who has been paying attention to the news in recent years has heard time and time again of the waste, fraud, and abuse involving a number of Government agencies and contractors. We are all familiar with the report on acquisition problems that arose in response to Hurricane Katrina and in the reconstruction efforts in Iraq and Afghanistan.

These problems aren't just one-time occurrences; they often occur in routine Federal acquisition projects. It is clear that our Govern-

ment has serious problems with the way it manages contractors and contracts.

The purpose of this hearing is not just to talk about the problems with the system, but to find meaningful solutions. We want to know how we can make the system better.

I am eager to hear ideas from our witnesses on how we can improve our Federal acquisition system. GAO has written numerous reports on government contracting, and, likewise, Ms. Marcia Madsen, legal background in contracting, and her service with the panel establishes her as an expert in this area. We are delighted to have you, as well.

Also, we look forward to getting feedback from the administration and members of the contractor community on three contracting reform bills that we have before us today. One bill is the Government Contract Accountability Act of 2007, which has been introduced by my good friend, Representative Chris Murphy. This bill would require disclosure of the names and salaries of top executives of companies that receive more than 80 percent of its annual gross revenues and more than $5 million annually from Federal contracts.

The Contractors and Federal Spending Accountability Act of 2007 requires a data base of information on contractor performance and integrity. This bill is sponsored by Representative Maloney. The intent is to gather together in one place information from evaluations, audits, and legal proceedings so contracting officers have a full picture of a contractor's track record.

We will also examine a bill introduced by Representative Brad Ellsworth designed to prevent companies with seriously delinquent Federal tax debt from receiving new contracts. This is a bill that Mr. Ellsworth and I worked on together based on the input from a hearing held last April.

I look forward to hearing from our witnesses and gaining their perspective as we work together to find a workable solution to something that we can all agree is a continuing problem.

[The prepared statement of Hon. Edolphus Towns follows:]

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SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT

OVERSIGHT HEARING

Contract Reform: Expert Recommendations and Pending Bills

Wednesday, February 27, 2008
Room 2154 Rayburn House Office Building

OPENING STATEMENT

OF CHAIRMAN TOWNS

The Subcommittee will come to order. Today's hearing focuses on one of the most important parts our Subcommittee's oversight jurisdiction – the acquisition of goods and services by the federal government. As stewards of taxpayer dollars, we owe American citizens no less than full transparency and accountability over the federal government's operations. We need to be certain that federal assets are protected from loss or misuse.

Today, we will examine the recommendations made by the Services Acquisition Advisory Panel for improving federal government acquisition practices. We will also get input on three bills related to contracting reform.

The federal government is the largest buyer of goods and services in the world. Between 2000 and 2006, spending on government contracts

has grown from almost $219 billion to $415 billion. That is an astounding 89 percent increase in the past six years.

Anyone who has been paying attention to the news in recent years has heard time and time again of the waste, fraud, and abuse involving a number of government agencies and contractors. We're all familiar with the reports on acquisition problems that arose in the response to Hurricane Katrina and in the reconstruction efforts in Iraq and Afghanistan. These problems aren't just one-time occurrences; they often occur in routine federal acquisition projects.

It is clear that our government has serious problems with the way it manages contractors and contracts. The purpose of this hearing is not just to talk about the problems with the system, but to find meaningful solutions. We want to know how we can make the system better.

I am eager to hear ideas from our witnesses on how we can improve our federal acquisition system. GAO has written numerous reports on government contracting. Likewise, Ms. Marcia Madsen's legal background in contracting and her service with the SARA Panel establish her as an expert in this area.

I also look forward to getting feedback from the Administration and members of the contractor community on three contracting reform bills that we have before us today.

One bill is the Government Contractor Accountability Act of 2007, which has been introduced by my good friend, Representative Chris Murphy. This bill would require disclosure of the names and salaries of top executives of companies that receive more than 80% of annual gross revenues and more than $5 million annually from federal contracts.

The Contractors and Federal Spending Accountability Act of 2007 requires a database of information on contractor performance and integrity. This bill is sponsored by Representative Maloney. The intent is to gather together, in one place, information from evaluations, audits, and legal proceedings, so contracting officers have a full picture of a contractor's track record.

We will also examine a bill introduced by Representative Brad Ellsworth designed to prevent companies with seriously delinquent federal tax debts from receiving new contracts. This is a bill that Mr. Ellsworth and I worked together on, based on the input from a hearing I held last April.

I look forward to hearing from our witnesses and gaining their perspectives as work together to find a workable solution to something that we can all agree is a continuing problem.

Mr. TOWNS. At this time I recognize Congressman Murphy for an opening statement.

Mr. MURPHY. Thank you very much, Mr. Chairman. I thank you greatly for holding today's hearing. I look forward to hearing from the panel, especially with regard to how we can improve our procurement process, increase competition, establish clear performance requirements, including how we measure performance.

As Mr. Towns elucidated in his explanation of the bill before us today, I think it is necessary to add one more recommendation to the list of those put before this committee today. I am pleased that we will be able to talk about a bill presented by both myself and by another member of this subcommittee, Peter Welch.

Our legislation, the Government Contractor Accountability Act, seeks one simple thing with regard to Government contracting, and that is transparency. As pointed out by the GAO study, buying services account for 60 percent of the total fiscal year 2006 procurement dollars, a staggering number. Expenditures on security services due to our engagement in Iraq and Afghanistan have increased substantially.

Obviously, the most high-profile company involved in those security services is Blackwater, a subject of a major, important hearing before the full committee some months ago.

This Nation spends billions of dollars on private Government contractors overseas. The American taxpayers and this Congress, as we have found out, know very little about these companies and the windfalls that they may be reaping from those contracts. Their management practices, their financial statements, and their employment policies are tightly held secrets not subject to public scrutiny, unlike their public company that are competing in many cases for the very same contracts.

Not surprisingly, at that hearing in October by the full committee, the CEO of Blackwater refused to provide Congress with details of the company's profits or his personal compensation.

I found and still find that refusal unacceptable. In the case of Blackwater, the American people pay 90 percent of the CEO's salary and 90 percent of the salaries of his employees. Congress and the American people have a right to know how its money is being spent.

And this principle shouldn't be held just for private contractors in Iraq. While Blackwater is the clearest example of why this legislation is needed, this principle should be required of all those private businesses that make a vast amount of their earnings from the Federal Government and, more importantly, the Federal taxpayer.

The Government Contractor Accountability Act, which I am pleased to say is also cosponsored by the chairman of the subcommittee, Mr. Towns, and the chairman of the full committee, Mr. Waxman, requires that contractors who receive more than 80 percent of their annual gross revenue from Federal contracts and have contracts worth more than $5 million in any fiscal year disclose the salaries of their most highly compensated employees.

I hardly believe this is an onerous requirement and certainly should do nothing to diminish the competitiveness of Government contractors reaping an enormous benefit from the Federal tax-

payer, highlighted by the fact that public companies, those that must open their books to the world, compete and win Government contracts every day. Our legislation would merely align the disclosure requirements for Government contractors with existing requirements for publicly traded companies and nonprofit corporations.

Government contractors should be held responsible to the American taxpayer, and we should have a right to know where our money is being spent. If a private company is making multi-million dollar profits off of Government contracts and can still afford lavish payments to its executives, then we should closely explore why Government continues to do business with these contractors. Unfortunately, without our legislation, we will never have access to this information.

Again, Mr. Chairman, I thank you for the opportunity to have this bill before us, and I look forward to hearing from the panel on this bill and on other very important matters related to government contracting.

[The prepared statement of Hon. Christopher S. Murphy follows:]

Subcommittee on Government Management, Organization and Procurement
Statement by Congressman Christopher Murphy
Wednesday, February 27, 2008

Mr. Chairman, thank you for holding today's hearing. It is critically important that this Committee take a hard look at the contracting practices of the federal government, especially as we rely more heavily on private contractors to deliver government services.

As will be highlighted, as part of the Services Acquisition Reform Act, the GAO and the Services Acquisition Advisory Panel were tasked with providing recommendations to improve the federal government's acquisition process. As laid out by the GAO and the Panel, it's clear that we must improve procurement through increased competition, establish clear performance requirements, and improve how we measure performance.

I think it's necessary to add one more recommendation to that list and I'm pleased and thankful that today we'll be able to spend a little time speaking about a bill that I drafted with my friend, Peter Welch.

Our legislation, the Government Contractor Accountability Act (H.R. 3928) seeks one simple thing – transparency.

As pointed out in the GAO's study, buying services accounted for sixty percent of total FY 2006 procurement dollars – a staggering number. And expenditures on security services due to our engagement in Iraq and Afghanistan have increased substantially.

The case of Blackwater USA is, unfortunately, a supreme example of government contracting at its worst. Since 2001, Blackwater has had a meteoric rise in profits due to the hundreds of millions of dollars in government contracts it has received, often won through a no-bid process. From 2001 through 2006, Blackwater contracts increased by 80,000%, from just over $700,000 to almost $600 million in 2006.

As our nation spends billions of dollars on private government contractors overseas, the American taxpayer and Congress know very little about the companies that are reaping this windfall. Their management practices, financial statements, and employment policies are tightly held secrets not subject to public scrutiny. Not surprisingly, at an October 2007 full committee hearing, the CEO of Blackwater refused to provides Congress with details of the company's profits or his personal compensation.

I found and still find that refusal unacceptable. In the case of Blackwater, the American people pay 90% of the CEO's salary and 90% of the salaries of his employees. Congress and the American people have a right to know how its money is being spent.

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Government contractors should be held responsible to the American taxpayer and we should have a right to know where our money is being spent. If a private company is making multi-million dollar profits off of government contracts and can still afford lavish payments to its executives, than we should closely explore why the government continues to do business with these contractors. Unfortunately, without our legislation, we'll never have access to this information.

Thank you, Mr. Chairman for the opportunity to discuss these important issues. We must remember that we are stewards of the people's treasure and must do everything in our power to ensure that it is not being squandered or appropriated in ways that aren't responsible to their wishes. I look forward to hearing from our witnesses and I hope that the testimony today will help us perfect our legislation as it moves through the legislative process.

Mr. TOWNS. Thank you very much.

It is a longstanding policy of this committee that we swear our witnesses in, so will you please stand and raise your right hands.

[Witnesses sworn.]

Mr. TOWNS. Let the record reflect that the witnesses answered in the affirmative.

Let me introduce our first panel.

Paul Denett is the Administrator of the Office of Federal Procurement Policy at OMB, where he is the point person for the administration on issues of Federal contracting and acquisition.

John Hutton is the Director of Acquisition and Sourcing Management at the Government Accountability Office.

Marcia Madsen served as the Chair of the Services Acquisition Advisory Panel. Ms. Madsen has nearly 20 years experience in Government contract law. She has served as Chair of the ABA's Section of Public Contract Law and was also president of the Board of Contract Appeals Bar Association.

Let me just indicate to you that your entire statement will be included in the record. I ask that you summarize your testimony in 5 minutes.

Let me just point out one other thing. There is a light. When you start out, the light is on green. Then, as you proceed, it moves to yellow. That means that you should begin to summarize up. Then, when the red comes on, that means you should shut up. OK? Thank you. Thank you so much.

Now that we've got the rules straight, we can move forward. Thank you. We will now begin with you, Mr. Denett.

STATEMENTS OF PAUL A. DENETT, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET; JOHN HUTTON, DIRECTOR, ACQUISITION AND SOURCING MANAGEMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; AND MARCIA MADSEN, CHAIR, ACQUISITION ADVISORY PANEL

STATEMENT OF PAUL A. DENETT

Mr. DENETT. Thank you, Mr. Chairman.

Chairman Towns, Ranking Member Bilbray, and members of the subcommittee, I appreciate the opportunity to appear before you today to discuss the efforts of the Office of Federal Procurement Policy to implement the recommendations of the Acquisition Advisory Panel.

You have also asked for comments on several bills. I have prepared written remarks that I would like the subcommittee to enter into the record, and you indicated that it would be, so let me briefly summarize some of those comments for you.

Many of the recommendations made by the panel fit well with the priorities I have set as administrator at OFPP. These priorities include strengthening the professionalism, agility, and quality of the acquisition work force, using competition more effectively, and ensuring good stewardship of taxpayer resources.

I am happy to report that my office has either implemented or is in the process of implementing more than 40 of the 60 recommendations that the panel directed toward OFPP for action.

Here is just a taste of what we have done or are doing, both as part of our efforts to implement the panel recommendations and beyond:

We have launched certification programs to standardize training and experience requirements for contracting officers, their technical representatives, and our program managers. We have given agencies the tools they need to identify and close skill gaps as part of their human capital planning. We are working with regulatory drafters to come up with clear competition rules for multiple-award contracts, which account for a growing percentage of our growing acquisition expenditures.

We are institutionalizing results-oriented buying practices such as strategic sourcing, where agencies work together to pursue multi-agency solutions for commonly purchased goods and services. Strategic sourcing has the potential to produce tens of millions of savings for our taxpayers in 2008.

We are identifying models and best practices for agencies to get the most out of our buying tools. For example, we will soon publish a model inter-agency agreement to ensure agencies understand their roles and responsibilities and assist in acquisitions.

We are also developing a checklist to help our professionals evaluate if the performance-based acquisitions are structured in the best manner possible. We are integrating acquisition into the formal agency internal control program outlined in OMB Circular A–123 so that agencies will have a process to formally and comprehensively assess their progress on a broad range of acquisition initiatives, including those that carry out panel recommendations.

With respect to improving contractor tax compliance, I am pleased to report that final changes will be made to the Federal acquisition regulation in March to address how tax delinquency may be used as grounds for potential debarment or suspension. I believe this regulatory change, in combination with the ongoing efforts by the Federal Contractor Tax Compliance Task Force, will achieve the goals envisioned by the Contracting and Tax Accountability Act, H.R. 4881.

I hope the subcommittee will wait to see the beneficial results of these actions before making a final decision on the need for legislation.

Additional comments on the bills mentioned in your letter of invitation are in my written statement.

Before concluding, I would like to acknowledge the exceptional achievements of three SHINE Award winners. The SHINE initiative is another example of how we are promoting best in class behavior. It is the first coordinated Government-wide effort dedicated exclusively to recognizing individuals and team achievements of outstanding performance within our acquisition work force.

Ms. Jean Todd of the Army Corps of Engineers supported numerous reconstruction efforts in the wake of Hurricanes Katrina and Rita, including accelerated removal of water and construction of over 81,000 temporary roofs.

The late Commander Philip Murphy-Sweet volunteered to be the onsite contracting officer in central Iraq, supporting the establishment of a Criminal Investigative Court and helped ensure the project stayed on track.

The Bureau of Prisons Acquisition Team used an innovative alternative dispute resolution partnering approach in construction of a new environmentally friendly Federal correctional facility on time and budget.

Finally, I would like to express my appreciation for the steps Congress has taken to strengthen the work force by making permanent the acquisition work force training fund and extending direct hire authority. Both of these are immense help to us in strengthening the acquisition work force.

I look forward to working with the subcommittee as we continue to strengthen the acquisition process.

This concludes my prepared remarks. I will be happy to answer any questions you might have.

[The prepared statement of Mr. Denett follows:]

STATEMENT OF PAUL A. DENETT

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION,

AND PROCUREMENT

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2008

Chairman Towns, Ranking Member Bilbray, and Members of the Subcommittee, I am pleased to appear before you today to discuss the report of the Acquisition Advisory Panel (the Panel), which was officially released last July. Of the Panel's almost ninety recommendations, sixty were either regulatory or policy recommendations that fell to me to implement as the Administrator of the Office of Federal Procurement Policy (OFPP). I am pleased to report to you today that my office has either implemented or is in the process of implementing more than 40 of these 60 recommendations.

As Administrator of OFPP, my priorities include ensuring our acquisition workforce is equipped with the skills and competencies required to effectively use the competitive commercial marketplace to deliver the most innovative solutions to meet mission needs. I am also deeply committed to institutionalizing transparency and accountability. This morning, I would like to briefly summarize several of my main initiatives which dovetail with and, in some cases, go beyond the Panel's key recommendations.

Acquisition Workforce

Like the Panel, I believe the acquisition workforce is the key to a successful acquisition system. As agencies increasingly turn to contractors for their expertise and innovation, the skills and good judgment of our acquisition workforce become more closely tied to our government's ability to buy needed goods and services and deliver effective results. I wish to thank Congress for its recent actions to support our employees by making the acquisition workforce training fund permanent and extending direct hiring authorities. These actions allow us to lay the foundation for meaningful and ongoing improvements while providing a hiring tool to support immediate recruitment needs.

Partnering with the Federal Acquisition Institute (FAI), and with the support of the Defense Acquisition University, OFPP has taken unprecedented actions to improve the caliber, agility, and professionalism of the workforce. These actions include the following.

Certifying the acquisition workforce. We have developed certification programs that, for the first time, standardize training and experience requirements for contracting officers, contracting officer technical representatives, and program managers across all civilian agencies. These programs will benefit the acquisition workforce in many ways. First, structured programs will help strengthen our employees' capabilities and professionalism. Second, common training, education, and development standards will facilitate career mobility across agencies so that resources may be more easily applied where they are needed the most. Third, focusing on the entire acquisition community, as opposed to just contract specialists, will significantly improve our stewardship of taxpayer dollars. Developing program and project managers will enable them to partner more effectively with contracting personnel to write clear contract requirements, which was identified by the Panel as essential to achieving the benefits of competition.

Closing skills gaps. I strongly share the Panel's overarching concern with acquisition workforce assessment and planning. Last Spring, at my direction, FAI provided templates to agencies to facilitate the development of acquisition workforce strategic human capital plans. We also completed the first-ever contracting workforce competency survey of the civilian agencies. Each civilian agency, in consultation with the Office of Personnel Management (OPM), is using the results of this survey to develop a tailored plan for closing its own skills gaps. OFPP is currently working with OPM to review these plans. The Department of Defense is also conducting a contracting competency assessment of all military and civilian members of the Defense contracting workforce.

Recruitment and retention. Last month, we launched the Federal Acquisition Intern Coalition to improve recruitment and retention strategies among agencies and increase the number and caliber of new hires entering the government. I believe the Coalition goes beyond what the Panel had hoped for by providing a government-wide campaign that promotes acquisition as a career of choice, and serves as a "one stop shop" for job seekers to find internship and career development opportunities. I believe the Coalition will make a significant contribution to recruiting talented, business-skilled candidates and developing them into effective buyers and contract negotiators. These efforts are complemented by OFPP guidance on the hiring of retired annuitants to fill critical vacancies in the acquisition field. Use of this authority will enable agencies to manage the loss of experience and corporate knowledge as the baby boomer generation retires over the next few years.

Recognizing acquisition excellence. The SHINE initiative, which I established upon my arrival at OFPP, ensures best practices are shared and the value of our federal employees is appropriately recognized. Dedicated exclusively to recognizing individual employee

achievements of acquisition excellence within our workforce, SHINE is the first coordinated government-wide effort of its type. The achievements recognized under the SHINE initiative have touched on all aspects of the acquisition process. It is my hope that this recognition and appreciation will encourage our workforce to strive for excellence in their daily endeavors on behalf of our taxpayers. Today, I would like to briefly acknowledge the exceptional achievements of three SHINE award winners.

- Ms. Jean Todd of the Army Corps of Engineers set up an on-site, full service contracting office in New Orleans to provide critical reconstruction support in the wake of Hurricanes Katrina and Rita, including the award of contracts for more than 81,000 temporary roofs. Nearly $1 billion in subcontracts were awarded to small disadvantaged businesses and significant opportunities were also created for local small businesses.

- The late Commander Philip Murphy-Sweet volunteered to be the on-site contracting officer in central Baghdad to help support establishment of a Criminal Investigative Court in direct support for the Baghdad Security Plan. His critical dedication as part of the Joint Contracting Command for Iraq and Afghanistan helped to ensure milestones for this important project stayed on track.

- The acquisition team at the Department of Justice's Bureau of Prisons and its private sector contract partner employed an innovative alternative dispute resolution (ADR) partnering approach in constructing a new environmentally friendly "green" federal correctional facility on time and on budget. Both parties recognize the project, which was completed without any formal claims or contract appeals, as a model project and the Bureau now is utilizing similar partnering ADR approaches on its other construction projects.

Competition

As the Panel's report documents, competition is the cornerstone of our acquisition system. Competition saves money for the taxpayer, improves contractor performance, curbs fraud, and promotes accountability for results. The acquisition workforce has a number of tools to facilitate the efficient and effective use of competition. However, like the Panel, I am concerned that we may not be taking full advantage of these tools, especially in the placement of task and delivery orders under multiple award contracts. I welcomed the Panel's report and,

even before receiving their recommendations, initiated a number of changes to enhance competition in government procurement. Some changes mirror the Panel's recommendations while others go beyond. They include:

- Requiring agency competition advocates to submit written reports annually to their Chief Acquisition Officers and Senior Procurement Executives, with special emphasis on the quality of planning, execution and management of task and delivery orders over $1 million. Agencies were instructed to provide copies of the first report to OFPP in December of last year. We are reviewing these reports to identify competition best practices, such as including increased use of competition in employee position descriptions and performance plans;

- Limiting the length of contracts awarded noncompetitively under urgent and compelling circumstances to the minimum contract period necessary to meet requirements, and no longer than one year unless approved by the head of the contracting activity; and

- Strengthening competition for orders under multiple award contracts to include:

  - public notice of orders awarded on a sole source basis;

  - a requirement for the receipt of three proposals on Multiple Award Schedule (MAS) contract buys and fair notice to all contract holders on other multiple award contracts;

  - clear statements of requirements, greater disclosure of the government's evaluation criteria, reasonable response times, and documentation of the basis for best value award decisions; and

  - an explanation of the government's award decision for unsuccessful offerors.

Other Significant Panel Recommendations

The Panel made a number of recommendations to promote strategic acquisitions and effective accountability. My initiatives address these goals and the Panel's recommendations. They include improved use of interagency contracting and performance-based acquisition (PBA) and ensuring our contractual language on conflicts of interest and protection of proprietary data protect both government and industry.

Interagency contracts. I have asked Chief Acquisition Officers to give greater attention to the management and use of interagency contracts. Interagency contracts offer important

benefits to Federal agencies, including economies and efficiencies and the ability to leverage resources. OFPP has developed comprehensive guidance to strengthen acquisition practices under these vehicles, including a model interagency agreement to help agencies delineate their respective roles and responsibilities throughout the acquisition process. The guidance will be issued next month. In addition, we are working with the General Services Administration (GSA) to improve the accuracy of interagency contract data in the Federal Procurement Data System and recently posted information on our homepage about multi-agency contracts, a popular form of interagency contracting for which little government-wide data has been available to date. We also plan to ensure that agencies develop appropriate business cases as a prerequisite to the establishment or renewal of multi-agency contracts.

Maximizing the use and value of interagency contracts is helping to promote strategic sourcing -- a priority OFPP initiative that offers significant benefit for the taxpayer. Identifying multi-agency solutions for commonly purchased goods and services allows the government to leverage its purchasing power, reduce cost, and improve performance. Through the Federal Strategic Sourcing Initiative (FSSI), led by GSA, the federal community has come together to strategically source domestic delivery services, office supplies, and telecommunications expense management. In the case of the FSSI domestic delivery solution, over 52 agencies have placed almost $120 million in orders and some are saving up to 40 percent off the MAS contract prices for domestic package delivery services. In FY 2008, savings in this area alone could exceed $20 million.

Performance-based acquisition. OFPP has taken many steps to strengthen PBAs, including the interagency development and maintenance of *The Seven Steps to Performance-Based Service Acquisition*. This online guide includes templates and examples of performance

work statements, standards, measures, and incentives. OFPP's PBA Interagency Working Group continuously reviews and evaluates samples for incorporation into the guide. The group is also developing new features to supplement the guide, a number of which were specifically recommended by the Panel, including:

- an assessment tool to help agencies determine when to use PBA;
- a matrix of contract performance incentives;
- a best practices guide on performance measures; and
- a checklist that assesses how well an acquisition works within the basic elements of the *Seven Steps* guide.

Conflicts of interest. The Panel recommended that changes be considered to the current conflicts of interest rules in light of the government's growing reliance on service contractors and the increasing consolidations in many industry sectors. The Panel suggested that a review consider rules governing contractor behavior as well as how to best protect contractor proprietary data from unauthorized use and disclosure. At my request, the Federal Acquisition Regulatory Council has opened cases to evaluate current conflicts of interest regulations and we are also considering the training needs of the acquisition workforce responsible for implementing these regulations. I am pleased that the Office of Government Ethics agreed to join us in reviewing these matters and also thank the Government Accountability Office for attending our first meeting to discuss their research in this area.

Proposed Legislation

The Subcommittee asked that I provide my views on several bills: (1) the Contracting and Tax Accountability Act of 2007, H.R. 4881, (2) the Contractors and Federal Spending Accountability Act of 2007, H.R. 3033, and (3) the Government Contractor Accountability Act of 2007, H.R. 3928. We have some concerns with the bills and would welcome the opportunity

to work with the Subcommittee on its efforts to strengthen the acquisition process and ensure sound stewardship of taxpayer resources.

H.R. 4881. When I last testified before this Subcommittee almost a year ago, I expressed the Administration's commitment to improve tax compliance. I am pleased to report that we have made significant progress in meeting this important goal.

Next month, after significant deliberation and careful review of agency and public comment by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council, the Federal Acquisition Regulation (FAR) will be amended to authorize the appropriate federal officials to use tax delinquency as sufficient grounds for debarment or suspension in accordance with the established process in the FAR for protecting government interests. The rule will add conditions regarding violations of tax laws and delinquent taxes to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters.

In addition, the Federal Contractor Tax Compliance Task Force, on which OFPP participates, has made a number of significant improvements to policies and processes that directly result in increased debt collection. The Treasury Department states that levy collections from federal payments to contractors increased from $7 million in FY 2003 to $59.6 million in FY 2006.

These actions represent an important step forward. We hope you will wait to see their beneficial results before making a final decision on the need for legislation.

On a related legislative matter involving tax compliance, I urge the Subcommittee to pursue the repeal of section 511 of the Tax Increase Prevention and Reconciliation Act, which, with limited exception, requires a withholding of 3 percent from any government payment for

property or services. As noted just a moment ago, government-wide efforts to recover delinquent taxes have improved substantially in the past three years and the community should focus its tax compliance efforts on these effective measures. Any law or regulation to increase tax compliance must be more carefully targeted on delinquent contractors. The negative impact of this one-size-fits-all law will be significant on the vast majority of contractors who are tax compliant. This is especially the case for small businesses, who would be the most likely to face serious cash flow challenges and lost opportunities to reinvest in their businesses. Equally important, there will be very significant costs to the federal government in implementing this law, which will require modification to virtually every federal payment system.

H.R. 3033. It is important for federal departments and agencies to share information with one another regarding improper conduct or questionable activities of contractors. In addition to exchanging information about debarments and suspensions, agency debarment and suspension officials should share information about certain problematic contractor conduct that would not necessarily give rise to a debarment or suspension. For example, agencies sometimes enter into administrative agreements with contractors and grant recipients as an alternative to suspension or debarment from doing business with the federal government. When considering action with respect to a particular contractor or grant recipient, an agency debarment or suspension official should know whether another agency used an administrative agreement with that contractor or grantee, what the terms of the agreement were, and whether the contractor or grantee had complied with the agreement. With this goal in mind, my office and the Office of Federal Financial Management jointly issued a memorandum to Department and Agency Heads in August 2006 directing agency debarment and suspension officials to share this information with one another through the Interagency Suspension and Debarment Committee (ISDC).

While H.R. 3033 also seeks to promote improved information exchange, the provisions in the bill raise concerns. For example, H.R. 3033 would require the Executive branch to establish and maintain a database with a broad range of information, including: Federal or State suspensions or debarments; all suspension and debarment "show cause" orders; all civil, criminal and administrative proceedings "initiated or concluded" against a person by any Federal or State agency; all administrative, civil and criminal settlements, agreements, consent decrees, enforcement actions, corrective actions; and information on all federal contracts and assistance agreements that were terminated due to default and other actions. I have been advised by the Department of Justice that, to the extent that these provisions may be construed to require disclosure of ongoing investigations, including grand jury investigations and proceedings under seal such as *qui tam* actions under the civil False Claims Act, they contravene the law, jeopardize critical law enforcement efforts to root out fraud, waste, abuse, and corruption in procurement, and unfairly expose those falsely or mistakenly alleged to have committed fraud. In addition, OMB is concerned about the cost and difficulty of maintaining this information, both for States and the federal government, and the impact of differing State laws.

OMB objects to provisions of the bill which would prescribe the role of the ISDC, which was created 22 years ago by Executive Order 12549. For example, provisions of H.R. 3033 would inappropriately limit OMB's ability to revise OMB's suspension and debarment guidelines, by providing for the ISDC to authorize OMB to issue revised guidelines.

H.R. 3928. This bill would require a contractor whose annual revenues exceed $5 million to either certify that 80 percent or less of its annual gross revenues are from federal contracts or submit a financial disclosure for public posting that provides the names and salaries of certain senior executives. A contractor would be required to annually update the certification

or disclosure. I am concerned about the unintended harmful impact these requirements could have on our acquisition system. The accounting and reporting burdens associated with certification, coupled with public disclosure of the names and salaries of senior company officials, will likely have a chilling effect on contractor participation in federal acquisition that, in turn, will harm the government's ability to take full advantage of the competitive marketplace. The required public disclosures could also weaken the competitiveness of individual companies whose salary structures would become known to competitors. We think the burden of this bill will be especially harmful to small businesses and weaken business development programs that were created to help Federal agencies take better advantage of the innovation and creativity that small businesses offer. In my view, the Administration's ongoing efforts to strengthen acquisition planning, use of competition, and contract management are more appropriate approaches for protecting taxpayer interests. We urge the Subcommittee to carefully reconsider this bill.

Conclusion

All of the Administration initiatives you have heard me discuss this morning are shaped around a common goal: making sure our acquisition system produces the best results possible for our taxpayers. OFPP will continue to work closely with agencies on the effective implementation of these initiatives, including those that carry out recommendations of the Panel. We look forward to working with the members of this Subcommittee and the other members of Congress in a bipartisan effort to build on the progress we have made in strengthening the acquisition process and the performance of government.

This concludes my prepared remarks. I am happy to answer any questions you might have.

Mr. TOWNS. Thank you very much, Mr. Denett.

I would like to yield now for an opening statement to my colleague, Congressman Davis.

Mr. DAVIS OF VIRGINIA. Thank you. I may not be able to stay. We have a lot of conflicting meetings. This is a very important one today, obviously.

I want to thank you, Chairman Towns, for holding this hearing on the recommendations of the SARA panel established to review the laws and the regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines and responsibility, and the use of GWACS, the Government-wide contracts.

As you know, the Advisory Panel was created by section 1423 of the Services Acquisition Reform Act of 2003, which I authored. The act charged the panel with making recommendations for reforms to the acquisition system, with a focus on ensuring the effective and appropriate use of commercial practices and encouraging the most innovative firms to compete in the Government market.

My intent was to ensure that the Federal Government could harness the commercial market to acquire the best value of goods and services through a fair and a reasonable process. The SARA panel made a number of recommendations which I support, including those regarding the recruitment and retention of the Federal acquisition work force and the consolidation of inter-agency contracts.

Workforce issues, by the way, are issues where there is no partisan divide that we ought to be getting the work force. This is absolutely critical. Most of the major contracts that go under are because of lack of appropriate supervision and training and the like. That is something we ought to be able to move on quickly.

But, there are a number of recommendations I don't support. Still, the panel has helped foster a productive and a very reasoned debate, and I hope will lead to positive reforms to the Federal acquisition system.

Which leads me to the other focus of today's hearing. The subcommittee will also review a number of legislative proposals, all of which pertain to Federal acquisition. The three bills under consideration are the Contractors and Federal Spending Accountability Act, the Government Contractor Accountability Act, and the Contracting and Tax Accountability Act.

The titles of these bills more or less say it all. These proposals are not attempts to improve the Government acquisition system and process, but, instead, focus on punishing companies conducting business with the Federal Government. These bills would require increased disclosure of proprietary information or limit the pool of businesses eligible to receive Federal contracts.

The bills' sponsors presumably believe they are promoting the interests of the Federal Government by championing these reforms, because there have been press reports in recent years of bad conduct by certain companies doing business with the Federal Government. However well intentioned, though, these proposals don't focus on creating the most effective and efficient Federal acquisition system possible, and, instead, will have a chilling effect upon firms wishing to participate in the Federal marketplace. This could result in decreased competition for Federal contracts as companies

decide doing business with the Federal Government is not really worth the price.

At this crucial time, we should be seeking ways to bring more companies into the Federal marketplace, making it easier for them to participate, demanding more competition to ensure that American taxpayers receive the most for their precious tax dollars.

It is unclear to me how any of these proposals improve the Federal procurement system. If anything, I think they are a step in the wrong direction.

It is ironic that, while we focus today on the panel's efforts to improve the system, not one of the proposals we are considering today has any relationship to the panel's recommendations. There is nothing here to remedy poorly defined requirements, which lead to so many acquisition failures. Nothing here, by the way, to look at the security clearance backlog, which is a huge problem where the Federal Government is paying the price. Security clearances are almost a commodity today, because of the scarcity of them and the inability of the Government to move them through the process.

Nothing will provide us with a sufficient number of acquisition trained professionals with the right skills to select the best contractor and manage contract performance, probably the No. 1 change we can make to bring about improvements to the system.

That being said, it is important we hear from the witnesses today on the legislation and from the panel of experts on the recommendations of the panel.

Chairman Towns, I look forward to continued robust discussion on this and to seeing you in Columbia this weekend.

Thank you.

[The prepared statement of Hon. Tom Davis follows:]

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Ranking Member Tom Davis
Opening Statement

Subcommittee on Government Management, Organization, and Procurement Hearing on "Contracting Reforms: Expert Recommendations, and Pending Bills"

Wednesday, February 27, 2008
Room 2154 Rayburn House Office Building

Thank you, Chairman Towns, for holding this hearing today on the recommendations of the Services Acquisition Advisory Panel, established to review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of government-wide contracts.

As you know, the Advisory Panel was created by section 1423 of the Services Acquisition Reform Act of 2003, which I authored. The Act charged the Panel with making recommendations for reforms to the acquisition system with a focus on ensuring the effective and appropriate use of commercial practices and encouraging the most innovative firms to compete in the government market. My intent was to ensure that the federal government could harness the commercial market to acquire the best value goods and services available through a fair and reasonable process.

The SARA Panel made a number of recommendations I support, including those regarding the recruitment and retention of the federal acquisition workforce and the consolidation of interagency contracts. But there are a number of recommendations I do not support. Still, the Panel report has helped foster a productive and reasoned debate that I hope will lead to positive reforms to the federal acquisition system.

Which leads me to the other focus of today's hearing.

The Subcommittee will also will review a number of legislative proposals, all of which pertain to federal acquisition.

The three bills under consideration are (i) the Contractors and Federal Spending Accountability Act; (ii) the Government Contractor Accountability Act; and (iii) the Contracting and Tax Accountability Act.

The titles of the bills more or less say it all. These proposals are not attempts to improve the government acquisition system and process, but instead focus on punishing companies conducting business with the federal government. These bills would require increased disclosure of proprietary information or limit the pool of businesses eligible to receive federal contracts.

The bills' sponsors presumably believe they are promoting the interests of the federal government by championing these reforms because there have been press reports in recent years of bad conduct by certain companies doing business with the federal government.

However well-intentioned, these proposals do not focus on creating the most effective and efficient federal acquisition system possible – and instead, will have a chilling effect upon firms wishing to participate in the federal market.

This could result in decreased competition for federal contracts as companies decide doing business with the federal government is not worth the "price." At this crucial time, we should be seeking ways to bring more companies into the federal market place and demanding more competition to ensure American taxpayers receive the most for their precious tax dollars.

It is unclear to me how any of these legislative proposals improve the federal procurement system. If anything, I think they are a step in the wrong direction. It is ironic that, while we focus today on the Panel's efforts to improve the system, not one of the legislative proposals we are considering today has any relationship to the Panel's recommendations. There is nothing here to remedy poorly defined requirements which lead to so many acquisition failures. Nothing here will provide us with a sufficient number of acquisition professionals with the right skills to select the best contractor and manage contract performance.

That being said, it is important we hear from the witnesses today on the legislation and from the panel of experts on the recommendations of the SARA panel.

Mr. TOWNS. Thank you very much for your comments.

At this time I yield to Congressman Duncan from Tennessee for an opening statement.

Mr. DUNCAN. I have no opening statement.

Mr. TOWNS. Thank you very much.

We now go to you, Mr. Hutton.

STATEMENT OF JOHN HUTTON

Mr. HUTTON. Chairman Towns and members of the subcommittee, thank you for inviting me to discuss our recent report on the Acquisition Advisory Panel's findings and recommendations. In 2003, Congress established the panel to review acquisition laws and regulations and to make recommendations to improve the Federal acquisition practices.

The panel issued its report last year and made recommendations covering seven areas, including commercial practices and the Federal acquisition work force. The panel directed most of its recommendations to the Office of Federal Procurement Policy, while others were directed to Congress and Federal agencies.

In view of our past work and broad institutional knowledge, we were asked to review the panel's findings and recommendations.

The panel's results are important to consider, given that each year, the Federal Government spends billions of dollars to procure goods and services. In fiscal year 2006, it spent over $400 billion, and services now account for about 60 percent of the total procurement dollars.

At your request, my testimony today will highlight how the panel's findings and recommendations compare with our past work and OFPP's plans to address the panel's recommendations.

Overall, the panel's findings and recommendations are largely consistent with our past work. Like the panel, our past work has pointed out the need for competition, the need for clear performance requirements, measurable performance standards, and quality assurance plans to improve the use of performance-based acquisitions, the risks inherent in the use of inter-agency contracts, because of the rapid growth and their improper management, the stresses on the Federal acquisition work force and the need for a strategic approach to assess work force needs, concerns about contractors engaged in activities traditionally performed by Government employees, and the proper roles for contract employees in a blended work force, and, finally, the adverse effects of inaccurate Federal procurement data that cannot be relied on to conduct procurement analyses.

I will now highlight a couple of areas the panel reviewed, the general thrust of the panel's recommendations, and our views on them.

One area the panel focused on was commercial practices. The panel noted that the bedrock principle of commercial acquisitions is competition. It found that defining requirements is key to achieving the benefits competition and procurements, with clear requirements—are far more likely to produce competitive, fixed-price offers that meet customers' needs.

Further, the panel found that commercial organizations used multi-disciplinary teams to plan their procurements, conduct com-

petition for award, and monitor the contractor performance, and their recommendations included, among other things, that the requirements process be improved and competitive procedures be strengthened.

Our work is generally consistent with the panel's results, and we have issued numerous products that address the importance of well-defined requirements and the need for competition. Our past work has shown that poorly defined or broadly described requirements complicate the efforts to hold agencies and contractors accountable for poor acquisition outcomes. Further, our reports have noted the lack of competition in acquisition of goods and services.

The panel also focused on the Federal acquisition work force. It recognized the significant mismatch between the demands placed on the work force and the personnel and skills available within the work force to meet those demands.

For example, the panel found that work force demands have grown substantially, while at the same time the complexity of the Federal acquisitions system, as a whole, has increased. Accordingly, the panel made a number of recommendations designed to define, assess, train, and collect data on the acquisition work force, the recruitment of talented personnel, and the retainment of its senior work force.

Again, our work is generally consistent with the panel's findings. For example, our work at DOD has shown that effective work force skills were essential for ensuring that DOD receives fair and reasonable prices for the goods and services it buys.

We also noted increased demands on the acquisition work force as one of a number of conditions that increased DOD's vulnerabilities to contracting waste and abuse. We presently have ongoing work focusing on acquisition work force issues at DOD, DHS, and NASA.

Now, turning to OFPP's efforts to address the recommendations, OFPP has acted on some, while other actions are pending or under consideration. Generally, it expects implementation of the recommendation to fall into broad categories of legislative actions, changes to the Federal acquisition regulations, OFPP actions such as issue and revising policy, and Federal agency action.

OFPP noted that legislative actions and pending FAR cases could address about one-third of the recommendations, and they expect to address most of the remaining and plan to work with the chief acquisition officer or senior procurement officials within each agency to do so.

Mr. Chairman, OFPP, as the lead agency for responding to the panel report, is now in a key position to help sustain the panel's work. In some cases, it has established milestones, reporting requirements to help provide it with visibility over the progress and results of implementing the recommendations, but not for all.

As such, we recommended that OFPP work with the chief acquisition officers and senior procurement officials to lay out an overall strategy or plan to help engage how the panel's recommendations are being implemented and how they improve Federal acquisitions.

Mr. Chairman and members of the subcommittee, this concludes my statement, and I will be pleased to answer any questions.

Thank you.

[The prepared statement of Mr. Hutton follows:]

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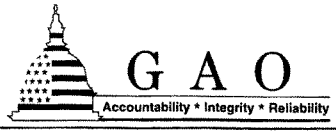
Testimony
Before the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives

For Release on Delivery
Expected at 10 a.m. EST
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FEDERAL ACQUISITION

Oversight Plan Needed to Help Implement Acquisition Advisory Panel's Recommendations

Statement of John P. Hutton
Director, Acquisition and Sourcing Management



GAO-08-515T

February 27, 2008

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Highlights

Highlights of GAO-08-515T, a testimony before the House Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives

FEDERAL ACQUISITION

Oversight Plan Needed to Help Implement Acquisition Advisory Panel's Recommendations

Why GAO Did This Study

A growing portion of federal spending is related to buying services such as administrative, management, and information technology support. Services accounted for about 60 percent of total fiscal year 2006 procurement dollars. The Services Acquisition Reform Act (SARA) of 2003 established an Acquisition Advisory Panel to make recommendations for improving acquisition practices. In January 2007, the panel proposed 89 recommendations to improve federal acquisition practices.

GAO was asked to testify on how the panel recommendations compare to GAO's past work and identify how the Office of Federal Procurement Policy (OFPP) expects the recommendations to be addressed. This statement is based on GAO's analysis of the advisory panel's report. GAO's analysis is included in its December 2007 report titled, *Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendation*, (GAO-08-160).

What GAO Recommends

In its December 2007 report, GAO recommended that OFPP develop an oversight strategy or plan with milestones and reporting requirements to help it ensure the implementation of the SARA Panel recommendations and to gauge how they improve federal acquisition. OFPP agreed in principle with GAO's recommendation.

To view the full product, including the scope and methodology, click on GAO-08-515T. For more information, contact John Hutton at (202) 512-7773 or huttonj@gao.gov.

What GAO Found

The SARA Panel, like GAO, has made numerous recommendations to improve federal government acquisition—from encouraging competition and adopting commercial practices to improving the accuracy and usefulness of procurement data. The recommendations in the SARA Panel report are largely consistent with GAO's past work and recommendations. The panel and GAO have both pointed out

- the importance of a robust requirements definition process and the need for competition;
- the need to establish clear performance requirements, measurable performance standards, and a quality assurance plan to improve the use of performance-based contracting;
- the risks inherent in the use of interagency contracts because of their rapid growth and their improper management;
- stresses on the federal acquisition workforce and the need for a strategy to assess these workforce needs;
- concerns about the role of contractors engaged in managing acquisition and procurement activities performed by government employees and the proper roles of federal employees and contractor employees in a "blended" workforce; and
- the adverse effects of inaccurate and incomplete federal procurement data, such as not providing a sound basis for conducting procurement analyses.

The panel also made recommendations that would change the guidance for awarding contracts to small businesses. While GAO's work has addressed some small business policy issues, GAO has not made recommendations that would change the guidance to be used for awarding contracts to small businesses.

OFPP representatives told GAO that OFPP agrees with almost all of the panel recommendations and expected that most of the 89 panel recommendations would be implemented through one of the following means: congressional actions; changes to the Federal Acquisition Regulation; OFPP actions, such as issuing new or revised policy; and federal agency actions. OFPP has already acted on some SARA recommendations, while other actions are pending or under consideration. Milestones and reporting requirements are in place to help OFPP gauge the implementation status of some recommendations but not for others. Moreover, OFPP does not have a strategy or plan to allow it to exercise oversight and establish accountability for implementing all of the panel's recommendations and to gauge their effect on federal acquisitions.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our review of the Services Acquisition Reform Act's Acquisition Advisory Panel report. Each year the federal government—the single largest buyer in the world—spends billions of dollars to procure goods and services. In fiscal year 2006, it spent over $400 billion. A growing portion of this spending is related to buying services, such as administrative, management, and information technology support. Services now account for about 60 percent of total procurement dollars.

Congress passed the Services Acquisition Reform Act of 2003 (SARA), which provided federal agencies an array of tools to improve how they acquire services. The act also established an acquisition advisory panel, which began work in February 2005, to review acquisition laws and regulations and make recommendations to improve federal acquisition practices. The SARA Acquisition Advisory Panel issued its final report dated January 2007, making 89 recommendations to improve federal acquisition in the following seven areas: commercial practices, performance-based acquisitions, interagency contracting, small business, the federal acquisition workforce, the role of contractors supporting government, and federal procurement data. The panel directed most of its recommendations to the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) for implementation, while the others were directed to Congress and federal agencies.

As you requested, my testimony will focus on our review of the panel's report. Specifically, I will address (1) how the panel recommendations compare with our past work and recommendations and (2) how OFPP is addressing the recommendations. My statement is based on our report issued in December 2007.[1]

Summary

The recommendations in the SARA Panel report are largely consistent with GAO's past work and recommendations. Like the panel report, our past work pointed out

- the importance of a robust requirements definition process;

[1] GAO, *Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations*, GAO-08-160 (Washington, D.C.: Dec. 20, 2007).

- the need for competition, which is a mandate that runs through the statutes and regulations governing federal procurement;
- the need for clear performance requirements, measurable performance standards, and a quality assurance plan to improve the use of performance-based contracting;
- the risks inherent in the use of interagency contracts because of their rapid growth and their improper management;
- the stresses on the federal acquisition workforce and the need for a strategic approach to assess workforce needs;
- concerns about the role of contractors engaged in managing acquisition and procurement activities traditionally performed by government employees and the proper roles for contractor employees in a "blended" workforce; and
- the adverse effects of inaccurate and incomplete federal procurement data, that cannot be relied on to conduct procurement analyses.

Like the panel, we have made numerous recommendations to address many of these issues and bring improvement to government procurement. The panel also made recommendations that would change the guidance for awarding contracts to small businesses. While our work on small business has addressed a number of these policy issues, we have not made recommendations that would change the guidance for awarding contracts to small businesses.

OFPP agrees with almost all of the 89 panel recommendations and has already acted on some of them, while other actions are pending or under consideration. Generally, OFPP expects implementation of the recommendations to fall into the broad categories of (1) legislative action; (2) changes to the Federal Acquisition Regulation (FAR); (3) OFPP actions, such as issuing or revising policy; and (4) federal agency action. OFPP noted that legislative actions and pending FAR cases could address about one-third of the recommendations. OFPP is expected to address most of the remaining recommendations and plans to work with the chief acquisition officer or senior procurement official within each agency to do so.

Based on the information OFPP provided, an overall strategy or plan with milestones and reporting requirements has not yet been established to help provide visibility over the progress and results of implementing the recommendations. Without an overall strategy or plan, it is unclear how OFPP will gauge how the panel recommendations are being implemented and their successes and shortcomings in improving federal acquisitions.

Most SARA Panel Recommendations Are Consistent with GAO's Past Work

The 89 recommendations in the panel report are largely consistent with our past work and recommendations. I will now discuss each of the seven areas the panel reviewed, the general thrust of the panel's recommendations, and our views on them.

Commercial Practices

The first area the panel reviewed was commercial practices. According to the panel, the bedrock principle of commercial acquisition is competition. The panel found that defining requirements is key to achieving the benefits of competition because procurements with clear requirements are far more likely to produce competitive, fixed-price offers that meet customer needs. Further, the panel found that commercial organizations invest the time and resources necessary to understand and define their requirements. They use multidisciplinary teams to plan their procurements, conduct competitions for award, and monitor contract performance. Commercial organizations rely on well-defined requirements and competitive awards to reduce prices and obtain innovative, high-quality goods and services. Hence, practices that enhance and encourage competition were the basis of the panel recommendations. The panel recommended, among other things, that the requirements process be improved and competitive procedures be strengthened.

Our work is generally consistent with the panel's recommendations, and we have issued numerous products that address the importance of a robust requirements definition process and the need for competition. For example, in January 2007, we testified that poorly defined or broadly described requirements have contributed to undesired services acquisition outcomes. To produce desired outcomes within available funding and required time frames, our work has shown that DOD and its contractors need to clearly understand acquisition objectives and how they translate into the contract's terms and conditions. The absence of well-defined requirements and clearly understood objectives complicates efforts to

hold DOD and contractors accountable for poor acquisition outcomes. This has been a long-standing issue.

Regarding competition, we have stated that competition is a fundamental principle underlying the federal acquisition process. Nevertheless, we have reported numerous times on the lack of competition in DOD's acquisition of goods and services. For example, we noted in April 2006 that DOD awarded contracts for security guard services supporting 57 domestic bases, 46 of which were let on an authorized sole-source basis. The sole-source contracts were awarded by DOD despite recognizing it was paying about 25 percent more than previously paid for the contracts awarded competitively.

Improving Implementation of Performance-Based Acquisition

The second area the panel reviewed was improving the implementation of performance-based acquisitions. The panel reported that performance-based acquisition (PBA) has not been fully implemented in the federal government even though OMB has encouraged greater use of it—setting a general goal in 2001 of making performance-based contracts 40 percent or more of all eligible service acquisitions for fiscal year 2006. The panel reported that agencies were not clearly defining requirements, not preparing adequate statements of work, not identifying meaningful quality measures and effective incentives, and not effectively managing the contract. The panel noted that a cultural emphasis on "getting to award" still exists within the government, an emphasis that precludes taking the time to clarify agency needs and adequately define requirements. The panel recommended that OFPP issue more explicit implementation guidance and create a PBA "Opportunity Assessment" tool to help agencies identify when they should consider using PBA contracts.

Like the panel, we have found that agencies have faced a number of issues when using PBA contracts. For example, we reported in April 2003 that there was inadequate guidance and training, a weak internal control environment, and limited performance measures and data that agencies could use to make informed decisions on when to use PBA. We have made recommendations similar to the panel's. For example, we have recommended that the Administrator of OFPP work with agencies to periodically evaluate how well agencies understand PBA and how they can apply it to services that are widely available in the commercial sector, particularly more unique and complex services. The panel's concern that agencies are not properly managing PBA contracts is also consistent with our work on surveillance of service contracts. In a March 2005 report, we found that proper surveillance of service contracts, including PBAs, was

not being conducted, leaving DOD at risk of being unable to identify and correct poor contractor performance. Accordingly, we recommended that the Secretary of Defense ensure the proper training of personnel in surveillance and their assignment to contracts no later than the date of contract award. We further recommended the development of practices to help ensure accountability for personnel carrying out surveillance responsibilities. We have also found that some agencies have attempted to apply PBA to complex and risky acquisitions, a fact that underscores the need to maintain strong government surveillance to mitigate risks.

Interagency Contracting

The third area the panel reviewed was interagency contracting. The panel found that reliance on interagency contracts is significant. According to the panel report, 40 percent of the total 2004 obligations, or $142 billion, was obligated through the use of interagency contracts. The panel also found that a significant reason for the increased use of these contracts has been reductions in the acquisition workforce accompanied by increased workloads and pressures to reduce procurement lead times. Accordingly, the panel made numerous recommendations to improve the use of interagency contracts with the intent of enhancing competition, lowering prices, improving the expertise of the acquisition workforce, and improving guidance for choosing the most appropriate interagency contract for procurements.

Our work is generally consistent with the panel's recommendations on interagency contracting. In fact, 15 of our reports on interagency contracting were cited in the panel report. These included numerous recommendations that are consistent with the panel's recommendations. Our reports recognize that interagency contracts can provide the advantages of timeliness and efficiency by leveraging the government's buying power and providing a simplified and expedited method of procurement. However, our prior work has found that agencies involved in the interagency contracting process have not always obtained required competition, evaluated contracting alternatives, or conducted adequate oversight. A number of factors render the use of interagency contracts high risk; these factors include their rapid growth in popularity, their use by some agencies that have limited expertise with this contracting method, and the number of parties that might be involved. Taken collectively, these factors contribute to a much more complex procurement environment—one in which accountability is not always clearly established. In 2005, because we found that interagency contracts can pose risks if they are not properly managed, we designated the management of interagency contracting a governmentwide high-risk area.

Small Business

The fourth area the panel reviewed was small business. The panel made recommendations to change the guidance to contracting officers for awarding contracts to small businesses. These recommendations are intended to improve the policies and, hence, address the socioeconomic benefits derived from acquiring services from small businesses. OFPP has taken the position that all but one of the recommendations requires legislation to implement. While our work on small business has addressed a number of policy issues, we have not made recommendations for statutory and regulatory changes when arguments for such changes are based on value judgments, such as those related to setting small business contracting goals.

Federal Acquisition Workforce

The fifth area the panel reviewed was the federal acquisition workforce. The panel recognized a significant mismatch between the demands placed on the acquisition workforce and the personnel and skills available within the workforce to meet those demands. The panel found, for example, that demands on the federal acquisition workforce have grown substantially while at the same time, the complexity of the federal acquisition system as a whole has increased. Accordingly, the panel made a number of recommendations designed to define, assess, train, and collect data on the acquisition workforce and to recruit talented entry level personnel and retain its senior workforce.

Our work is generally consistent with the panel's findings and recommendations on the acquisition workforce. On the basis of observations made by acquisition experts from the federal government, private sector, and academia, we reported in October 2006 that agency leaders have not recognized or elevated the importance of the acquisition profession within their organizations. The agency leaders further noted that a strategic approach had not been taken across government or within agencies to focus on workforce challenges, such as creating a positive image essential to successfully recruit and retain a new generation of talented acquisition professionals. In September 2006, we testified that while the amount, nature, and complexity of contract activity has increased, DOD's acquisition workforce, the largest component of the government's acquisition workforce, has remained relatively unchanged in size and faces certain skill gaps and serious succession planning challenges. Further, we testified that DOD's acquisition workforce must have the right skills and capabilities if it is to effectively implement best practices and properly manage the goods and services it buys. In July 2006, we reported that in the ever-changing DOD contracting environment, the acquisition workforce must be able to rapidly adapt to increasing

workloads while continuing to improve its knowledge of market conditions, industry trends, and the technical details of the goods and services it procures. Moreover, we noted that effective workforce skills were essential for ensuring that DOD receives fair and reasonable prices for the goods and services it buys and identified a number of conditions that increased DOD's vulnerabilities to contracting waste and abuse.

Contractors Supporting the Federal Government

The sixth area the panel reviewed was contractors supporting the federal government. The panel reported that, in some cases, contractors are solely or predominantly responsible for the performance of mission-critical functions that were traditionally performed by government employees, such as acquisition program management and procurement, policy analysis, and quality assurance. Further, the panel noted that this development has created issues with respect to the proper roles of, and relationships between, federal employees and contractor employees in the "blended" workforce. The panel stated that although federal law prohibits contracting for activities and functions that are inherently governmental, uncertainty about the proper scope and application of this term has led to confusion, particularly with respect to service contracting outside the scope of OMB's Circular A-76, which provides guidance on competing work for commercial activities via public-private competition. Moreover, according to the panel, as the federal workforce shrinks, there is a need to ensure that agencies have sufficient in-house expertise and experience to perform inherently governmental functions by being in a position to make critical decisions on policy and program management issues and to manage the performance of contractors. The panel recommended (1) that the FAR Council consider developing a standard organizational conflict-of-interest clause for solicitations and contracts that sets forth a contractor's responsibility concerning its employees and those of its subcontractors, partners, and any other affiliated organization or individual; (2) that OFPP update the principles for agencies to apply in determining which functions government employees must perform; and (3) that OFPP ensure that the functions identified as those that must be performed by government employees are adequately staffed.

On the basis of our work, we have similar concerns to those expressed by the panel, and our work is generally consistent with the panel's recommendations on the appropriate role of contractors supporting the federal acquisition workforce. We have testified and reported on the issues associated with an unclear definition of what constitutes inherently governmental functions, inadequate government experience and expertise for overseeing contractor performance, and organizational conflicts of

interest related to contractor responsibilities. We found that there is a need for placing greater attention on the type of functions and activities that could be contracted out and those that should not, for reviewing the current independence and conflict-of-interest rules relating to contractors, and for identifying the factors that prompt the government to use contractors in circumstances where the proper choice might be the use of government employees or military personnel. In our recent work at DHS, we found that more than half of the 117 statements of work we reviewed provided for services that closely supported the performance of inherently governmental functions. We made recommendations to DHS to improve control and accountability for decisions resulting in buying services that closely support inherently governmental functions. Accordingly, our work is consistent with panel recommendations to update the principles for agencies to apply in determining which functions government employees must perform; and to ensure that the functions identified as those that must be performed by government employees are adequately staffed.

Report on Federal Procurement Data

Finally, the seventh and last area the panel reviewed was federal procurement data. The Federal Procurement Data System-Next Generation (FPDS-NG) is the federal government's primary central database for capturing information on federal procurement actions. Congress, Executive Branch agencies, and the public rely on FPDS-NG for a wide range of information including agencies' contracting actions, governmentwide procurement trends, and how procurement actions support socioeconomic goals and affect specific geographical areas and markets. The panel reported that FPDS-NG data, while insightful when aggregated at the highest level, continue to be inaccurate and incomplete at the detailed level and cannot be relied on to conduct procurement analyses. The panel believes the processes for capturing and reporting FPDS-NG data need to be improved if that data is to meet user requirements. As a result, the panel made 15 recommendations aimed at increasing the accuracy and the timeliness of the FPDS-NG data. For example, the panel recommended that an independent verification and validation should be undertaken to ensure all other validation rules are working properly in FPDS-NG.

Our work has identified similar concerns as those expressed by the panel. In fact, the panel cited our work numerous times in its report. Like the panel, we have pointed out that FPDS-NG data accuracy has been a long-standing problem and have made numerous recommendations to address this problem. As early as 1994, we reported that the usefulness of federal procurement data for conducting procurement policy analysis was limited.

More recently, in 2005, we again raised concerns about the accuracy and timeliness of the data available in FPDS-NG. We have also reported that the use of the independent verification and validation function is recognized as a best business practice and can help provide reasonable assurance that the system satisfies its intended use and user needs.

OFPP Plans to Address Most SARA Panel Recommendations

OFPP representatives told us the office agrees with almost all of the 89 panel recommendations and has already acted on some, while potential actions are pending on others. OFPP identified legislative actions and FAR cases that could address over one third of the recommendations. OFPP expects to address at least 51 of the remaining recommendations and plans to work with the chief acquisition officer or senior procurement official within each agency to do so. In some cases, OFPP has established milestones and reporting requirements to help provide it with visibility over the progress and results of implementing the recommendations. Although OFPP has taken some steps to track the progress of selected recommendations, it does not have an overall strategy or plan to gauge the successes and shortcomings in how the panel's recommendations are implemented and how they improve federal acquisitions. Table 1 shows how OFPP expected the 89 recommendations to be implemented.

Table 1: OFPP Expectations for SARA Panel Recommendations as of October 2007

	Number of recommendations
Legislative action	23
Changes to the FAR	9
OFPP actions	51
Agency actions	6
Total	**89**

Source: GAO analysis of OFPP data.

In October 2007, OFPP representatives noted that while the panel directed 17 recommendations to Congress, legislative actions could address as many as 23 panel recommendations. Panel recommendations directed to Congress include potential legislative changes such as authorizing the General Services Administration to establish a new information technology schedule for professional services and enacting legislation to strengthen the preference for awarding contracts to small businesses. An example of the latter is amending the Small Business Act to remove any statutory provisions that appear to provide for a hierarchy of small

business programs. According to the panel, this is necessary because an agency would have difficulty meeting its small business goal if any one small business program takes a priority over the others. Since October 2007, some panel recommendations have been addressed by legislative actions. For example, the panel recommended that protests of task and delivery orders valued in excess of $5 million be permitted. Section 843 of the National Defense Authorization Act for Fiscal Year 2008 allows for such protests, but raised the dollar threshold to orders valued in excess of $10 million.

For those recommendations that were expected to be addressed by legislative actions but have not yet been the subject of congressional action, OFPP representatives told us the office could take administrative actions, such as issuing a policy memorandum or initiating a FAR case, to implement most of them.

Conclusions and Recommendation

In closing, the SARA Panel, like GAO, has made numerous recommendations to improve federal government acquisition—from encouraging competition and adopting commercial practices to improving the accuracy and usefulness of procurement data. Our work is largely consistent with the panel's recommendations, and when they are taken as a whole, we believe the recommendations, if implemented effectively, can bring needed improvements in the way the federal government buys goods and services. OFPP, as the lead office for responding to the report, is now in a key position to sustain the panel's work by ensuring that panel recommendations are implemented across the federal government in an effective and timely manner. To do this, we recommended in our recent report that OFPP work with the chief acquisition officers and senior procurement officials across all the federal agencies to lay out a strategy or plan that includes milestones and reporting requirements that OFPP could use to establish accountability, exercise oversight, and gauge the progress and results of implementing the recommendations.

Mr. Chairman and members of the subcommittee this concludes my statement. I would be pleased to respond to any questions you might have.

For questions regarding this testimony, please call John P. Hutton at (202) 512-4841 or huttonj@gao.gov. Contact points for our Office of

Congressional Relations and Public Affairs may be found on the last page of this testimony.

Key contributors to this testimony include James Fuquay, Assistant Director, Daniel Hauser, John Krump, Robert Miller, and Robert Swierczek.

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Mr. TOWNS. Thank you very much, Mr. Hutton.
Ms. Madsen.

STATEMENT OF MARCIA MADSEN

Ms. MADSEN. Mr. Chairman, members of the subcommittee, thank you for inviting me here today to talk about the Acquisition Advisory Panel. Mr. Davis did a good job of summing up the panel's charter. Sometimes people think that we were tasked to look at the entire acquisition process, so I always feel compelled to talk about what the panel's charter was, which was commercial practices, performance-based contracting, and use of inter-agency contracts.

I should recognize that there are two other panel members with me today. Sitting behind me, Mr. Ty Hughes, a Deputy General Counsel for the Air Force for Acquisition and Mr. Roger Waldron, formerly of GSA. Also, several of our panel staff came today: Laura Latta, who was our Executive Director, Ms. Ann Terry, and Mr. Eric Cho.

It is no small challenge to sum up the panel's report in 5 minutes, but I will be happy to try to do that. I actually need one of these timers at home. I think it would be a great idea.

With respect to commercial practices, the one thing I think that we did differently is nobody has really looked at commercial practices in about 10 years since FAS or FARA were enacted, so we asked big commercial buyers to come and talk to the panel about what works for them in acquisition of services. The things they emphasized to us were requirements—that is where they invest, requirement's definition, and competition. That is what our recommendations reflect. I think most of our recommendations, actually, in this area have been picked up in the Defense Authorization Act and in S. 680, and we are very happy about that progress.

On inter-agency contracts, we recommended a number of steps to improve the management of inter-agency contracts. Our findings and recommendations recognized that they are important to helping the Government meet its mission, but that there were significant issues with proliferation and failure, really, of management between agencies that owned those vehicles and agencies that used them, so we have a number of recommendations there. Again, many of those have been picked up in pending legislation.

I was asked specifically to address our work force recommendations. Although they are not called out in the statute specifically, we felt that we couldn't do our work justice without talking about the Federal acquisition work force.

The panel determined that there was a significant mismatch between the demands placed on the work force and the personnel and skills available to meet those demands, but we also realized, after a lot of work, that there wasn't much in the way of reliable information about the size, competencies, and composition of the Federal acquisition work force, or, I might add, of contractors supporting that work force.

One can't understand the transitive affect of the work force without adequate data, so we commissioned a study, the executive summary of which I have provided a copy to the staff. It is actually

available in a nine-CD set. We are happy to provide the whole thing to you if you want to take a look at it.

But our recommendations start with prompt and aggressive action to improve the work force, consistent definitions, a single Government-wide data base, and an emphasis on human capital planning by the agencies. I would like to add, again, a number of these recommendations have been picked up in the Defense Authorization bill, as well as in S. 680, including the importance of providing funds, which are in the work force development fund, and the SARA training fund, both of which are in the National Defense Authorization Act, and the SARA training fund made permanent, which is in S. 680.

We did not recommend that agencies rush out and hire scores of new acquisition professionals, because we did not have enough information to tell us the relationship between numbers of acquisition professionals and competencies of those people, gaps in skills, and the use of contractors. But, we did state that a flexible planning process should be used and begun immediately so that changes could begin as soon as the information was available, and OFPP has recently completed a work force assessment process, and DOD has one underway.

Again, although not called out in the statute, the panel also determined that our findings and recommendations would have an impact on small business. So, we set up a cross-cutting working group to take a look at small business issues, and we recognized that particularly the growth of task and delivery order contracts for multi-agency use created challenges for small businesses. This is because, basically, most of the small business laws were written in the era before it became common practice to use these contracts that have delivery order or task order mechanism.

So, we have some recommendations in our report to deal with this issue, including statutory revisions that would allow contracting officers to reserve a portion of awards and a full and open competition. For small businesses, we also recommended express authority to reserve orders for competition among the small business contract holders only.

I would be happy to answer more questions about the panel's findings and recommendations when you all are ready to ask them. I appreciate the opportunity to be here today.

Thank you.

[The prepared statement of Ms. Madsen follows:]

STATEMENT OF MARCIA G. MADSEN

CHAIR OF THE ACQUISITION ADVISORY PANEL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION AND

PROCUREMENT OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT

REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2008

STATEMENT OF MARCIA G. MADSEN

CHAIR OF THE ACQUISITION ADVISORY PANEL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION AND PROCUREMENT OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2008

Mr. Chairman, Congressman Bilbray and Members of the Subcommittee, I appreciate the opportunity to appear before you to address the Acquisition Advisory Panel's findings and recommendations. Two Panel members have joined me today, Mr. James "Ty" Hughes, Deputy General Counsel (Acquisition), Department of the Air Force, and Mr. Roger D. Waldron, formerly of the U.S. General Services Administration. In addition to chairing this Panel, I am a partner in the law firm of Mayer Brown LLP and I have 20 years of experience in government procurement law.

You have asked for an overview of the recommendations made by the Acquisition Advisory Panel and the progress toward implementation of the recommendations. My testimony could not possibly cover the Panel's 100 findings and 89 recommendations in their entirety. However, I will try to provide a good overview regarding competition and adoption of commercial practices, the management and use of interagency contracts, acquisition workforce challenges, opportunities for small businesses, and the appropriate role of contractors supporting the government – the "blended workforce" issues. I also will talk briefly about the Panel's data recommendations.

The Panel Report was published in draft form in January 2007 and was published in final form by GPO in July 2007. Since that time, many of the Panel's recommendations have been included in proposed legislation originating both in the House and the Senate. Several recommendations addressing competition under multiple award contracts and the acquisition workforce were included in the National Defense Authorization Act for Fiscal Year 2008 (the DoD Authorization Act). Finally, as noted in the Government Accountability Office's (GAO's) December 2007 Report "Oversight Plan Needed to Help Implement Acquisition Advisory Recommendations," the Office of Federal Procurement Policy (OFPP) agrees with almost all the Panel's recommendations and is moving forward to implement many of them through changes in policy or regulation.

The Panel was established pursuant to Section 1423 of the National Defense Authorization Act For Fiscal Year 2004. Its members, balanced between the public and private sectors, were appointed in February 2005. The Panel held 31 public meetings and heard the testimony of 108 witnesses representing 86 entities or groups from industry, government, and public interest organizations. The Panel's public deliberations produced approximately 7,500 pages of transcript. In addition, we received written public statements from over 50 sources, including associations, individual companies, and members of the public.

I again would like to personally thank the 13 Panel members for their dedication over the course of our deliberations. As you know, each of them was a volunteer with a full-time and highly responsible position in "regular" life. The Panel conducted its work under significant constraints with respect to staff and money. We had only one full-time staff member, the Executive Director. We are grateful to GSA and to the Director of Defense Acquisition and Policy for making staff available on a temporary basis to the Panel. The level of participation by

the members in the hearings, in developing findings and recommendations, and in writing the Report was substantial.

The Panel is grateful to the many witnesses and members of the public who helped shape the Panel's report through their active participation and interaction with the Panel. (There is a complete list of the witnesses in the appendices to the Report.) The insight gained from the exchange with witnesses was invaluable. In many instances, approaches under consideration by the Panel were revised or adjusted based on input from the witnesses who helped the Panel see many different perspectives. I would like to especially thank those commercial companies that addressed the Panel. We invited large commercial buyers of services to address the Panel in an effort to determine their current best practices for services acquisition. These companies generously shared their expertise with the Panel even though many of them do little or no business with the government. We are grateful for this rare opportunity to learn how they buy services and where they invest in the services acquisition process.

To summarize, significant observations from the Panel's work:

Requirements Definition and Acquisition Planning Enhance Competition

- Commercial buyers invest heavily in planning and requirements analysis to obtain meaningful competition
- Government practice focuses on rapid awards at the expense of planning, competition and performance
- The Government must invest time and resources to enhance its ability to develop/maintain market expertise and define requirements

Competition Drives Innovation and Fair and Reasonable Prices

- Commercial practice relies on competition for innovation and pricing
- Government practice does not meet the standard commercial practice for competition
  - Interagency Contracting
    - -Incentives to compete lacking
    - -Improve the ordering process competition and transparency of data

Increased Accountability and Transparency Will Improve Interagency Contracting

- No consistent, government-wide policy for agencies who manage or use interagency contracts
- Accountability and transparency lacking in interagency contracting
- Recommendations to require formal business cases to support interagency contracts, greater accountability in their management, and more transparent use

Multiple Award Contracts Need to Provide More Opportunities for Small Businesses

- Agencies should be authorized to reserve awards to small businesses in full and open competition multiple award procurements not suitable exclusively to small businesses
- Ordering procedures under multiple award contracts, including Federal Supply Schedules, should provide agencies with explicit discretion to limit competition for orders to small businesses

The Acquisition Workforce Requires Immediate Attention

- Demands on the acquisition workforce have outstripped its capacity
- An expedited assessment of the workforce is needed in order to improve capacity
- Human capital planning and investment in the acquisition workforce are imperative

Appropriate Role of Contractors Supporting the Workforce

- Management challenges of a "blended" workforce
  - Blurring the distinctions between inherently governmental and commercial functions
  - Rising concerns about
    - -Organizational and personal conflicts of interest
    - -Protection of contractor proprietary/confidential data
  - Recommendations to promote ethical/efficient use of "blended" workforce

Enhance Competition by Investing in Requirements Definition and Planning

If there is one fundamental lesson to be learned from the Panel's review of commercial practices, it is the critical role requirements development plays in the successful acquisition of commercial services. Sound requirements development is the key to improving contractor performance and saving taxpayer dollars. Sound requirements development increases competition, reduces costs, eliminates time-and-materials contracts, and increases the likelihood of successful contract performance. Commercial buyers do it well. Government buyers need to improve.

Commercial Practice: Meaningful competition, pricing, contract type, and terms and conditions all are dependent on the time and effort commercial firms invest in the preliminary requirements development stage. The commercial buyers described a rigorous requirements definition and acquisition planning process. To them, requirements definition is of equal importance to the selection of the right contractor. These companies invest the time and resources necessary to clearly define requirements up-front in order to achieve the benefits of competition. They perform on-going rigorous market research and are thus able to provide well-defined, performance-based requirements conducive to innovative fixed-price solutions. They obtain a commitment on their requirements from all appropriate levels in the corporation.

Government Practice: The Panel's work shows that the government fails to invest in this phase of procurement, focusing instead on rapid awards. While at the conceptual level buyers appear to understand the importance of requirements definition to successful, cost-effective contracts, culture and the metrics focus on "getting to award" rather than contract results. In testimony, public sector officials and representatives of government contractors expressed frustration that the government is frequently unable to define its requirements

sufficiently to allow for fixed-price solutions, head-to-head competition, or performance-based contracts.

Ill-defined requirements fail to produce meaningful competition for services solutions. Instead, agencies often rely on time-and-materials contracts with fixed hourly rates that lack incentives for innovative solutions. The testimony was consistent that the major contributors to this problem are the cultural and budgetary pressures to quickly award contracts or orders, combined with a lack of market expertise in an already strained acquisition workforce. The government's lack of investment in acquisition planning is well-documented beyond the testimony heard by the Panel. For instance, two recent audits from the Department of Defense Inspector General (DoD IG) found that of the $217 million spent under 117 awards reviewed, 116 lacked acquisition planning or market research.[1]

Recommendations: The Panel recommendations are based on current commercial sector practices. For instance, to develop and maintain market expertise, the Panel recommended that agencies establish "centers of expertise" to protect their high-dollar investments in recurring or strategic requirements. The Panel also saw a need for a central source of market research information comparable to that maintained by private companies. We recommended that the General Services Administration (GSA) establish such a capability to monitor services acquisitions by government and commercial buyers, collect information on private sector transactions that is publicly available, as well as obtain information on government transactions, and make this information available government-wide. Under our recommendations for improving Performance-Based Acquisition (PBA), the Panel recommended that OFPP provide

[1] DoD IG Report No. D-2007-007, "FY 2005 Purchases Made Through the General Services Administration," Oct. 30, 2006, at 1-4 (general discussion of the issue); DoD IG Report No. D-2007-032, "Report on FY 2005 DoD Purchases Made Through the Department of Treasury," Dec. 8, 2006, at 32 (specific statistics cited).

more guidance to agencies regarding how to define requirements in terms of desired outcomes, how to measure those outcomes, and how to develop appropriate incentives for contractors to achieve those outcomes. Because defining needs/requirements up-front is one of the most critical aspects of a PBA, the Panel recommended that the FAR require the government to develop and provide to contractors a "baseline performance case." The Panel's Report contains details about what this baseline performance case would entail, but it is essentially a framework to provide discipline in the government's requirements definition process. We also recommended an educational certification program for contracting officer representatives to help them become effective planners and monitors of PBAs. With respect to the concerns expressed by the GAO and Inspectors General (IGs) regarding ill-defined requirements for orders under interagency contracts, the Panel recommended criteria for requirements planning by ordering agencies ***before*** access to an interagency contract is granted. OFPP has begun to implement these recommendations - for example, OFPP has tasked GSA to implement the Panel's recommendation regarding market research. In addition, the Department of Defense is focusing on improving the development, definition and communication of requirements during the procurement process.

Encourage Competition to increase Innovation and Produce Fair and Reasonable Prices

Commercial Practice: In addition to learning that basic commercial practice involves substantial investment in requirements analysis, the Panel also was advised that commercial buyers rely extensively on competition to produce innovation and fair and reasonable prices. In fact, competition is fundamental to producing innovation and to determining fair and reasonable prices. Because there is no substitute for competition, commercial companies rarely buy on a sole-source basis. In those rare cases where they do not seek or cannot achieve competition, commercial buyers rely on their own market research, benchmarking, and often seek data on

similar commercial sales to establish fair and reasonable pricing. In some cases, they may even obtain certain cost-related data, such as wages or subcontract costs, from the seller to determine a price range. But commercial buyers generally find these methods far inferior to competition for arriving at the best price. As a result, they monitor non-competitive contracts closely, and eliminate such arrangements as soon as the requirement can be moved to a competitive solution.

Government Practice: It is instructive to compare the strong commercial preference for competition to the government's competition statistics. In fiscal year 2004, the government awarded $107 billion, or over one-third of its total procurement dollars, non-competitively. Over one-fourth, or $100 billion, was awarded non-competitively in 2005.[2] The number of competitions that result in the government only receiving one offer doubled between 2000 and 2005. Spending on services in both 2004 and 2005 accounted for 60% of procurement dollars with 20% and 24% awarded without competition, respectively.[3]

Interagency Contracting. The Panel believes the amount of non-competitive awards may, in fact, be underreported for orders under multiple award contracts available for interagency use, generally known as "interagency contracts." The Panel's repeated attempts over several months to obtain information about the extent of competition for orders under these types of contracts were frustrated. The government's database on federal procurement spending, the Federal Procurement Data System-Next Generation (FPDS-NG) only began to collect data on interagency contracts in 2004. Due to a number of factors, including poor reporting instructions, faulty validations, and even DoD policy, the "extent competed" field in FPDS-NG for these orders overwhelmingly reflects the competitive nature of the master contract, rather than the

[2] Standard Competition Report from FPDS-NG, available on-line at https://www.fpds.gov under Standard Reports (last visited Jan. 29, 2007). The competitive/non-competitive base (against which the percentage is derived) is $338 billion for fiscal year 2004 and $371.7 billion for fiscal year 2005.
[3] FPDS-NG special reports for the Panel.

actual level of competition for orders. This reporting problem skews the data such that it is unreliable. The lack of transparency into the nature of these orders is a significant weakness. FPDS-NG reports spending under contracts available for multi-agency use at as much as $142 billion, or 40% of procurement spending, in fiscal year 2004.[4]

Despite the Panel's overarching concern with data reliability and transparency, there certainly appears to be sufficient cause for concern in addition to these statistics. The Panel was well aware that GAO put management of interagency contracting on its High Risk Series in 2005. Since the GAO high risk designation in 2005, more data regarding orders under these contracts has become available. In fact, in a recent audit, the DoD IG found that 62% of reviewed orders, totaling nearly $50 million, failed to provide a fair opportunity to compete as required by law. In addition, 98 of 111 orders valued at $85.9 million were either improperly executed, improperly funded, or both.[5]

The Panel's Report sets forth the history and efforts by Congress to improve competition. The intent of interagency contracts, most of which are assumed to be multiple award contracts, was to lower administrative costs, leverage buying power and provide a streamlined acquisition process -- all well-meaning goals. Such contract vehicles were never intended to be used to avoid competition.

Interagency contracts generally are indefinite-delivery/indefinite-quantity type contracts with very broad scopes of work, most of which provide for multiple awardees that will compete with one another for specific orders at a later point when an agency identifies a requirement. Therefore, where services are concerned, the initial competition is based on loosely defined

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[4] Id.

[5] DoD IG Report No. D-2007-023, "FY 2005 Purchases Made Through the National Aeronautics and Space Administration," Nov. 13, 2006, at ii.

statements of the functional requirements resulting in proposals for hourly rates for various labor categories. The expectation is that once an agency identifies a specific need, a more clearly defined requirement will be provided at the order level allowing the multiple awardees to submit task-specific solutions and pricing. Because this process narrows the number of eligible contractors at the order level, Congress has insisted that these multiple awardees be given a "fair opportunity" to compete for the task orders.

So why do interagency contracts seem to be drawing so much non-competitive activity? There appear to be a number of checks and balances missing that would otherwise contribute to healthier incentives for competition.

Incentives to Compete Lacking. The Panel found that there is no government-wide requirement that all interagency contracts provide notification that a task order is available for competition. There is no visibility into sole-source orders, as there is no requirement for a synopsis or public notification for orders under multiple award contracts, regardless of the size of the order. Even where a best value selection is made at the order level, there is no requirement for a detailed debriefing, regardless of the amount of the order or the amount of bid and proposal costs expended by the eligible contractor, thus denying the contractor information that might enable it to be more competitive on future orders/contracts. Further, without regard to size of the order, there is no option for contractors to protest the selection process under multiple award contracts, reducing the pressure on the government to clearly define requirements, specify its evaluation criteria, and make reasonable trade-off decisions among those criteria. For example, even issues that affect the integrity of the competitive process such as organizational or personal conflicts of interest cannot be protested.

However, the Panel also took testimony from agency officials who told us they could not meet their missions without the use of interagency contracts. Therefore, the Panel sought to

achieve a balance in its recommendations that will introduce incentives to encourage more competition while not unduly burdening these tools for streamlined buying. For instance, some of our recommendations only apply to orders over $5 million. Why this threshold? We found that of the $142 billion spent on orders under these interagency contracts in fiscal year 2004, $66.7 billion, nearly half, was awarded in single transactions (at the order level) exceeding $5 million. The fiscal year 2005 statistics show total spending on these contracts at $132 billion with $63.7 billion in single transactions over $5 million.[6]

Nearly half of the dollars are spent on single transactions over this threshold, but the majority of transactions are actually below it. By using this threshold, we were able to impact a significant dollar volume, but not the majority of transactions. "Bite-sized" orders for repetitive needs can be placed using the current methods under this threshold, while large transactions involving the need for requirements in a Statement of Work, evaluation criteria, and best value selection procedures would be subject to a higher level of competitive rigor.

Recommendations: It is gratifying to see that the Panel's recommendations in this area are receiving substantial attention. The Panel recommended expanding government-wide the current DoD Section 803 requirements that include notifying all eligible contractors under multiple award contracts of order opportunities. We also recommended that the 803 procedures apply to supplies and services. And while we agreed that a pre-award notification of sole-source orders might unduly burden the ordering process, the Panel recommended post-award public notification of sole-source orders finding that it would improve transparency. For single orders exceeding $5 million, the Panel recommended that agencies adhere to a higher competitive standard by: 1) providing a clear statement of requirements; 2) disclosing the significant

[6] FPDS-NG special reports for the Panel.

evaluation factors and subfactors and their relative importance; 3) providing a reasonable response time for proposal submissions; and 4) documenting the award decision and the trade-off of price/cost to quality in best value awards. We also recommended post-award debriefings for disappointed offerors for orders over $5 million when statements of work and evaluation criteria are used. Concerned that the government is buying complex, high-dollar services without a commensurate level of competitive rigor, transparency, or review, we recommended limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at $5 million or less. Of course, it should be noted that under existing law, any order under the GSA Schedules may be protested.

Specific to the GSA Federal Supply Schedules program, the Panel recommended a new services schedule for information technology that would ***require*** competition at the task order level and reduce the burden on contractors to negotiate up-front hourly labor rates with GSA. The Panel sees the exercise of negotiating (and auditing) labor rates as producing little in the way of meaningful competition given that solutions are project-specific and the price depends on the actual labor mix applied. In such cases, analyzing labor rates contributes little to understanding the price that the government will pay for the project. Much time and effort are wasted by GSA and contractors in providing and auditing labor rates that do not provide useful information about the costs of a project.

The DoD Authorization Act adopted the Panel's recommendations requiring enhanced competition requirements and post award debriefings for task orders exceeding $ 5 million. The DoD Authorization Act also authorized bid protests for task orders exceeding $10 million (the Panel had recommended a $5 million threshold). In addition, S. 680 and HR 6069 would extend the Section 803 ordering procedures for the Federal Supply Schedules, government-wide. At the

same time OFPP has opened FAR Cases implementing several of the Panel competition recommendations.

Accountability and Transparency Inadequate for Interagency Contracting

While I have already discussed interagency contracting with respect to requirements analysis and competition, the Panel also separately addressed the issues of management of, accountability for, and transparency of interagency contracts. We included in our review the practice of using assisting entities that buy from interagency contracts. The Panel found that while some competition among interagency contracts is desirable, there is no coordination regarding the creation or continuation of these contract vehicles to determine whether their use is effective in leveraging the government's buying power or whether they have proliferated to the point of burdening the acquisition system. The Panel also was concerned that recent focus on the problems of interagency contracting would result in an increase of so-called "enterprise-wide contracts." Such contracts are operationally the same as interagency contracts, except they are restricted for use by one agency. The Panel found the trend toward such contracts to result in costly duplication if the existing problems with interagency contracts can be addressed through better management discipline and a more transparent competitive process.

Recommendations: Specifically, the Panel found that the lack of government-wide policy regarding the management of interagency contracts is a key weakness that can be addressed by OFPP. OFPP is in the process of developing just such a policy. (As the Panel was developing its findings and recommendations in this area, Panel Members met with OFPP to provide input regarding the Panel's work.) The Panel also recommended that agencies, under policy guidance issued by OFPP, formally approve the creation, continuation, or expansion of interagency contracts using a formal business case. Agencies managing these contracts would, among other things, be required to identify and apply the appropriate resources to manage the

contract, clearly identify the roles and responsibilities of the participants, and measure sound contracting procedures. As discussed above, there is little visibility into the numbers and use of interagency contracts. The data must be derived from FPDS-NG and is not, as discussed earlier, completely reliable. Therefore, the Panel made a number of recommendations to improve the transparency and reliability of data on interagency contracts.

S.680 includes Panel recommendations regarding management of interagency contracts. At the same time, OFPP is working toward implementing management policies and procedures for the creation, continuation and operation of interagency contracts.

Providing Opportunities for Small Businesses Under Multiple Award Contracts

Although not included in the topics specified in Section 1423 of SARA, the Panel decided early on that because its recommendations likely would impact small businesses it needed to include an examination of small business issues in its work. The growth in multiple award contracts has created particular challenges for small businesses. The Panel recognized the positive efficiencies of multiple award contracts, especially those available for multi-agency use. However, the goal of efficiency must be balanced against the negative impact these contracts can have on small business opportunities. The Panel found that multiple award contracts often have a broad scope of work, geographically, functionally, or both, and that these broad scopes of work make it extremely difficult for small businesses competing against large businesses under full and open competition for multiple awards. Further, when small businesses do receive awards under a multiple award contracts, there is no specific statutory or regulatory authority for agencies to reserve orders under multiple award contracts for small business competition to achieve agency small business goals.

Recommendations: The Panel recommended specific statutory amendments that would allow contracting officers to reserve, for small business competition only, a portion of the

multiple awards in a full and open competition not suitable for a total small business set-aside. The Panel also recommended express statutory or regulatory authority to reserve orders, at the explicit discretion of the ordering agency, under multiple award contracts for competition among the small business multiple awardees only. These authorities will provide contracting officers with greater flexibilities in using multiple award contracts to meet agency small business goals. To date, there has been little movement in addressing these recommendations.

The Panel considered mandatory reserves or set-asides of orders but instead recommended providing agencies with the discretion to reserve orders in order to meet small business goals. Agency discretion is consistent with the flexibility and inherent efficiency of multiple award contracts. That discretion, when combined with the flexibility of multiple award contracts can create an effective tool for creating opportunities for small business. For example, the Panel considered the record of the Federal Supply Schedule program, which has been one of the most successful contracting programs for small businesses programs, with small businesses receiving over 36 % of the dollar value of orders over the last five years. The Federal Supply Schedule does not have mandatory set-asides for orders. However, under the Federal Supply Schedule, agencies do have the discretion to consider socio-economic status during the ordering process.

A related issue is contract bundling. The Panel found inconsistent implementation of contract bundling requirements across the government. The Panel recommended additional training and the creation of an interagency group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling. S. 2300 adopts this recommendation requiring a report on best practices to reduce bundling, followed by the issuance of additional policies to reduce bundling.

The Acquisition Workforce Requires Immediate Attention

The Panel determined that a quantitatively and qualitatively adequate workforce is essential to the successful operation of the acquisition system. But the demands on the acquisition workforce have outstripped its capacity. Just since 9/11, the dollar volume of procurement has increased by 63 %. While the current workforce has remained stable since 2000, there were substantial reductions in the 1990s accompanied by relatively little new hiring. Compounding the problem, while a variety of simplified acquisition techniques were introduced by the 1990s acquisition reforms for low dollar value procurements, higher dollar procurements require greater sophistication by the government buyer due to the growth in best value procurement, the emphasis on past performance, and the use of commercial contracting. Accompanying these trends is the structural change in what the government is purchasing, with an emphasis on high dollar, complex technology related solutions. However, due to the lack of a consistent definition of the workforce and lack of ability to measure the workforce, as well as the lack of competency assessments and systematic human capital strategic planning, determining the needs of this workforce is difficult. The Panel was very frustrated by the lack of useful and meaningful data regarding the federal acquisition workforce and undertook its own study – dating back to the 1960s in an effort to obtain information on the size, composition and skills of the workforce.

The Panel was struck by the difference from commercial practice. Private sector buyers of services invest in extremely well-qualified employees and consultants to define their requirements, design, and carry out their acquisition of services. Larger acquisitions - $10 million and up - are subject to a tightly controlled and carefully structured process overseen by highly credentialed and experienced buyers. The Committee need only look at the presentations

to the Panel by the private sector buyers and the consulting firms that support them for comparison.

Recommendations: An accurate understanding of the key trends about the size and composition of the federal acquisition workforce cannot be obtained without using a consistent benchmark, and none is currently available for such an assessment. The Panel recommended that OFPP prescribe a consistent definition and methodology for measuring the workforce. The urgency of this task is reflected in another recommendation that OFPP collect data using this definition and measuring methodology ***within one year*** of the Panel's final report. Consistent with this, OFPP should be responsible for creating and maintaining a mandatory government-wide database for members of this workforce. The Panel noted that the Commission on Government Procurement recommended just such a system over 30 years ago - in 1972. While there are a great many recommendations for workforce improvement in the Panel's report, one of the key recommendations is that each agency must engage in systematic assessment and human capital strategic planning for its acquisition workforce. Without such plans, it is impossible to know how and to what extent a given agency's workforce is deficient. It is also difficult to know to what extent and how efficiently agencies are using contractors to support the acquisition function. In support of these recommendations, the Panel has also suggested that these plans be reviewed by OFPP for trends, best practices, and shortcomings as part of an agency's overall human capital planning requirements. Finally, the Panel recommended an SES level position be established within OFPP responsible for acquisition workforce programs, a government-wide intern program, as well as the reauthorization of the SARA training fund. I am pleased to note that the DoD Authorization Act included a number of these recommendations that are now law. Most importantly, the DoD Authorization Act requires the Chief Acquisition Officers for each agency, in consolation with OFPP, to develop human capital succession plans for the acquisition

workforce. DoD is already in the midst of a comprehensive assessment of its acquisition workforce, an assessment that will be used in developing a strategic human capital plan for its acquisition workforce.

Over the past year OFPP, also conducted a government-wide competency survey assessing the skills of the civilian acquisition workforce. OFPP received over 5,400 responses to the survey, approximately half the civilian acquisition workforce. OFPP has communicated the results of the survey to the respective agency Chief Acquisition Officers for human capital strategic planning purposes and closing skill gaps. Planning requires investment and I am pleased to note that two important steps have been taken to invest in the future of the acquisition workforce. The DoD Authorization Act created the Defense Acquisition Workforce Development Fund for the recruitment, training, and retention of acquisition personnel. The DoD Authorization Act also made permanent the Acquisition Workforce Training Fund managed by OFPP and GSA. The Acquisition Workforce Training Fund supports government-wide training of the acquisition workforce through the Federal Acquisition Institute.

Appropriate Role of Contractors Supporting the Workforce

Management challenges of a "blended" workforce: The Panel heard testimony regarding the use of and management of the "blended" workforce, where contractors work side-by-side with government employees, often performing the same or similar functions.

Blurring the Distinctions. During the 1990s, the federal acquisition workforce was reduced substantially. For example, DoD's acquisition workforce was reduced by nearly 50 % during that time. The structural changes in what and how much the government is buying since 9/11 have left agencies with no alternative to using contractors to deal with the pressures of meeting mission needs and staying within hiring ceilings. Agencies have contracted for this capability and contractors are increasingly performing the functions previously performed by

federal employees. To a significant degree, this has occurred outside of the discipline of OMB Circular A-76, with the result that there is no clear and consistent government-wide information about the number of people and the functions performed by this growing cadre of service providers.

While the A-76 outsourcing process provides a certain discipline in distinguishing between "inherently governmental" and commercial functions, it is less clear if and how agencies apply these concepts to the blended or multi-sector workforce that has arisen outside of the A-76 process. The challenge is determining when the government's reliance on contractor support impacts the decision-making process such that the integrity of that process may be questionable. A second challenge that arises is how the government effectively manages a blended workforce given the prohibition on personal services.

Rising Concerns. The Panel identified the increased potential for conflicts of interest, both organizational and personal, as a significant challenge that arises from the blended workforce and from the consolidation in many sectors of the contractor community. Alongside this issue is the need to protect contractor proprietary and confidential data in such an environment when a contractor supporting one agency in a procurement function may be competing against other contractors for work that is in the subject area of its support contract at another agency.

Recommendations: The Panel recommended that OFPP update the principles for agencies to apply in determining which functions must be performed by federal employees, so that agencies understand that such principles apply even outside the A-76 process. Agencies need to identify and retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors.

Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with federal employees.

With respect to the growing potential for conflicts of interest, the Panel did not see a need for new statutes. Instead, it viewed the issues as contract-specific and suggested that the better approach would be policy guidance and new solicitation and contract clauses. Therefore, the Panel recommended that in its unique role as developer of government-wide acquisition regulations, the FAR Council review existing conflict of interest rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses regarding conflicts of interest, as well as clauses protecting contractor proprietary and confidential data. In particular, the rules regarding organizational conflicts of interest need to be updated to address situations involving impaired objectivity. The Panel also recommended that the FAR Council work with the Defense Acquisition University and the Federal Acquisition Institute to devise improved training for contracting officers to assist in identifying and addressing potential conflicts and to develop better tools for the protection of contractor proprietary and confidential data. I am pleased to note OFPP and the FAR council have opened several FAR cases to provide additional guidance regarding organizational and personal conflicts of interest, the protection of contractor proprietary and confidential data, as well as new training on the identification and resolution of conflicts of interest.

Conclusion

Mr. Chairman, Congressman Bilbray, and Members of the Subcommittee, thank you for your interest in the Panel's efforts. We are available to provide any additional information or assistance that the Committee or the staff may need.

This concludes my prepared remarks. My colleagues and I are happy to answer any questions you might have.

Mr. TOWNS. Thank you very much for your testimony.

Let me begin with you, Mr. Denett. In your testimony, you discussed that you have started the process of implementing most of the changes recommended by the SARA panel. I think GAO and SARA panel agree that you are off to a good start, but I want more details on how you will finish the job. I understand you are off to a good start, but are there any timetables for the changes to be finalized? I mean, could you just tell us more about it?

Mr. DENETT. Sure. Many of them are going to be put in our Federal acquisition regulation, and that is a process. It is a deliberative process where we go out, we propose it, we get comments from industry, citizenry, and everybody else. After we cull through all that and complete the analysis, then we issue regulations.

We have groups, both within the Defense Department and the civilian agencies, that spent a lot of time and months on that, so those will be coming out almost every month. Every month there is a new issuance, which includes more and more of them.

I think one of the most important things we are going to be doing for tracking a lot of this—I am pretty excited about this—is we are going to include an acquisition component in the existing OMB Circular A–123, where departments go out and check on their progress on a wide range of management things and see what they are accomplishing. We are going to have a detailed listing of all our things that we want tracked in the acquisition area, and individual departments, when they go out and make their field visits and checks, they will now, for the first time, incorporate acquisition into that to tell us if, in fact, the policies that we are putting out to implement the SARA panel, in fact, are being done by the agencies in the field.

Mr. TOWNS. So have you ranked them in order of priority in terms of the recommendations in order of priority? Have you ranked them?

Mr. DENETT. Not a specific ranking. Of the 60 that are pointed toward us, over 70 percent of them we have already moved out on and are taking action. The remaining ones we have work groups analyzing it to make a recommendation to us as to which ones we should aggressively implement or which ones we might be coming back to you, talking more with Marcia and others to better understand to see if, in fact, we should move out on those.

Mr. TOWNS. Right.

Mr. DENETT. Like one is the creation of the Federal Acquisition University. That was one that I was hoping to get more guidance in terms of—let's do it, but that recommendation said let's study it, so we will study it. But, that is one that I view favorably, and I can see a lot of benefits of having a Federal Acquisition University.

Mr. TOWNS. All right. Thank you.

I guess to you, Ms. Madsen, and also Mr. Hutton, everyone agrees that there are serious issues with the acquisition work force. Of course, there are a lot of questions throughout Government about how to fill the gaps when the large number of baby boomers start to retire. How are these issues for the acquisition work force similar or different than the issues of the overall Federal work force?

Ms. MADSEN. Mr. Chairman, I am not sure I feel competent to comment on the overall Federal work force, but, with respect to the acquisition work force, certainly one of the things that we saw, and it is very visible in the data collection that we did, is that in the mid-1990's, just to use DOD as an example, the acquisition work force at DOD was cut by 50 percent. It looks like maybe acquisition jobs were viewed as expendable because of the post cold war defense build-down. The problem with that is, of course, no one anticipated what was going to happen on September 11th and that we would be in the situation we are today where we have sort of a convergence of a very complex acquisition system and not enough people, and not only that. I think not enough people with the right skill set.

I mean, one of the things the panel report points out is that 60 percent of the Federal procurement budget today, including at the Department of Defense, is being spent on services. A lot of those are complex IT-related services. Much of it are services that are purchased in the commercial sector. It may well be that there is a different skill set than the traditional acquisition skill set that is required. That is why our recommendations talk about doing an assessment, doing very capable human capital planning, and making decisions about where agencies' core needs are and what kinds of people they need before just adding to the number of traditional procurement people who they employ.

Mr. TOWNS. Thank you.

Mr. HUTTON. Mr. Chairman, just to build on that response, GAO does look at human capital issues across Government, and I think, more broadly, there are issues Government-wide. But, GAO has offered various principles that one can use to look at the human capital situation in Government, and Ms. Madsen has mentioned some of the key components, but having a human capital strategy where you are trying to identify what are the missions and how you are going to conduct those missions, what kind of skills and abilities do you need, how many do you need, and whether, even the extent to which these are things that you need for issues that are more tasked that the Government employees ought to be doing versus contractors.

So, I think the human capital strategy is probably an underpinning to get at not only the Government-wide issues, but I think some of the things that we are talking about here today with respect to acquisition work force.

Mr. TOWNS. All right. Yes?

Mr. DENETT. I would like to build on that also. I mean, I believe the acquisition area, one of the reasons that perhaps were worse than some of the other functions is because people that know acquisition are so employable. Private industry has a lot of need for people that really know how to do contracting, so we really have to take initiatives to bring in new blood. We have launched aggressive intern coalition where we are taking in over 500, 600 new people out of college each year to help fill the pipeline.

We have gotten big help in two areas already from Congress. One is direct hire authority now, where we can hire people more rapidly, because we are competing with industry, and when somebody has to wait several months before they actually get a job offer,

that puts us at a big disadvantage. By giving us the direct hire authority, that helps us a lot.

The other is for us to re-employ annuitants when they retire. They used to have the retirement money taken away from them. Now we are allowed to hire newly retired acquisition people to come back and assist us with the training and filling in some of the holes while we get staffed up adequately.

Mr. TOWNS. Right. Thank you very much.

Congressman Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

Let me just make a couple of comments. I remember several years ago Governor Rendell of Pennsylvania, when he was mayor of Philadelphia, he testified in front of a subcommittee here in the Congress, and he said the problem with Government is that there is no incentive for people to work hard, so many do not. There is no incentive to save money, so much of it is squandered. Because of that, we found out years ago that we could get almost anything done in the Federal Government by private contractors more cheaply, efficiently, quicker, and so forth, by going to private contractors.

Now, what has happened, though, over the last few years—and the chairman did a real good job in his opening statement—these contracts have been exploding over the last 6 years, and now we are continually reading stories about the waste, the fraud, and abuse that the chairman mentioned, and just excessive, ridiculous, exorbitant profits. These Government contracts have become the most profitable contracts, far exceeding profits that companies would make in the private sector.

So now some of these contractors are about to kill the goose that laid the golden egg. It started most heavily and to be seen most vividly in the Defense Department. The International Tribune had an article about the revolving door at the Pentagon. We found out the Defense contractors were hiring all the retired admirals and generals, but then it started going to all the departments and agencies, where they would hire these retired high-level Federal employees. Then, these companies would go back and get these contracts, so that it was beginning to look to some of us that every major Federal contract was a sweetheart deal of some sort or another.

I want to read to you something I had in one of my last newsletters. The Washington Post carried a front-page story reporting that one no-bid $2 million contract awarded by the Department of Homeland Security in 2003 ballooned up to $124 million by July of this year. In December 2004 Department lawyers said payments to Booz Allen Hamilton, one of the largest Federal contractors to provide consultants, had gone "grossly beyond the scope" of the original contract. The lawyers advised the Department to allow other companies to compete.

At that point, payments had reached $30 million. The competition did not take place for more than a year. During that time, payments under a no-bid arrangement went to $73 million. Then, DHS broke it up into five contracts totaling $51 million. Shock of all shocks, Booz Allen Hamilton won "the competition" for all five contracts, thus adding up to $124 million so far.

Then I added, The Department of Homeland Security apparently has turned into a very lucrative gravy train for some people.

Now, first of all, I appreciate the fact that Congressman Murphy said, because I want to cosponsor your bill. Put me down on that. These things are getting out of control.

It seems to me there are two major problems. Most Federal bureaucrats think that it is easier and they feel more important if they are dealing with one big, huge, giant company instead of 100 small companies, but you have to get more competition into these contracts, for one thing. Then we have to put some restrictions or limitations of some sort on the revolving door that we are getting in every department and agency where all these Federal contracts are sweetheart deals that are going to high-level Federal employees who have retired and gone to work in the private sector, and then those companies are coming back and getting those contracts.

These things are getting ridiculously out of control, and the profits are just almost obscene. It is just totally unfair to the taxpayers.

I was going to ask for your comments. Unfortunately, we have this vote going on, so I will try to come back in a little bit and hear what you have to say. But it seems to me that those are the problems, and they are really getting to be very, very serious.

Thank you very much, Mr. Chairman.

Mr. MURPHY [presiding]. Thank you.

I apologize for the inconvenience, but we have one vote on the House floor, so it is our intention to take a short recess and then reconvene here for further questioning in about 10 minutes.

[Recess.]

Mr. MURPHY. If the witnesses could take their seats.

Mr. Duncan, I know that we were a little hasty in having to run over to vote. I don't know if you have anything further.

Mr. DUNCAN. Thank you, Mr. Chairman. I guess I got everything off my chest all at once there, but if any of the panel has any comments about anything that I have said, or do they feel that any of these reforms that have been suggested will help cure any of the problems that I raised—yes, sir, Mr. Hutton, or whoever?

Ms. MADSEN. Mr. Duncan, a couple of things I think that are in our report, and some of which are making their way into some of the bills, I think will help. I mean, as I listened to you, I thought at the bottom of what you were talking about were some structural issues that are addressed in our report.

Requirements definition—typically when you see a contract that sounds like the one you are describing, the agency hasn't really thought that hard about what it really needed and hasn't really specified its needs.

Competition—effective competition has to be built on a good requirements base.

Another recommendation we made that I didn't have a chance to talk about is, we strongly recommended that the agencies do—particularly when they are acquiring consulting services—IT-type services, that they do the same kind of market research that the private sector does so they know what their options are. It sounds like that didn't happen there, either.

So all of those recommendations that we made would have helped the situation that you described.

Mr. DUNCAN. All right.

Mr. HUTTON. Mr. Duncan, I would like to just add to that comment. It is very important, as we know, to have sound policies and very good policies to help direct us to good outcomes, but the important thing, as well, is just having that sustained leadership and being able to drive these policies down through an organization at the practitioner level, making sure that the people that have to work on these things on the ground have the tools, they are properly trained, and they have sufficient oversight to basically plan for these acquisitions in a way that you are going to have a higher likelihood of a good outcome.

I think Ms. Madsen does underscore some of the key principles for that, and that is the whole issue of commercial practice and competition.

Mr. DUNCAN. All right.

Mr. DENETT. I would tack on that I agree completely. We have to define our requirements properly. When we don't, it leads to problems. Strongly for competition, we have issued some additional guidance for the reinvigorated position, called the competition advocate in the departments that had fallen dormant over the years, so we have revitalized that. We are collecting information.

But, I have to, also, mention that the percentage of dollars that are competed are at about 64 percent, and that is a constant number. It has been that way for about 10 years, so even though we have had a huge surge, increase in spending, the amount of dollars that were competed is staying right around 64 percent.

We want to educate our contracting officers so they can do a stronger job on competition, so they can search the marketplace. We want to limit the one case you gave at Homeland Security that kept going on and on and on. We have proposed to put a limit on those to 1 year without having to get the direct approval of a much higher authority. There are some bills being proposed by the Congress that would make it less than a year. I think one of them is 270 days. But, regardless, we want to put a limit to it. Now there is not one.

Those are some of the things we are doing to try to address some of the concerns that you have raised.

Mr. DUNCAN. Thank you very much. It is frustrating. I mean, I am a very pro-business, conservative Republican. I would like to see many, many things done in the Federal Government by private contractors, but it is getting almost embarrassing to people like me who support Government contracting to see some of the waste, the fraud, the abuse, the sweetheart deals, the sham competitions. I mean, 64 percent doesn't impress me when I read that a lot of these competitions are rigged or set up so that a contract is almost guaranteed to go to one contractor or another. And, when I see that all these contracts end up going just to the big giants, and even fairly large and medium-sized companies can't even compete fairly, so there is just a lot of problems throughout this Federal contracting process. I don't know how much we can get done on it, but we sure need to make some changes.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Duncan.

I wanted to turn to one of the bills at issue here that, Mr. Denett, you offered testimony on in your written remarks to the committee, and that is H.R. 3928, which Mr. Duncan spoke so kindly of, which requires certain companies doing a percentage of their business—80 percent or above—with the Federal Government have and should have an obligation to disclose the amount of profit or, at the very least, the salaries of their top executives when those salaries are, in effect, paid 80, 90, potentially 100 percent in taxpayer dollars.

Your remark in your written testimony was expressing concerns on how that would potentially stifle competition. I certainly understand that concern here.

I guess my first question is: we already have this information with regard to profit and executive compensation when it comes to public companies, and, as we know, public companies have done very well with regard to Government contracts. In Connecticut, home for several incredibly successful Defense contractors, those are public companies that disclose that information, and they not only compete, I think very effectively, with their other public companies, but they compete very effectively with private companies, as well. In fact, conversely, private companies right now seem to compete with public companies, as well.

So, my question is: if we haven't seen a stifling of competition with regard to public companies that disclose this type of information, why are we concerned that simply requiring private companies to disclose a modicum of the same amount of information the public companies disclose, why are we concerned that would, all of a sudden, result in a decrease in competition?

Mr. DENETT. Well, you know, contracting officers on cost reimbursement contracts have access to all that information anyway. I guess, making it known to the world can have a chilling effect, especially with the dollar threshold that you currently selected of $5 million. If you were to go through with it, I would highly recommend that you raise the threshold to maybe $25 million, because there are a lot of small businesses that would be discouraged from jumping into the Government space or pursuing it, and we are trying to bring along more small businesses. And, those presidents of those private companies, they don't want their employees to know what they are making, so I believe in those instances some of them might decide not to jump into the public space.

We are trying to encourage more of them to get in. We want to increase small business, so I would hope that you would see that the ones, when it digs down that low, that it could have a chilling effect on those small businesses. So, you might consider a higher dollar amount, which would get at some of the much larger ones that I would conjecture are causing you the most consternation.

Mr. MURPHY. I think I and those that support the bill would be very willing to enter into that conversation. I think you are very right that we are really getting at private companies that operate and look like some of the bigger public companies that provide that information.

I guess, let me just followup on a statement that you made. Can you just give a window into the type of information that the contracting agents and personnel that are reviewing and awarding

these contracts, what kind of information regarding profit and executive compensation do those contracting agents have?

Mr. DENETT. Well, on cost reimbursement contracts they get all the cost data on the larger ones. I mean, it breaks down all the overhead, where the money is going, and there is actually caps on compensation that have been around for many years for the executives on these cost reimbursement contracts.

Mr. MURPHY. So then how do we get into a situation in which we have reports? I don't want to keep on harping on Blackwater, because I think it is the most high-profile case, but I think we have seen examples in some of the contractors involved in the Gulf Coast recovery and others where you have executive compensation that is exorbitant in comparison to what similar public employees are getting. How do we have those private employees making compensation amounts in the multiple-millions of dollars with those caps in existence?

Mr. DENETT. Well, most of it, they are fixed-price contracts, and on fixed-price contracts we do not dissect, get cost information, and see what people are getting. If it is a fixed-price one, we are just trying to make sure that the price is fair and reasonable, and we don't get involved with what the compensation is.

Mr. MURPHY. And, I guess the thought behind this bill is that in understanding what price is fair and reasonable, it would seem to be that the amount of money that is being taken off the top for profit—and for private companies, profit really effectively means compensation of employees— that is a relevant piece of information in deciding what price is reasonable or fair; that if we find out that 10 to 15 to 20 percent is being taken off of the top for executive salaries, that is a relevant piece of information in deciding whether what we believed was a fair and reasonable price is actually fair and reasonable, given the amount of money that is being taken for compensation.

Would you agree with that?

Mr. DENETT. Let's say we have three offers to provide widgets to the Federal Government, and they are all close and we go to the lowest-priced one. Maybe they have been in existence 20 years; maybe they have superior manufacturing techniques. Who knows what goes into that? But, if we get the best possible price, if the head of that company, you know, makes $1 million a year, as long as I am getting a really good price for the widget I generally—especially on fixed price—I just would not get involved with when is he making too much. When he or she breaks $200,000, is it too much? $400,000? I don't get into that, especially on fixed price.

Mr. MURPHY. Thank you for your testimony.

My time is up.

I guess for any private investor that was investing in that firm, that would be part of the decisionmaking process in whether they were getting a fair price or not, and I think it should be part of our consideration. But, thank you for your testimony.

Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you.

Let me ask all of you—I will start, Mr. Denett, with you—do you think legislation mandating the publication of proprietary salary data, establishing a data base of information of allegedly wrong-

doing, and using the acquisition system to collect back taxes addresses the fundamental problems that are plaguing our acquisition system?

Mr. DENETT. No, I do not. I mean, you know, what we need is some of the things that we have already been provided, the direct hire authority, being allowed to get re-employed annuitants without it impacting their annuity. Those are the things that are helpful. The training fund, the skill gap analysis that we are doing, these are all proactive steps that are going to improve the process.

Having to add to all of the things that we have to do to try to get a data base that includes information from States—and every State has different information—I mean, that would be very cumbersome, costly, difficult to administer. And, as I was explaining a short while ago, I don't see that the salary of the executives and posting those, how that is going to help us do a good job.

Mr. DAVIS OF VIRGINIA. Let me just stop here. Under cost contracts, the cost type contracts, data related to a company's executive salaries are available to contracting officials, and you only get a certain reimbursement level anyway. Isn't that correct?

Mr. DENETT. That is correct.

Mr. DAVIS OF VIRGINIA. All right. Thank you.

Let me ask Mr. Hutton and Ms. Madsen to just react to that, as well.

Mr. HUTTON. Mr. Davis, we weren't asked to formally comment on those bills, but I did look at them before the hearing. I think, more broadly, GAO tends to look at, again, the policies that are in play in the Federal acquisition arena and the extent to which there is the leadership to drill it down into the practitioners on the ground level.

Mr. DAVIS OF VIRGINIA. But, this doesn't address the fundamental problems. That is the whole point here. We know there are some fundamental issues that need to be addressed, and we have talked about whose contracting officers and procurement personnel, and giving them appropriate training, and the brain drain, but this doesn't really go to any of those issues, does it?

Mr. HUTTON. Well, sir, in our work when we looked at contracting, what we find is: was there sufficient acquisition planning? There are existing policies and practices in place. Do you get adequate competition? Do you have good oversight—tools like that?

I don't have a formal comment on any of these three bills, and if there is any interest in that we could——

Mr. DAVIS OF VIRGINIA. I am not asking, except that these bills don't address the fundamental problems, do they?

Mr. HUTTON. Again, I will take it back to the process, what we——

Mr. DAVIS OF VIRGINIA. Let me ask you this. I am surprised to hear you say that you think that publication of proprietary salary data is a fundamental problem in the system.

Mr. HUTTON. I would ask, sir—I don't even know how many that bill would affect, how many contractors that would affect. I don't even know where to start with that particular——

Mr. DAVIS OF VIRGINIA. Is that one of the fundamental issues that you have identified in terms of what is wrong with the contracting?

Mr. HUTTON. I would say that the basis of our work over the years—that is not an issue that GAO is——

Mr. DAVIS OF VIRGINIA. Of course it isn't. It isn't even close.

Ms. Madsen.

Ms. MADSEN. Good morning.

Mr. DAVIS OF VIRGINIA. Hi.

Ms. MADSEN. I am here in my panel capacity today, and these are obviously not issues that the panel looked at.

Mr. DAVIS OF VIRGINIA. So the SARA panel didn't even look at these issues?

Ms. MADSEN. The SARA panel didn't look at any of these issues.

Mr. DAVIS OF VIRGINIA. These weren't part of your recommendations, were they?

Ms. MADSEN. No.

Mr. DAVIS OF VIRGINIA. OK.

Ms. MADSEN. The issues we looked at really are more structural, and that is what the committee asked us to look at in the legislation.

Mr. DAVIS OF VIRGINIA. So none of these bills really were before the SARA panel or a result of your recommendations?

Ms. MADSEN. No. That is correct.

Mr. DAVIS OF VIRGINIA. You agreed that under cost type contracts data related to a company's executive salaries are available to contracting officials?

Ms. MADSEN. The rules—speaking generally with respect to the rules for cost type contracts, which have been in place actually for a long time—the contracting officer has access to all of the costs. There are restrictions in a number of areas on cost type contracts, and one of the restrictions is that the costs that are passed through to the Government under that type of arrangement, the salary levels are capped. I couldn't tell you off the top of my head——

Mr. DAVIS OF VIRGINIA. If they want to pay more, they can pay more, but they are not going to get reimbursed for it?

Ms. MADSEN. Right. They are not going to get reimbursed for it. The Government is not going to pay for it under——

Mr. DAVIS OF VIRGINIA. So we already take care of that in acquisition regulations?

Ms. MADSEN. Right. Regulations have addressed this since probably the 1980's.

Mr. DAVIS OF VIRGINIA. So it is addressing an issue that isn't even there. It goes to the committee looking at what corporate salaries, next week across the board, but the reality is in most of these contracts you only get reimbursed for a certain amount. If the company wants to take it out of profits or something else to pay people, they are certainly free to do that, and that is really the shareholders' issue. But, the taxpayers don't pay for it, and that is the point I want to make.

Thank you.

Mr. MURPHY. Thank you.

Mr. Welch.

Mr. WELCH. Thank you.

I just want to followup on some of my colleague, Mr. Davis', questions. My understanding of this legislation, it is not expected that it gets to "the core of the problem" on this contractor com-

pensation issue. We had testimony from Mr. Prince that the profit was about 10 percent. We asked him the question how much "he made" on contracts of $1 billion. Straightforward math is $100 million. That is not a bad payday.

The point of this is just to have some public disclosure, something that the SEC requires for corporations and then provides information that becomes the basis for appropriators to evaluate whether this is a wise use of taxpayer money.

So, I guess I would ask the question a little bit differently than Congressman Davis did, and ask each of you: is it helpful to us in a procurement contract process to have more, rather than less, information about the expenditures and how our money is actually being spent? Mr. Denett, you look confused. I probably didn't ask the question right.

Mr. DENETT. I was listening. It is not an area that contracting officers need added to their information they have to make a determination as to who the low offerer is. They have all the cost and pricing data they need. So, I think they have what they need to make an appropriate determination. To get into the area of is a president of a corporation making too much money—as long as we are getting a good deal, fair and reasonable price for what we need, and they are delivering it in the best manner, that is what the contracting officer focuses on.

So I see requiring additional information to be provided to him as something that they don't need. On cost reimbursement, as has already been said, they already have that information. So if we are talking about fixed-price ones, I just don't see the need for having that information.

Mr. WELCH. Well, let me ask you this: if you have a fixed-price contract and you have made a determination that it is a so-called fair price, the price we can get, but then, upon reexamination, it turns out that they were buying widgets, let's say, that was a part of the contract, and they were paying $50, when they would be available for $25. So, the cost embedded in the contract price that we are paying is higher than if there were more aggressive management was necessary. That would be relevant information in evaluating whether the next contract would be adjusted to get the widgets at the $25 instead of $50, right?

Mr. DENETT. Well, if we find out there are ones available for $25, then we ought to terminate the contract for convenience and go get the $25 one.

Mr. WELCH. Yes. You know, it may be that it is more helpful to Congress to have this to decide whether it makes sense for us to be signing contracts where there is an individual who, in effect, is making $100 million on these contracts. We might think that he could suffer at $50 million.

Mr. Hutton, how about you? Do you have any opinions one way or the other about this legislation?

Mr. HUTTON. Sir, when I look back at how GAO approaches its work, typically we look at the policies and the guidance and we look at how those things are implemented. And, what Mr. Denett is mentioning are things that we share as the importance of competition, and if you have competition those market forces are going to help put pressures on what the Government is paying.

We don't have a position on this particular bill, but I think that our focus has always been on ensuring that the folks, the practitioners on the ground, have the tools and the capacity to make sure that the existing policies and guidances are followed through. And, that is what we typically focus on and make recommendations to help improve that.

Mr. WELCH. Well, is it any problem to you if this legislation were passed and information about CEO compensation was public and made known to appropriators? That wouldn't cause you any problem, right?

Mr. HUTTON. Me personally, sir?

Mr. WELCH. No, you professionally in your capacity?

Mr. HUTTON. Professionally?

Mr. WELCH. Yes.

Mr. HUTTON. Well, I think Mr. Denett points out just things that would have to be considered and understood as this or any other alternatives are looked at as to what one is trying to address with this particular legislation.

Mr. WELCH. I don't understand what you just said.

Mr. HUTTON. OK, sir. What I am saying is that, you know, there is an outcome perhaps that one is trying to obtain through a piece of legislation, and there may be alternatives or other ways that one might approach how best to get that outcome. I haven't reviewed this to have an official position, or GAO doesn't have an official position on this, but there are just basic things that we would want to consider and look at as to whether this is something that would, in our view, strengthen, or there are other alternatives out there.

Mr. WELCH. Wait. This is just about public information.

Mr. HUTTON. Yes.

Mr. WELCH. In the case of Congressman Murphy's bill here, of which I am a cosponsor, it is taxpayer dollars that largely are spent on all the activities of a particular company. In other words, if a company gets over 80 percent of its revenues from you and me, we are just simply asking for some information, in this case salary information. I don't see how it would in any way interfere with the procurement process. Are you suggesting that it might, or there is some doubt about that?

Mr. HUTTON. No, sir. I just think, as a typical approach to these types of things, when we do our work we are always looking at what the condition is and what the existing policies and practices are. And, if there is a particular problem, then it is what options are available to best address it. Like I said, sir, we just don't have a position on this particular piece of legislation.

Mr. WELCH. Thank you.

Ms. Madsen, how about you? Let me just preface it. I am a little bit puzzled what the big deal here is. We're talking about companies where 80 percent of the revenues come from taxpayers, so we obviously have an interest in getting as much information as we can. We are also talking oftentimes about contracts where, as a practical matter, there is either no competition or very limited competition, and where it is probably difficult to put a price on what is "a fair price." So, the sole request here in this legislation is some transparency that applies to these essentially taxpayer financed corporations for their revenues about what CEO compensation is,

and it is the same standard that applies to our public corporations. Then, of course, the shareholders have the benefit of at least knowing what the compensation schedule is.

Is there any reason that we wouldn't want to know that?

Ms. MADSEN. Congressman, I was not asked to comment on the legislation. I am here really as the Chair of the Acquisition Advisory Panel to talk about the Panel's report. I mean, I can talk to you about how the system works and how there are some recommendations in our report that I think potentially would address this question. Our report talks a lot about the acquisition of services, and we talk about how, in the private sector, for example, companies that acquire services use the requirements process and the competitive process to get the best possible deal that they can get, and the Government—and part of our charter was to look at how the Government acquires commercial services, for example.

So, we have recommendations in our report that talk about that, and we also talk about we have recommendations that deal with the issue of what happens in the Government when contracts are awarded without adequate competition and what kinds of data the Government should be able to get under those circumstances. You have cost-type contracts. The Government gets tons of data; the Government gets cost or pricing data. Most of these large contractors are subject to the cost accounting standards. They are subject to sort of ongoing audit for compliance with all of these requirements. So, for those kinds of contracts the data is there.

When they are fixed price, if they are not competitive, one of the issues the panel looked at was what kinds of information should the taxpayers be getting, should the contracting officers be getting, and we made some recommendations about something called—other than cost or pricing data, which will get into a level of arcanity that you probably don't want me to talk about—but some recommendations about what kinds of data that they should get and some revisions to the regulations that would provide a little more detail into data in that area.

I haven't looked at the bill, so I really can't comment further on that.

I would suggest you might want to look at that part of our report.

Mr. WELCH. Thank you.

Mr. MURPHY. Thank you very much, Mr. Welch.

Mrs. Maloney.

Mrs. MALONEY. First of all I want to thank you for holding this hearing. I think that better management of our $419 billion that we spend in procurement is really important, and I have a bill H.R. 3033, the Contractors Federal Spending Accountability Act, which would work to really help the Federal Government's watchdog, suspension and debarment officials, give them the information they need to really protect the taxpayers' dollars in a better way.

I was in another hearing that we had with Chairman Bernanke on the state of the economy. I apologize that I am somewhat late.

I would like to ask all three panelists: do you believe that contracting officers have adequate information to determine if a company should be awarded a Government contract at this time?

Mr. DENETT. Yes, I do believe they do. I mean, they have to take the time to obtain it. They check the debarred mailing list. We now require——

Mrs. MALONEY. You are saying if they took the time to obtain it?

Mr. DENETT. Well, if they follow the proper procedures, they do have adequate information. They have to check to see if any company is on a debarred bidders list or suspended. We also initiated a new requirement where agencies are required to share administrative actions they may have taken against a company so that EPA can be aware that the Defense Department took an administrative action against a company short of a suspension or a debarment. So that, added to the information pool that they already have, is sufficient.

Mrs. MALONEY. Well, do you think it would be more efficient if all of this information was gathered together by the various data bases and agencies were hosted in one data base where you could get this information would be very, very efficient.

Mr. DENETT. Well, we already have a single location for debarment and suspension, so I am not sure what additional things you would feed into that. If you are talking about any of the ones with States, I am concerned about that, because every State is different, and I think it would be a huge undertaking to try to encompass all State activity and meld it with the Feds.

Mrs. MALONEY. But your data base now only says whether or not they have been debarred; is that correct?

Mr. DENETT. Well, we have a list of debarred or suspended.

Mrs. MALONEY. Debarred or suspended.

Mr. DENETT. Right.

Mrs. MALONEY. Do you think it would be helpful if there was other information in this data base such as they are consistently a low bidder but they always come in with alterations to contracts or contract overruns, which then end up costing millions of dollars? I think information about whether or not they complete the contract on time, whether or not they complete it within budget, whether or not it is done appropriately—you can complete a project and it not work. So there is a lot of information that could help our procurement officers make better decisions on our taxpayer dollars.

Mr. DENETT. We do have people rate the performance on contracts with contracting——

Mrs. MALONEY. Is that kept in your central data base?

Mr. DENETT. It is not kept with the suspend and debar thing; it is kept in another system.

Mrs. MALONEY. So my question is: wouldn't it be more efficient if we pulled together all of this relevant information and had it in one data base so that our procurement officers could be held accountable for the decisions they are making?

Mr. DENETT. I guess the point would be where do you draw the line. I would be glad to engage in a discussion with you or the Congress as to looking at the full array of all the data and figuring out which ones would make sense. I am concerned if we launch into it too quickly without fully understanding the ramifications, especially if it goes so broad as to pulling in State information.

Mrs. MALONEY. Well, information such as whether or not they are members of organized crime, listed in organized crime list—

New York City that I grew up in, the rough and tumble of New York City contracts, after numerous scandals we created a law—actually, I wrote that law—that created a central data base called Vendex, which allowed our procurement officers to be responsible and accountable for the decisions they are making. And, we had relevant data on various important things.

I was wondering if you had looked at that data base or looked at that legislation, what New York City is doing in terms of a centralized data base?

Mr. DENETT. I have not. I would be glad to.

Mrs. MALONEY. I would really appreciate it if you would look at it, and maybe we could have a meeting and see what you think of it. It did not go into what other States were doing, but it certainly had relevant information on whether or not they complete contracts, whether or not they are members of organized crime in the crime data base, whether or not it was completed in time, on budget, whether they had a history of constantly having cost overruns and increased cost estimates that ended up really making the contract more costly and really abusive to the taxpayers.

Anyway, I thank you all for your testimony and your time, and I thank all my colleagues.

Mrs. MALONEY. Thank you.

Mr. Davis.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

Representative Carolyn B. Maloney (NY-14)
"Contracting Reforms: Expert Recommendations and Pending Bills"
February 27, 2008

I want to thank Chairman Towns and Ranking Member Bilbray for holding today's hearing about improving federal purchasing and contracting procedures.

I have been working on the issue of contracting reform since my days as a member of the New York City Council. I have introduced legislation, H.R. 3033, the "Contractors and Federal Spending Accountability Act," that will fortify the current federal suspension and debarment system. I am pleased that this bill will be discussed today, and I look forward to working with my colleagues to move this legislation through the committee.

The United States is the largest purchaser of goods and services in the world spending more than $419 billion on procurement awards in FY2006 and $440 billion on grants in FY2005.

Yet the federal government's watchdogs, the federal suspension and debarment officials, lack the information that they need to protect our business interests and taxpayers' dollars. I believe that we need a centralized and comprehensive government-wide method to account for the performance of contractors and assistance participants to prevent those who repeatedly violate federal law from receiving millions of dollars from the federal government.

"The Contractors and Federal Spending Accountability Act" establishes a centralized and comprehensive database on actions taken against federal contractors and assistance participants, requiring a description of each of these actions. It places the burden of proving responsibility and subsequent eligibility for contracts or assistance on the person seeking contracts or assistance should they have been previously convicted of two exact or similar violations that constitutes a charge for debarment. Additionally, it improves and clarifies the role of the Interagency Committee on Debarments and Suspension, and requires the Administrator of General Services to report to Congress within 180 days with recommendations for creating the centralized and comprehensive federal contracting and assistance database.

It is Congress's responsibility to ensure that the taxpayers' dollars are used wisely and not wasted by some contractors who are more interested in lining their pockets with profits than providing the American people with the goods and services they are paying for.

We should strive to have an open and transparent government. I believe that fixing the system for awarding contracts is critical to boosting the public's faith in their government.

Thank you.

Mr. DAVIS OF VIRGINIA. Thank you.

Let me just say to my friend from New York that the thing that troubles me about this big data base that is going to have all of this information—this information includes, in many cases, just allegations. It includes something somebody brought, but we are not talking about any adjudication. We are not talking about convictions. We are talking about allegations. Then, she is bringing in organized——

Mrs. MALONEY. Would the gentleman yield?

Mr. DAVIS OF VIRGINIA. Yes. That is what the bill says.

Mrs. MALONEY. Well, that was not the intent of the bill. In the New York City law it is not allegations. It is facts. It is a factual item whether or not you are overpricing your contract.

Mr. DAVIS OF VIRGINIA. This says an administrative proceeding brought against the firm, not the adjudication. It talks about administrative proceedings initiative. Those don't give anybody an opportunity to come back and rebut the substance of that. It doesn't give them their day in court. They are blacklisted from day one. They go on this big list.

I mean, what we are talking about here really is the institutionalization of gossip. That gives me great concern.

If you want to put a blacklisting group together, let's talk about adjudications. We already have some of that in debarment proceedings that are part of the law. Past performance is taken into account when you are giving that.

I think there is an appropriate way to do that and I would be happy to work with the gentlelady to try to make something that works. But, putting down mere allegations or charges and trying to make this a part of what a contracting officer or procurement official looks at in allowing who gets it I think makes this an open season that does not help the contracting process at all.

Mrs. MALONEY. Would the gentleman yield?

Mr. DAVIS OF VIRGINIA. I understand the panel's reluctance to embrace it.

Yes. I would be happy to.

Mrs. MALONEY. I look forward to working with the gentleman, as we have on so many important issues. I congratulate him for bringing this point up. It was certainly not my intent for it to be allegations, but only fact. I look forward to working with him to put forward facts and concrete examples.

Mr. DAVIS OF VIRGINIA. We will have some discussion.

Mrs. MALONEY. Certainly not gossip. As politicians, we know how damaging gossip can be, and there is always a lot of it out there.

Mr. DAVIS OF VIRGINIA. Well, I look forward to working with my friend.

Mrs. MALONEY. And a lot of it is not true, and we certainly don't want to bring that into the contracting process.

Mr. DAVIS OF VIRGINIA. Thank you.

Mrs. MALONEY. We want our contracting process to be factual, accurate, streamlined, and helpful to business and helpful to taxpayers and helpful to Government.

Mr. DAVIS OF VIRGINIA. Thank you.

Mr. MURPHY. Thank you, Mr. Davis. I think we can say safely that we do look forward to working with you on these pieces of leg-

islation as they move forward, and we thank you very much for your testimony here today. Thank you very much.

We are going to take just a brief break while we get set up for our second panel, and then we will conduct the second panel.

[Recess.]

Mr. MURPHY. Good afternoon. The committee will come back to order.

I would like to welcome our second panel here this afternoon. As with our first panel, it is the committee's policy that all witnesses are sworn in, and so if the two witnesses would please rise and raise your right hands.

[Witnesses sworn.]

Mr. MURPHY. Thank you. The record will show that each witness answered in the affirmative.

Before we hear your testimony before the committee, I would just like to briefly introduce each witness.

Mr. Scott Amey serves as general counsel of the Project on Government Oversight. It is a watchdog group that studies Federal spending and contracting.

Alan Chvotkin is the senior vice president and counsel of the Professional Services Council, representing many of the largest Federal contractors in the United States.

Your entire statements are on the record and part of the record, but I would ask each of the two witnesses to please summarize. As Mr. Towns noted to the first panel, you will have lights in front of you noting with the yellow light when your time is almost up, and a red light alerting you when to conclude your remarks.

We will begin with Mr. Amey.

STATEMENTS OF SCOTT AMEY, GENERAL COUNSEL, PROJECT ON GOVERNMENT OVERSIGHT; AND ALAN CHVOTKIN, SENIOR VICE PRESIDENT AND COUNSEL, PROFESSIONAL SERVICES COUNCIL

STATEMENT OF SCOTT AMEY

Mr. AMEY. Good morning to the subcommittee, and thank you for inviting me to testify today about the status of Federal contracting reform.

I am Scott Amey, the general counsel of the Project on Government Oversight, a nonpartisan watchdog group founded in 1981. POGO investigates and exposes corruption and other misconduct in order to achieve a more accountable Federal Government.

POGO is pleased that this subcommittee is holding this very important hearing. First, Government contract spending has eclipsed the $40 billion range in fiscal year 2007. Second, there are numerous legislative proposals and recommendations that require serious attention.

POGO has been asked to present its views on the recommendations made by the Acquisition Advisory Panel, as well as the proposals made in H.R. 3033, H.R. 4881, and 3928.

POGO fully supports H.R. 3033, the Federal Contracting and Federal Spending Accountability Act of 2007. As the subcommittee may recall, on July 18th I testified before this committee and supported H.R. 3033 at that time. That bill will propose a data base

that will formalize and replicate POGO's Federal contractor misconduct data base and address the Government's failure to vet contractors to determine whether they are truly responsible.

Since the subcommittee's hearing last year, POGO has been working with the Senate to introduce companion legislation. As the subcommittee might recall, POGO's Federal contractor misconduct data base is a compilation of instances of misconduct and alleged misconduct committed by the top Federal Government contractors. Currently we have 420 instances of misconduct in that data base, totaling $10 billion.

The pending cases or the allegations that Representative Davis had mentioned earlier are not included in those totals.

H.R. 3033 would correct the Government's inaction in collecting and evaluating contractor responsibility information. While Congress is considering this legislation, the Defense and civilian agencies have initiated a rulemaking that would begin to address some of the issues raised in this important bill, specifically, notification to contracting officers when there are violations of Federal criminal laws regarding contracts and subcontracts. The proposed rule also stipulates that failure to comply with the notification requirement could result in suspension or debarment.

Although greater in scope, H.R. 3033 would codify into law the actions agencies are already taking on their own. More importantly, however, those instances needed to be logged into a data base created by H.R. 3033 for all Government officials and the public to see. Without a data base, those instances are not shared between agencies.

Even the National Procurement Fraud Task Force Legislation Committee has proposed a similar data base that will include violations of criminal laws, so this isn't far removed from what everybody is asking Congress and the agencies to do already.

Sharing information between departments and agencies as proposed in the bill would go a long way in improving pre-award contracting decisions and enhancing the Government's ability to weed out risky contractors, especially those with repeated histories of misconduct or poor performance.

I predict that there will be industry criticism about what to call the data base and efforts to scale back the type of information that is included. POGO encourages an open debate on those topics and will fight to keep all criminal, civil, and administrative settlements, even those without any admission of guilt or liability by the contractor.

POGO believes that the Contracting and Tax Accountability Act of 2007, H.R. 4881, is also very important. We actually think it should be part of Representative Maloney's bill, 3033, because that would help put together instances where contractors are delinquent in paying their taxes. That should be one of the first things entered. That is not an allegation, but if they are being held to be delinquent, then at that point that is the type of information that should be presented to taxpayers.

The Senate has held three hearings on Federal contractors with unpaid tax debt, identifying $6.3 billion in unpaid taxes. That is the type of information that should be collected.

H.R. 4881 is on the right track, but POGO believes that it could go further in its scope. The bill is limited to negotiated acquisitions, leaving out FAR part 12 commercial item purchases. The bill would also only apply to contractors that are seriously delinquent in paying their taxes.

POGO supports H.R. 4881 with the understanding that the definition for seriously delinquent encompasses the companies that owe the $6.3 billion in delinquent taxes to the Federal Government. We see H.R. 4881 as another tool to prevent companies with questionable track records from receiving Federal taxpayer dollars.

The third bill that I was asked to speak about is the Executive Compensation Disclosure Bill, H.R. 3928, which would require certain contractors to disclose the names and salaries of their most highly compensated officers. POGO struggled with our stance on this bill, because there have been some issues that have already been raised in the first panel as far as bringing to light private information; however, I think on the side of caution, disclosure wins out here. The scope of the bill is very limited, and at that point, these are companies that are vastly majority funded by the taxpayer, and, therefore, their information should be brought to light.

In conclusion, because I see that my time is running out, I think that POGO's worst fear with the Acquisition Advisory Panel and some of these other bills is they are things that have been batted around for years. If you take a look at the GAO's report and the testimony from today, a lot of the issues were issues that they have raised for many, many years that have been ignored.

I think that there needs to be a change in the culture in the contracting system throughout the Government to promote competition and some of the other items and issues that are major concerns with our contracting system as it stands. Even if all of the 1423 Panel's recommendations are implemented and Congress passes the legislation included in today's hearing, POGO believes that there is still more work to be done.

Thank you for inviting me to testify today. I look forward to working with Chairman Towns, Ranking Member Bilbray, and the entire subcommittee to further explore how the Federal Government can improve the buying of goods and services.

Thank you.

[The prepared statement of Mr. Amey follows:]

POGO
Project On Government Oversight

Testimony of
Scott Amey, General Counsel
Project On Government Oversight
before the
Subcommittee on Government Management,
Organization, and Procurement
on the
Status of Contracting Reform
Wednesday, February 27, 2008
2154 Rayburn House Office Building

Good morning Chairman Towns, Ranking Member Bilbray, and Members of the Subcommittee.

Thank you for inviting me to testify today about the status of federal contracting reform. I am Scott Amey, General Counsel of the Project On Government Oversight (POGO), a nonpartisan public interest group. Founded in 1981, POGO investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government.[1] Throughout its twenty-seven-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government spending.

POGO is pleased that the Subcommittee is holding this very important hearing. First, government contract spending was nearly $440 billion in fiscal year 2007, and that amount continues to increase on a daily basis.[2] Second, there have been many changes in contracting through the years, and it is a perfect time to audit the system to ensure that is it working in the best interest of the government and taxpayers. Third, there are numerous legislative proposals

[1] For more information on POGO, please visit www.pogo.org.
[2] According to the FPDS-NG, federal agencies have reported awarding $439,862,555,999 in FY 2007. Available at http://www.fpdsng.com/downloads/agency_data_submit_list.htm. Total contract spending in FY 2000 was $219,346,881,314. Available at http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

and recommendations that require serious consideration. The Iraq reconstruction, Hurricane Katrina, the dramatic rise in contract spending, and recent procurement scandals resulted in numerous headlines, government reports, and legislative fixes that require greater attention.

POGO has been asked to present its views on the recommendations made by the Acquisition Advisory Panel, as well as on the proposals made in H.R. 3033 (the "Contractors and Federal Spending Accountability Act of 2007"), H.R. 4881 (the "Contracting and Tax Accountability Act of 2007"), and H.R. 3928 (the "Government Contractor Accountability Act of 2007").

The Acquisition Advisory Panel[3]

Nearly two years after its initial meeting in February 2005, the Acquisition Advisory Panel (also known as the 1423 Panel and the Services Acquisition Reform Act (SARA) Panel) released its report on the status of the federal contracting system.[4] During that two year period, the Panel held over thirty public meetings, interviewed scores of government and private sector witnesses, reviewed thousands of pages of testimony, studied numerous government reports, and formulated hundreds of findings and recommendations that, if considered and passed by Congress and the Office of Federal Procurement Policy, could improve the government's system for buying goods and services.

POGO followed very closely the activities of the Panel. We testified before the Panel in 2005, provided it with additional written comments over the next year, and attended nearly every Panel meeting.[5] Last year, I went on the record to state that "Congress has been thrown a contracting softball, and it should hit the ball out of the park.... Although the Panel's recommendations do not go as far as POGO would like, the Panel focused in on some core problems that, if resolved, will improve competition, negotiations, oversight, and transparency, and provide better spending decisions. The evidence presented to the Panel highlighted many flaws in the government's system. Hopefully, the Panel's work will push Congress to reject those inside the government and the contracting industry who often contend that the system isn't in need of repair."

Although originally POGO feared the Panel would rubber stamp House Government Reform Committee's then-Chair Tom Davis' pro-contractor agenda, the Panel's findings were in fact very evenhanded. POGO's subsequent fear was the 1423 Panel's work would be the next federal

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[3] Authorized by Section 1423 of the Services Acquisition Reform Act of 2003, the Panel was directed to "review and recommend any necessary changes to acquisition laws and regulations as well as government-wide acquisition policies with a view toward ensuring effective and appropriate use of commercial practices and performance-based contracting." To handle the complexity of the federal contracting system, the Panel created smaller working groups in the following areas: (1) Commercial Practices, (2) Federal Acquisition Workforce, (3) Interagency Contracting, (4) Performance-Based Services Acquisition, (5) Small Business Contracting, and (6) Appropriate Role of Contractors Supporting the Government.

[4] Report of the Acquisition Advisory Panel, to the Office of Federal Procurement Policy and the United States Congress, January 2007. Available at http://acquisition.gov/comp/aap/24102_GSA.pdf.

[5] POGO testified before the Panel on May 17, 2005. Available at http://pogo.org/m/cp/cp-POGOAcq-05172005.pdf. POGO remained active in Panel activities, submitting three additional letters to the Panel for its consideration. Available at http://pogo.org/p/contracts/cl-050801-acquisition.html, http://pogo.org/p/contracts/cl-050802-acqreform.html, and http://pogo.org/p/contracts/cl-051201-acqureform.html.

study to sit on a shelf collecting dust. The Panel's work deserves attention because, rather than recommending changes that benefit contractors, the Panel instead has urged the government to tighten up contracting rules and to adopt many commercial best buying practices that protect taxpayers.

POGO urges the Subcommittee and Congress to pass legislation that incorporates the following Panel recommendations and findings:

1. Competitive fixed-priced offers are essential in contracting.

2. Congress should redefine the definition of "commercial" services to include only those services that are actually sold in substantial quantities in the commercial marketplace. "Commercial" item requirements should be revised to strengthen price reasonableness determinations when no or limited competition exists.[6] (POGO recommends that Congress also re-define "commercial" *items* to include only those goods sold in substantial quantities in the commerical marketplace.)

3. Contractors should receive an agency's annual ethics training.

4. Federal contract reporting systems should be improved to ensure that complete, accurate, and timely information is available to the public. Agencies should improve transparency and openness of all no-bid task and delivery orders.[7]

5. Agencies should develop a system to un-bundle contracts and mitigate the effects of contract bundling.

6. Contractors should be permitted to file bid protests of task and delivery orders over $5 million under multiple award contracts.

Some of these provisions have already been incorporated into House and Senate acquisition reform bills—H.R. 1362 and Senate S. 680.[8] Those bills attempt to restrict noncompetitive contracts, increase contract oversight by expanding the acquisition workforce, promote integrity

[6] In July 2006, GAO reported that "DOD sometimes uses commercial item procedures to procure items that are misclassified as commercial items and therefore not subject to the forces of a competitive marketplace." GAO Report, *Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, GAO-06-838R, July 7, 2006, p. 11. Available at http://www.gao.gov/new.items/d06838r.pdf. However, if the government designates a service (or an item) as commercial merely because the service is "of a type" that is sold commercially, but the offered service is not readily available in the commercial market, the government reduces its ability to assess the reasonableness of the contractor's price because it does not have prices derived through the benefit of competition in the commercial market place.

[7] "Like the panel, [GAO has] pointed out that FPDS-NG data accuracy has been a long-standing problem and have made numerous recommendations to address this problem." GAO Report, *Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations*, GAO-08-160, December 2007, p. 18. Available at http://www.gao.gov/new.items/d08160.pdf.

[8] On March 15, 2007, the House passed H.R. 1362, the "Accountability in Contracting Act," by a vote of 347-73. The Senate unanimously approved the bipartisan "Accountability in Government Contracting Act of 2007" on November 7, 2007.

in federal contracting, and authorize protests of task or delivery orders that exceed a certain threshold.

In addition to new legislation, many 1423 Panel recommendations require Office of Federal Procurement Policy actions, including guidance, review, and data collection. Although OFPP has produced some memoranda and guides related to 1423 Panel recommendations, and more are on the horizon, additional work needs to be done to ensure that the Panel's recommendations are implemented.

Of particular note, the Panel emphasized that government is not following the private sector's lead when it comes to competition in contracting. The Panel's report stated: "It is clear from the many private sector buyers who testified before the Panel that the bedrock principle of current commercial practice is competition."[9] The Panel also found that the "[c]ommercial practice strongly favors fixed-price contracts in the context of head-to-head competition in an efficient market."[10] That fact was corroborated in a recent industry study, which stated that:

> In this year's survey, 40% of the revenue from federal contracts was from cost reimbursable contracts, which is slightly higher than the 39% reported in the 12th annual survey and significantly higher than the 28% and 30% reported in the 11th and 10th annual surveys. It is difficult to reconcile the high use of cost reimbursable contracts with the notion that the government is attempting to use more commercial processes to streamline federal procurement. The commercial environment generally uses fixed price or time and material contracts while the government continues to maximize the use of cost reimbursable contracts.[11]

Despite those basic principles to ensure fair and reasonable contracts, the government ultimately enters into far too many noncompetitive cost reimbursable contracts. Competition is also an issue because nearly 35 percent of federal contract award dollars are awarded without competition.[12] That number increases to nearly 45 percent if one-bid awards are included.[13] Simply stated, although the commercial sector strives for full and open competition to obtain goods and services, the federal government awards contracts based on that principle only 50 percent of the time.[14]

What is the result? GAO found that "sole-source contracts were awarded by [the Department of Defense] despite recognizing it was paying about 25 percent more than previously paid for the

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[9] 1423 Panel Report, p. 4.
[10] 1423 Panel Report, p. 11.
[11] Grant Thornton, *13th Annual Government Contractor Industry Highlights Book: Industry Survey Highlights 2007*, p. 6. Available at http://www.grantthornton.com/staticfiles/GTCom/files/Industries/Government%20contractor/13Highlights_Final.pdf. POGO generally opposes the government's use of Time and Material (T&M) contracts.
[12] POGO's total is based on contracts "not competed," "not available for competition," and "follow-on to previous contract." USAspending.gov, *Federal Contract Awards by extent of Competition*. Available at http://www.usaspending.gov/fpds/tables.php?tabtype=t1&rowtype=a&subtype=p&sorttype=2007.
[13] Id.
[14] Id.

contracts awarded competitively."[15] Everyone agrees that competition is essential in contracting, yet competitive processes are often replaced by sole source processes that, in the long run, waste taxpayer money and create an impression of favoritism.

POGO believes that a more accountable contracting system will benefit the government, taxpayers, and federal contractors. At the same time, an improved contracting system will create a cultural shift that rewards good contracting decisions and that genuinely holds contractors accountable for the goods and services they provide to the government.

I urge the Members of the Subcommittee to focus on Appendix II of the GAO report discussing the 1423 Panel's recommendations.[16] That section highlights GAO's assessment of the 1423 Panel's recommendations and OFPP's implementation plans. Appendix II is a great source to find out what actions OFPP is taking, and should be used as a benchmark to determine what future legislation will be needed in order to fix the contracting system.

"Contractors and Federal Spending Accountability Act of 2007" (H.R. 3033)

POGO is pleased to share its thoughts on Representative Carolyn Maloney's bill, H.R. 3033—"Contractors and Federal Spending Accountability Act of 2007."[17] On July 18, 2007, POGO testified before this Subcommittee in support of that bill.[18] H.R. 3033 would formalize and replicate POGO's Federal Contractor Misconduct Database (FCMD),[19] and address the government's failure to vet contractors to determine whether they are truly responsible.[20] Since the Subcommittee's hearing last year, POGO has also been working with the Senate to introduce companion legislation to H.R. 3033.

As the Subcommittee might recall, POGO's FCMD is a compilation of instances of misconduct and alleged misconduct committed by the top federal government contractors between 1995 and the present. POGO compiled these instances through searches of public records. We do not claim to have identified every instance of misconduct and alleged misconduct involving these contractors. We have attempted, however, to find and categorize specific instances of misconduct that should help government officials. POGO has tirelessly scanned the internet and utilized the Freedom of Information Act (FOIA) to find government and contractor press

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[15] GAO Report (GAO-08-160), p. 7.
[16] "The 89 recommendations in the panel report are largely consistent with our past work and recommendations." GAO Report, *Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations*, GAO-08-160, December 2007, p. 5. Available at http://www.gao.gov/new.items/d08160.pdf.
[17] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3928ih.txt.pdf.
[18] Testimony of POGO's Scott Amey, before the Subcommittee on Government Management, Organization, and Procurement, *Federal Contracting: Why Do Risky Contractors Keep Getting Rewarded With Taxpayer Dollars?*" July 18, 2007. Available at http://www.pogo.org/p/contracts/ct-070718-fedcon.html#3. POGO's response to the Subcommittee's July 30, 2007, letter is available at http://www.pogo.org/p/contracts/cl-070827-contract.html.
[19] POGO's FCMD is available at http://www.contractormisconduct.org/. The FCMD will be updated and expanded to include the top 100 federal contractors in March 2008.
[20] *See* FAR Subpart 9.104-1(d) (contractors must "[h]ave a satisfactory record of integrity and business ethics." Available at http://www.arnet.gov/far/current/html/Subpart%209_1.html#wp1084075.

releases, settlement agreements, court documents, and other primary sources to support each instance of misconduct. The FCMD now includes over 420 instance of misconduct totaling over $10 billion. Frankly, it is shocking that a nonprofit is doing this work. H.R. 3033 would correct the government's inaction in collecting and evaluating contractor responsibility information.

While Congress is considering this legislation, the defense and civilian agencies have initiated a rulemaking that would begin to address some of the issues raised in H.R. 3033. That proposed rulemaking would (1) require contractors to have a code of ethics and business conduct, (2) establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of federal contracts or subcontracts, and (3) require the notification of contracting officers without delay when there are violations of federal criminal laws with regard to such contracts or subcontracts. The proposed rule also stipulates that the failure to comply with the notification requirement could result in suspension or debarment.[21] Related to the database provision in H.R. 3033, contractors would have to disclose overpayments on a government contract and, when reasonable grounds exist, violations of criminal law. Although greater in scope, H.R. 3033 would codify into law the actions that agencies are taking on their own.

Even the Department of Justice's National Procurement Fraud Task Force (NPFTF) Legislation Committee (co-chaired by two Inspectors General) has proposed a database system that is a variation of one provision in H.R. 3033.[22] In an unreleased white paper, the NPFTF Legislation Committee made many recommendations to improve the government's ability to detect, prevent, and prosecute contract and grant fraud.[23] The "Procurement Inquiry Check System" (PCIS) would provide for a procurement fraud background check system.[24] The system would contain contractor performance information, including fraud instances and suspension and debarment details.[25] The NPFTF Legislation Committee found that "mobility permits fraudulent contractors and service providers to move between levels of government and across jurisdictions with little fear of detection sine a national database does not exist."[26]

H.R. 3033 would go a long way in improving pre-award contracting decisions and enhancing the government's ability to weed out risky contractors, especially those with repeated histories of misconduct or poor performance. I predict that there will be industry criticism about what to call

[21] POGO provided a public comment on the contractor compliance programs and integrity reporting proposals on January 14, 2008. POGO supported the proposal, but advocated that the proposed rule's mandatory reporting requirement must be clarified and expanded to require contractors to disclose a broader array of unethical conduct. Available at http://pogo.org/p/contracts/cl-080114-fedcontracts.html.

[22] National Procurement Fraud Task Force, Legislation Committee, Procurement and Grant Fraud: Legislation and Regulatory reform Proposals, July 9, 2007 The Committee Chairs are Inspector General Brian D. Miller, GSA, and Inspector General Richard L. Skinner, DHS. Available at http://www.ballardspahr.com/files/tbl_s29GeneralContent/PDFfile1222/94/8-1-07TaskForceWhitePaper.PDF.

[23] NPFTF stated that "procurement fraud includes, but is not limited to, cost/labor mischarging, defective pricing, defective parts, price fixing and bid rigging, and product substitution." NPFTF Legislation Committee Report, p. 15.

[24] The Procurement Inquiry Check System (PICS) would be created and maintained by the General Services administration (GSA) and utilized by federal, state, and local procurement officials prior to the authorization of grant or contract actions using federal funds

[25] NPFTF Legislation Committee Report, p. 16.

[26] NPFTF Legislation Committee Report, p. 15.

the database and efforts to scale back the type of information that is included. POGO encourages an open debate on those topics, and POGO fully supports this bill.

"Contracting and Tax Accountability Act of 2007" (H.R. 4881)

POGO believes that the "Contracting and Tax Accountability Act of 2007" will also help address the need for greater transparency to prevent risky contractors from receiving federal dollars. Improved market research and contractor specific information should provide for better pre-award contractor responsibility determinations. Furthermore, these tax evaders should be included in the database created by H.R. 3033.

POGO is concerned about contractors that cheat on or are delinquent in paying their taxes. The Senate has held three hearings on federal contractors with unpaid tax debt,[27] identifying at least $6.3 in unpaid taxes by defense and civilian contractors.[28] Contractors that owe taxes are still allowed to do business with the federal government. To fix this problem, H.R. 4881 would prohibit any person or contractor that has a seriously delinquent tax debt from obtaining a federal government contract. The bill also requires federal agency heads to require prospective contractors to certify that they do not have such a debt and authorize the Secretary of the Treasury to disclose information describing whether such contractors have such a debt. [29]

H.R. 4881 is on the right track, but POGO believes that it could go further in its scope. The bill is limited to "negotiated" acquisitions (leaving out FAR Part 12 contracts for commercial goods and services) and would apply only to contractors with "seriously delinquent tax debt."[30] The prohibition would apply only to contractors "for which a notice of lien has been filed in public records" pursuant to applicable tax law. POGO supports H.R. 4881 with the understanding that the definition for "seriously delinquent" encompasses the companies that owe the $6.3 billion in delinquent taxes to the federal government. H.R. 4881 provides another tool to prevent companies with questionable track records from receiving federal contracts.

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[27] The Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations held hearings on contractors who cheat on their taxes on March 14, 2006, June 16, 2005, and February 12, 2004. Available at http://hsgac.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=333 (GSA contractors), http://hsgac.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=248 (civilian contractors), and http://hsgac.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=153.

[28] "On February 12, 2004, the Subcommittee held a hearing entitled DOD Contractors Who Cheat on Their Taxes, which examined the IRS' failure to collect $3 billion in unpaid taxes owed by contractors doing business with the Department of Defense (DOD) and getting paid with taxpayer dollars. On June 16, 2005, the Subcommittee held a hearing entitled Civilian Contractors Who Cheat On Their Taxes, which identified an additional $3.3 billion in unpaid taxes and demonstrated that the problem of tax delinquent federal contractors is not confined to DOD. Senate Committee on Homeland Security and Governmental Affairs,
Permanent Subcommittee on Investigations, Hearing Announcement. Available at
http://hsgac.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=333.

[29] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h4881ih.txt.pdf.

[30] H.R. 4881 section 3.

"Government Contractor Accountability Act of 2007" (H.R. 3928)

H.R. 3928 would require covered government contractors that receive more than 80 percent of their annual gross revenue from federal contracts to disclose the names and salaries of their most highly compensated officers.[31] Covered contractors are defines as non-publicly traded companies that receive more than $5 million in annual gross revenues from federal contracts or subcontracts at any tier.[32] The data would be made publicly available in searchable form through the Federal Procurement Data System.[33]

Executive compensation is an intriguing part of the contracting regulations. Currently, $597,912 in executive compensation (which includes wages, salary, bonuses, deferred compensation, and employer contributions to defined contribution pension plans) is allowable under a federal contract. That amount, however, is not a limit on the compensation an executive may receive—the nearly $600,000 is the maximum allowable amount that the government will reimburse contractors for their senior executives' compensation.[34] Simply stated, the threshold is the maximum allowable amount that may be allocated to a government contract. For example, if a contractor has a 50/50 share in federal and commercial contracts, the threshold would be allocated proportionally -- the government would only reimburse just under $300,000 for executive compensation.

The intent of the executive compensation threshold is to prevent taxpayers from footing the bill for high salaries paid to contractor executives, particularly defense contractor officials.

The executive compensation threshold, however, is based on commercially available data from publicly traded companies with annual sales over $50 million.[35] More specifically, as required by Section 39 of the OFPP Act, the data used is the median (50th percentile) amount of compensation accrued over a recent 12 month period for the top five highest paid executives of publicly traded companies with annual sales over $50 million. Unlike a publicly traded company that is required by the Securities and Exchange Commission to open its books to its shareholders and the public, there is very little, if any, information disclosed by privately-held contractors. As witnessed during the October 2007 House Oversight and Reform Committee hearing on Private Security Contracting in Iraq and Afghanistan, representatives of Blackwater were less than

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[31] Section 2(a). Section 2(a)(1)(A) of the bill would require contractors to file a "certification that the contractor received, during the fiscal year preceding the fiscal year in which the contract is awarded, 80 percent or less of its annual gross revenues from other contracts with the Federal Government." Available at http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.3928:.

[32] H.R. 3982, Section 2(c).

[33] H.R. 3982, Section 2(b).

[34] Office of Management and Budget, Office of Federal Procurement Policy, Determination of Executive Compensation Benchmark AmountDetermination of Executive Compensation Benchmark Amount, March 27, 2007. Available at http://www.whitehouse.gov/omb/fedreg/2007/032707_casb.pdf. *See* FAR Subpart 31.205-6(p) ("Limitation on allowability of compensation for certain contractor personnel.) Available at http://www.arnet.gov/far/current/html/Subpart%2031_2.html#wp1095659.

[35] *See* http://www.whitehouse.gov/omb/fedreg/2007/032707_casb.pdf.

forthcoming with company information. Blackwater's justification was that "we are a private company, and there is a key word there, private."[36]

H.R. 3928 raises an interesting debate regarding privacy verses openness for private companies that are federal contractors. On one hand, the bill's 80 percent annual federal revenue threshold and the limited disclosure are limited in scope. On the other hand, what is the burden on the government to collect executive compensation information and how will it be used?

More importantly, however, POGO believes that the weak executive compensation laws need to be reviewed and amended to ensure that taxpayers are not being exploited. Although additional disclosure might assist the government's executive compensation efforts, the current law is riddled with loopholes. For example, the compensation limits only apply to the top five highest paid executives. That system allows companies to fully charge the government for excessively high contractor compensation packages for other mid- and high-level executives.

POGO has always urged Congress to promote openness in government. Therefore, we tepidly support H.R. 3928 because any contractor, public or private, that receives the majority of its revenue from the federal government should be held accountable by the public.

Conclusion

The aforementioned work by the 1423 Panel and the contractor accountability bills will add much-needed competition, oversight, and transparency to the contracting system.

POGO fully supports H.R. 3033 and H.R. 4881. We must remember that contracting with the federal government is a privilege, not a right, and taxpayers must be confident in the integrity of the federal government and the companies with which it does business. If all of the 1423 Panel recommendations are implemented and Congress passes the legislation included in today's hearing, as well as H.R. 1362 and S. 680, there will still be more work to be done.

Thank you for inviting me to testify today. I look forward to working with Chairman Towns, Ranking Member Bilbray, and the entire Subcommittee to further explore how the federal government can improve the methods of buying goods and services.

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[36] Testimony of Erik Prince, Chairman, The Prince Group, LLC and Blackwater USA, before the House Oversight and Reform Committee, *Hearing on Private Security Contracting in Iraq and Afghanistan*, October 2, 2007, p. 173. http://oversight.house.gov/documents/20071127131151.pdf.

Mr. TOWNS [presiding]. Thank you very much for your testimony. Mr. Chvotkin.

STATEMENT OF ALAN CHVOTKIN

Mr. CHVOTKIN. Mr. Chairman, thank you very much for the invitation to testify. The Professional Services Council is the leading national trade association representing the professional, technical, and engineering companies providing services to the Federal Government. Our members include small, mid-tier, and large businesses.

Before I comment on the specific legislative proposals being addressed today, I want to implore you to address all of these issues in a fact-based manner. All too often, the complexities and nuances of Federal procurement have either been misstated or misinterpreted and led to the creation of numerous myths about Federal contracting. In this business, words and terms matter, and as you examine avenues to enhance the quality of the Federal acquisition process, it is important to proceed with well-understood definitions, sound data, and an accurate assessment of the current environment.

It is also important to recognize that many layers exist today to protect the Government's interest in equities. The Government marketplace is vastly different and far more regulated than the commercial marketplace, and we do not suggest that the two can or should be identical. While the discussion is wholly appropriate, overly simplistic statutory or regulatory language that ignores the policy, implementation, due process, and other dimensions involved is the wrong way to start.

I also want to address the issue of the Federal acquisition work force in its broadest context. Far from simplifying the life of the Federal acquisition professional, many of the reforms included in enacted legislation and recommended by the SARA Panel actually make the acquisition process more demanding for the people charged with its execution. While the procedures are far easier to execute, they are also far less effective and frequently place procedural perfection over mission accomplishment.

Unfortunately, despite the near unanimous agreement that actions must be taken to address the challenges of the Federal work force, not enough has been done in the executive branch or by the Congress to turn the tables. More needs to be done.

PSC believes that a smart, well-trained, and prepared customer makes the best customer. As PSC testified before the Senate last July, we need a kind of work force Marshall plan that aggressively addresses the hiring, retention, training, reward, and development of the Federal work force we are asking to manage 40 percent of the discretionary budget of the Federal Government.

Let me address the three bills that you have asked for our comments on. With respect to H.R. 3928 by Mr. Murphy, PSC supports transparency and accountability in Federal contracting, but the reason for this bill is clear and obvious. It seems to be focused on only one company under a unique set of circumstances. Simply, the bill provides no information that the Government can use to determine whether the contractor performs under the contract or is profitable. Furthermore, more than a decade ago, as the earlier panel

pointed out, Congress imposed a comprehensive mechanism to annually cap the maximum compensation amount that the contractor is allowed to charge under any Defense or civilian agency government contract. We don't see this bill as necessary.

With respect to H.R. 4881, another bill pending before the subcommittee, private entities providing goods and services to the Federal Government should comply with Federal, State, and local tax requirements. Companies that do not comply simply have an unfair advantage over law-abiding contractors that pay their taxes. Yet, there is considerable rhetoric surrounding allegations that government contractors have reputedly violated tax laws but continue to receive contracts.

In May of last year, this subcommittee favorably reported a revised version of the bill under a substitute offered by you, Mr. Chairman, and adopted by the subcommittee. PSC supports the Towns substitute, although we had other recommendations that were not included in it. Nevertheless, the substitute properly relies on the debarment mechanisms under current regulations to ensure that a contractor is provided with due process before being denied access to Government contracts, as those already provided under the responsibility requirements of Federal law and the Federal acquisition regulations. Many of those positive attributes are also included in H.R. 4881.

As you know, there were two nearly identical provisions related to contractor and grantee tax compliance included in the 2007 Appropriations Act. Different formulations were included in different stand-alone bills.

Since the enactment of these two provisions, we are not aware of any guidance or inter-procurement regulations that have been issued, but we will be watching for them.

In addition, as Mr. Denett noted, there are administrative actions that have been taken and are still in process that deserve to be implemented and then assessed before adopting new legislation. In light of these actions, we urge the subcommittee to hold off pursuing further legislation in this area at this time.

Finally, to address H.R. 3033, another bill pending before this subcommittee, PSC supports the objectives of transparency and accountability in Federal contracting and recognizes the importance of the Government having access to relevant information pertaining to contractor responsibility. We do not conceptually oppose a Government-wide data base that includes objective information based on factual, Government-provided input that includes sufficient descriptors to fully explain the nature of the reported data, the nature of the remedial action taken, and the relative severity of the infractions cited. Unfortunately, the legislation does not address these elements.

Furthermore, to the extent that the data base includes information on fines paid or settlements, fundamental due process mandates that include only those judicial or administrative actions that result in findings or admission of guilt.

In my statement I go on to talk about the Acquisition Advisory Panel recommendations. I would be happy to address any issues that the subcommittee may have about that.

We appreciate the invitation to testify and look forward to answering any questions you may have.

[The prepared statement of Mr. Chvotkin follows:]

PSC PROFESSIONAL SERVICES COUNCIL
The *Unified* Voice of the Government Services Industry

STATEMENT OF

ALAN CHVOTKIN
EXECUTIVE VICE PRESIDENT AND COUNSEL
PROFESSIONAL SERVICES COUNCIL

BEFORE THE SUBCOMMITTEE ON
GOVERNMENT MANAGEMENT, ORGANIZATION
AND PROCUREMENT

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

"CONTRACTING REFORMS: EXPERT RECOMMENDATIONS
AND PENDING BILLS"

FEBRUARY 27, 2008



Introduction
Mr. Chairman, Ranking Member Bilbray, members of the subcommittee, thank you for the invitation to testify at today's hearing. I am Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC).

PSC is the national trade association of the government professional and technical services industry. This year, PSC and the Contract Services Association of America (CSA) merged to create a single, unified voice representing the full range and diversity of the government services sector. Solely focused on preserving, improving, and expanding the federal government market for its members, PSC's more than 300 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

Whether assisting citizens seeking compensation for radiation illness, providing support to military men and women stationed at home and abroad, or developing scientific analyses to better protect sensitive wildlife habitats, PSC members are among the leading small, mid-tier and large companies providing the full range of professional services to every federal agency. PSC member companies employ tens of thousands of individuals in every region of the country. These dedicated employees provide government customers and taxpayers with good value, specialized expertise and innovative solutions. Our members believe strongly in the mutual benefit that is achieved when the government and its private sector suppliers work closely together to ensure the delivery of better outcomes for America's citizens.

Over the past decade, the government's missions have rapidly evolved, increased in complexity, and require new technology, thus resulting in growing challenges for the government and its workforce, and a substantial increase in the government's reliance on contractors. The evidence suggests that these challenges and trends will continue well into the future.

Contracting Myths
Before I comment on the specific legislative provisions, I want to address the importance of addressing all of these issues in a fact-based manner. All too often the complexities and nuances of federal procurement have either been misstated or misinterpreted and led to the creation of numerous myths about federal contracting. Words and terms matter and as we examine avenues to enhance the quality of the federal acquisition process, it is important to proceed with well-understood definitions, sound data, and an accurate assessment of the current environment. I've attached to my statement three papers that address and debunk some of the more common current myths about government contracting.

In fiscal year 2007, the federal government spent more than $400 billion on the purchase of goods and services, through more than 30 million individual contract transactions. Despite the current rhetoric, it is heartening and important to note that, even with its size and complexity, the federal acquisition system actually works quite well. The procurement system is a tool to acquire goods and services to meet federal agency mission needs; it is not an end product itself. Clearly,

it is also a system that faces many challenges and has areas where improvements are needed. But the bottom line is that this system as a whole serves the public well. Real fraud and abuse, while deeply troubling whenever it is uncovered, is actually relatively rare and the government has in place a wide array of generally effective statutes and standards that apply to entities seeking to do business with it.

Regulating Business

As you know, any organization wishing to do business with the government must comply with all of the general application laws and regulations for maintaining a business, including all relevant tax, environmental and labor provisions. Each area of law or regulation is enforced and adjudicated through its own experienced and knowledgeable entities at the federal, state and local levels. For example, Congress has given responsibility to the Internal Revenue Service to write regulations to implement the tax laws. The Environmental Protection Agency has primary responsibility for implementing the environmental laws, the Department of Labor for labor laws, and so on. Many of these agencies also have internal administrative enforcement authority while the Justice Department is generally charged with civil and criminal enforcement at the federal level.

Taken together, this layering of statutes and regulations across the government, at all levels, provides a construct under which all businesses in the nation must operate. But for government contractors, there is much more.

Regulating Government Contractors

There are numerous laws and regulations that apply to firms that want to do business with any agency of the federal government – such as registering in the government's central contractor registration (CCR) system, agreeing to unique audit and/or competition rules, meeting the government's unique accounting and billing standards, or agreeing to utilize small business for a certain percentage of subcontracting opportunities. For these government-wide procurement requirements, most federal agencies follow the uniform Federal Acquisition Regulation (FAR) requirements. The FAR is maintained by three lead agencies – DoD, NASA and GSA – and policy is provided by those agencies under the leadership of the Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget. However, in a recent column I wrote for Government Services Insider, I questioned whether we have a true uniform Federal Acquisition Regulation; actions by Congress and the regulatory agencies, and even by individual procurements, are actually moving us farther away from a uniform, government-wide, set of acquisition regulations. A copy of that column is attached.

Beyond these general rules, frequently there are specialized laws and regulations that apply when doing business with specific agencies of the federal government or for specific types of activities. For example, the Department of Homeland Security has a restriction on the types of companies with which it can do business. The Defense Department has an entirely separate set of specialized rules to guide the procurement of its major weapons systems and many of its own purchases. In those specialized areas, each federal agency is responsible for developing, publishing and maintaining separate acquisition regulations that supplement the government-wide regulations. Each agency is also responsible for writing its own contracts and monitoring compliance with agency-specific requirements.

In addition, a myriad of laws and regulations provide the authority and responsibility for government officials – primarily but not exclusively contracting officers and grants officers – to ask the right questions and take the right actions against those who fail to follow the laws and regulations. If a contracting officer is concerned about putting the federal government at risk by doing business with an entity – whether an individual, a company, a university or a non-profit organization – he or she has wide latitude with regard to the information that can be sought from existing government sources or directly from that concern. These procedures and protections generally apply equally to both contracts and grants.

But there are important constraints on the government's flexibility. For example, the government may not act arbitrarily and it must adhere to its own regulations and procedures. One of these is respect for due process before denying work to an individual or a contractor unless the government has an urgent need to protect its interests. There are also long-standing and appropriate procedures to protect small business from arbitrary agency decisions about the competency of these businesses to perform on federal contracts.

I mention all of this because it is important to recognize the many layers that exist to protect the government's interests and equities. It is equally important to recognize that this extensive regime of rules and regulations has evolved over many years in an effort to strike the proper balance between protecting the government's interest and maintaining a vibrant and effective marketplace that can support the government's diverse and increasingly complex mission. The government marketplace is vastly different and far more regulated than the commercial marketplace and we do not suggest that the two can be or should be identical. However, a balance is vital to ensure that the government has the access to the widest possible array of suppliers and solutions.

Unfortunately, no matter what laws or regulations are in place, a system this large and complex will have problems. With so many rules, it is not surprising that federal agencies or contractors may fail to adhere perfectly and completely to all of them. With so many dollars spent, unethical government and contractor employees will seek to enrich themselves at the expense of the taxpayer and the agency mission.

As PSC President Stan Soloway noted last year[1], no one wants to see his or her tax dollars go to companies or individuals that routinely and blithely violate the law. For the most part, the existing system prevents that from happening. Nonetheless, it is always appropriate to strive for improvement. While the discussion is wholly appropriate, overly simplistic statutory or regulatory language that ignores the policy, implementation, due process and other dimensions involved is the wrong way to start.

But because these cases are a distinct minority, policymakers should focus on how to appropriately punish such behavior while still guarding against imposing new and often untenable burdens on the entire federal procurement system. Overly punitive measures unnecessarily increase costs to government or its suppliers, all in the name of achieving the

[1] See Stan Soloway's 4/9/07 Washington Technology column, "The debate on contractor responsibility flares anew," online at http://www.washingtontechnology.com/print/25_05/30430-1.html.

unachievable. In the end, this is a delicate balancing act; this hearing offers an important opportunity to make progress toward that balance.

Indeed, each of the topics being discussed today raise complex and difficult questions of interpretation of and compliance with highly regulated areas, yet none of them have been adequately answered. Nor is this a new debate; it dates back to the Clinton Administration's so-called "blacklisting" initiative, ostensibly developed to ensure that the government did not award contracts to unethical companies or individuals. At that time, many of the government's own senior career contracting leaders opposed that initiative; then, as now, any such rule is both unnecessary and un-executable.

Acquisition Workforce

Before addressing the specific legislative proposals or SARA Panel recommendations on the agenda today, I want to address the issue of the federal acquisition workforce in its broadest context. Far from simplifying the life of the federal acquisition professional, many of the reforms included in the recently enacted legislation and recommended by the SARA Panel actually make the acquisition process more demanding for the people charged with its execution. One commentator summed up last year's legislative action as a series of "reports, restrictions and requirements." Furthermore, while "check the box" procedures are far easier to execute, they are also far less effective and frequently place procedural perfection over mission achievement.

Unfortunately, despite the near unanimous agreement that actions must be taken to address the challenges of the federal acquisition workforce, not enough has been done in the Executive Branch or by Congress to turn the tables.

To be sure, the mandatory competency survey separately conducted by DoD for a segment of its contracting workforce, and the voluntary competency survey for the civilian agencies' contracting staff conducted by OFPP, provide useful information to begin addressing the question of the current capabilities of the acquisition workforce. Yet there is little evidence that the military departments have substantially increased their investment in continuous learning and other developmental opportunities for the workforce. The situation is even worse across the civilian agencies where the availability of adequate funds to train and continuously improve the acquisition workforce has been woefully inadequate.

Five years ago, the Professional Services Council proposed the creation of the Acquisition Workforce Training Fund and we were pleased to see that recommendation included in the 2003 Services Acquisition Reform Act (P.L. 108-136); this year we recommended that the fund be made permanent and we are pleased that the fiscal year 2008 Defense Authorization Act took that action. That fund is a way to fence training funds for acquisition professionals; it is a start but it is not the whole solution.

Furthermore, the fiscal year 2008 National Defense Authorization Act includes an interesting provision creating an acquisition workforce development fund to help attract and retain the department's workforce. We will be closely watching the implementation of this provision. Other provisions in pending legislation, particularly S. 680, the "Accountability in Government Contracting Act of 2007" that passed the Senate last November, include important provisions we

support, such as creating a government-wide acquisition intern program, an acquisition fellowship, and a government-industry exchange program.

But more needs to be done. PSC believes that a smart, well-trained, and prepared customer makes the best customer. As PSC testified before the Senate last July[2], we need a kind of workforce "Marshall Plan" that aggressively addresses the hiring, retention, training, reward and development of the workforce we are asking to manage 40 percent of the discretionary budget of the federal government. We believe this initiative should include a special focus on emergency and contingency contracting. We also propose that Congress direct the creation of a government-wide Contingency Contracting Corps that is given special training in emergency and contingency contracting and would be immediately deployable when the mission need arises.

HR 3928: "Government Contractor Accountability Act of 2007"

One of the bills pending before the subcommittee that you asked for comment on is HR 3928, the "Government Contractor Accountability Act of 2007" introduced on October 23, 2007 by Congressman Chris Murphy and others. The bill directs federal government contracting officers to require "covered contractors" to submit for each contract entered into either (1) a certification that the contractor received 80 percent or less of its annual gross revenues from other federal contracts; or (2) a statement disclosing the names and salaries of the contractor's principal executive officer, principal financial officer, three most highly compensated other executives officers or individuals, and directors. Such certifications and any annual updates that are required to be submitted are to be made publicly available in searchable form through the Federal Procurement Data System. The term "covered contractor" means an entity that (1) received more than $5 million in annual gross revenue from federal contracts in the preceding fiscal year and (2) is not a publicly traded company required to file periodic reports under the Securities Exchange Act of 1934. The GSA administrator is required to issue regulations to implement these provisions.

Mr. Chairman, while PSC supports transparency and accountability in federal contracting and recognizes the importance of the government having access to all relevant information pertaining to contractor responsibility and awarded contracts, we oppose this bill in its entirety. The reason for this bill is clear and obvious – and focused on only one company under a unique set of circumstances. The bill requires the disclosure of irrelevant information for all covered contractors that neither current law nor the SEC requires of publicly held companies, and should not be so compelled. Government contractors, like any business, must be allowed to maintain the business model that works best for each individual company. A privately held company should not be punished for organizing itself in a manner that best suits its needs. Finally, the 80 percent threshold is purely arbitrary and is designed solely to get personal information from a selected company. It provides no information that the government can use to determine whether the contractor performs under the contract or even if it is profitable.

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[2] See Stan Soloway's 7/17/07 testimony to the Senate Homeland Security and Governmental Affairs Committee, online at http://www.pscouncil.org/pdfs/solowaystatementhsgac07-17-07.pdf.

HR 4881: "Contracting and Tax Accountability Act of 2007" and related bills
Another bill pending before the subcommittee that you asked for comment on is HR 4881, the "Contracting and Tax Accountability Act of 2007," introduced on December 19, 2007 by Congressmen Ellsworth and Towns.

We strongly believe that private entities providing goods and services to the federal government should comply with federal, state and local tax requirements; companies that do not comply have an unfair competitive advantage over law-abiding contractors that pay their taxes.
Yet there is considerable rhetoric surrounding allegations that government contractors have reputedly violated tax laws but continue to receive contracts. If one carefully reads the Government Accountability Office (GAO) and other objective reports on the subject, very few government contractors are actually accused of, let alone been proven to have committed, tax fraud. In fact, the main point of the GAO report was that the system to link IRS tax collection procedures with agency payment processes were not working as planned. Since those reports were prepared, several regulatory and administrative actions have already been taken and more are in process.

In addition, businesses, governments and other taxpayers are already subject to numerous information reporting and withholding requirements. Federal agencies are specifically required to file information returns with the IRS with respect to awarded contracts, pursuant to Section 6050M of the Internal Revenue Code and Section 1.6050M-1 of the IRS regulations. This information return (IRS Forms 8596 and 8596-A) is due quarterly and is equivalent to the "Form 1099" so familiar to individual taxpayers who receive non-wage income.

HR 4881 provides that any person who has a "serious delinquent tax debt" shall be proposed for debarment from obtaining a government contract, pursuant to regulations to be issued by the Office of Federal Procurement Policy within 270 days after enactment. For grantees, the bill prohibits an award of such grant greater than the simplified acquisition threshold unless the certification required by the bill is made, pursuant to regulations to be issued by the Office of Management and Budget within 270 days after enactment. The bill requires federal agencies to require prospective contractors or grantees to (1) certify that they do not have such debt; and (2) authorizes the Treasury Secretary to disclose information describing whether such contractors or grantees have such a debt. The bill defines the term "seriously delinquent tax debt" as an outstanding tax debt for which a notice of lien has been filed in public records, but does not include a debt that is being paid pursuant to an agreement with the IRS or is being challenged by the taxpayer.

On April 20, 2007, Congressman Ellsworth introduced an earlier proposal, HR 1986, the "Federal Contractor Accountability Act of 2007," that provides an outright prohibition on the award of a contract in excess of the simplified acquisition threshold to any entity unless the entity certified that the contractor owed no federal tax debt.

On April 17, 2007, Congressman Towns and others introduced HR 1870, the "Contractor Tax Enforcement Act," to prohibit delinquent tax debtors from being eligible to be awarded federal contracts. In May 2007, this subcommittee favorably reported a revised version of HR 1870; under the substitute offered by Mr. Towns and adopted by the subcommittee, a contractor who

has a "serious delinquent tax debt," as defined in the substitute, shall be proposed for debarment pursuant to the requirements of the Federal Acquisition Regulations. The substitute covers procurements conducted by federal agencies under FAR Parts 14 and 15 and requires an entity that submits a bid or proposal to submit a certification that the offeror does not have a "serious delinquent tax debt" and a statement that the entity authorizes the Secretary of the Treasury to disclose to the procuring agency information limited to describing whether the entity has a serious delinquent tax debt. A serious delinquent tax debt is a debt greater than $2,500 and that has not been paid within 180 days after the assessment, but does not include a debt being paid in a timely manner pursuant to an agreement with the IRS.

PSC supported the Towns substitute, although we had other recommendations that were not included in the substitute. Nevertheless, the substitute properly relies on the debarment mechanism under current regulations to ensure that a contractor is provided with due process before being denied access to federal contracts, as already provided for under the responsibility requirements of federal law and the Federal Acquisition Regulations. We also supported the creation of a de minimus threshold for coverage and applauded the subcommittee's action to recognize the options available to a taxpayer to pay off any tax debt by excluding them from the definition of a tax delinquency.

As you know, there are two nearly identical provisions relating to contractor and grantee tax compliance included in the 2007 Consolidated Appropriations Act (P.L. 110-161; 12/26/07). Section 535 of Division B, the Commerce, Justice, Science Appropriations Act, provides that none of the funds appropriated or otherwise made available to the agencies covered by this act may be used to enter into a contract greater than $5 million or to award a grant in excess of $5 million unless the prospective contractor or grantee certifies in writing to the agency awarding the contract or grant that, to the best of its knowledge and belief, the contractor or grantee has filed all federal tax returns required during the three years preceding the certification, has not been convicted of a criminal offense under the Internal Revenue Code, and has not, more than 90 days prior to the certification, been notified of any unpaid federal tax assessment for which the liability remains unsatisfied, unless the assessment is subject to an installment agreement or an offer in compromise has been approved by the IRS and is not in default. Section 523 of Division G, the Departments of Labor, Health and Human Services and Related Agencies Appropriations Act, has almost identical language for agencies covered by that division.

Different formulations were included in six stand-alone, Senate-passed, fiscal year 2008 appropriations acts during calendar year 2007 and PSC opposed them because of their different requirements, scopes of coverage and treatment of thresholds, and other inconsistencies without apparent justification, among other reasons. Since the enactment of these two provisions, we are not aware of any guidance or interim procurement regulations that have been issued to implement these appropriations act restrictions, but we will be watching for them and intend to comment on them. While these appropriations act provisions do cover both contracts and grants, and unlike the Towns substitute adopted last year that we support, these provisions do not have any de minimus threshold for tax delinquency and do not differentiate between the types of contract awards covered by the provision.

Nevertheless, in light of the enactment of these two sets of provisions, we urge the subcommittee to hold off pursuing further legislation in this area at this time. While elements of Mr. Ellsworth's HR 4881 include useful provisions from the Towns substitute relating to the use of due process procedures for determining risk to the federal government and cover both contracts and grants, there are other provisions from the Towns substitute (such as the de minimus threshold and its proper focus on contract award types) that should be included in any legislation. We would prefer to see the limitation on appropriations from the Consolidated Appropriations Act replaced with stand-alone procurement legislation, although there are still too many details to be worked out before we could endorse any permanent legislation. We would welcome the opportunity to work with the subcommittee, and with Mr. Ellsworth and others, on the essential elements of any further legislation.

Furthermore, in a related matter, Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 requires all federal, state and local governments to automatically withhold three percent of all payments made to government contractors to address the so-called "tax gap;" this provision is scheduled to take effect for all payments made after December 31, 2010, regardless of when the contract is entered into. The sweeping requirements of Section 511 raise a number of serious concerns about fairness and implementation. Chief among them is that this withholding is based on revenues from government contract payments that bear no relationship to a company's taxable income. While we are awaiting Treasury tax and FAR contract regulations to implement the provision, PSC and dozens of other associations have joined together in a coalition, the Government Withholding Relief Coalition, to seek the repeal of this provision in conjunction with the enactment of increased information reporting that we believe offer a better solution. We are pleased that bi-partisan legislation has been introduced in the House, and a companion bill has been introduced in the Senate, to repeal this provision.

HR 3033: "Contractors and Federal Spending Accountability Act of 2007"
Another bill pending before the subcommittee that you requested comment on is HR 3033, the "Contractors and Federal Spending Accountability Act of 2007," introduced on July 12, 2007 by Congresswoman Maloney and Mr. Towns. We appreciate the subcommittee holding an additional hearing on this legislation beyond the July 18, 2007 hearing.

While PSC supports the objectives of transparency and accountability in federal contracting and recognizes the importance of the government having access to all relevant information pertaining to contractor responsibility and the source selection decision, we do not support HR 3033 in its present form. It is possible to provide substantial transparency while protecting other rights and the reasonable needs of the marketplace. But doing so requires balance and thought; unfortunately, as this proposal demonstrates, the trend could be headed in the wrong direction. We believe the bill (1) undercuts the fundamental principles of due process; (2) fails to establish fair and objective criteria for information to be collected to ensure such information is properly used; (3) presumes, without supporting evidence, that current suspension and debarment rules are inadequate or not fully used; and (4) demands, unrealistically, that government contracting officers make judgments on highly complex legal issues. Here again, we would welcome the opportunity to continue to work with the subcommittee and Mrs. Maloney on the development of a set of proposals that will provide federal agencies with accurate, actionable, information.

Section 3 of the bill requires the GSA administrator to establish and maintain a database regarding the integrity and performance of federal contractors for use by government contracting officers, officials having authority to suspend or debar contractors, and officials having authority over grant assistance. The database must include information regarding civil, criminal and administrative proceedings initiated or concluded by the federal government and by state governments against contractors or grant recipients. Specifically, for every person awarded a federal contract or assistance, the database must include the following information for the past five years: (1) information regarding all proceedings against that person; (2) each proceeding recorded must include a brief description of the proceeding, including any amount the person paid to the federal or state government; (3) all federal contracts and assistance awarded to the person that were terminated; (4) all federal suspensions and debarments; (5) all federal suspension and debarment show cause orders; and (6) all administrative agreements signed.

PSC does not conceptually oppose a government-wide database that includes objective information based on factual, government-provided input that includes sufficient descriptors to fully explain the nature of the reported data, the nature of the remedial action taken by the subject company, and the relative severity of the infractions cited. Unfortunately, the legislation does not address any of these elements. Furthermore, to the extent that the database includes information on fines paid or settlements, fundamental due process mandates that it only include those judicial or administrative actions that result in a finding or admission of guilt.

Section 4 of the bill requires that the Federal Acquisition Regulations (FAR) suspension and debarment regulations be amended six months after enactment to provide that a person be presumed ineligible for the award of a federal contract or for assistance if the person has received a judgment or conviction for the same offense twice within any three-year period, provided each offense independently constitutes a cause for debarment. The presumption may be rebutted only if the person demonstrates present responsibility and has corrected the conditions that gave rise to the violations. Finally, the section gives an agency suspension and debarment official the power to deem evidence of repeat violations as sufficient reason to find that immediate action is necessary to suspend the person under the regulations until the person can show present responsibility and has corrected the conditions that gave rise to the violations. PSC opposes this section.

The current suspension and debarment process works when used appropriately. Numerous companies have been suspended or debarred when their company behavior warrants it. Moreover, the legislation presumes that the method for "punishing" a contractor is suspension and debarment, a major change in the regulatory standards which currently apply to federal contracting; in so doing, the provision may impose a punishment that would exceed the nature of the offense. Finally, this provision improperly presumes that two occurrences equal a "pattern of abuse" that warrants suspension, without offering any context or perspective relative to the nature or severity of those occurrences or the remedial action the company may have taken. Yet even this approach raises a host of questions: when is a "pattern of abuse" sufficient to merit suspension? How do we ensure the due process protections granted by our laws and regulations are adhered to? What violations are significant enough to merit suspension or debarment? Do minor fines belong in the same category as major felonies? How do we treat administrative findings that are under review? These and other issues raise difficult, complex and often

troubling issues. While the discussion is wholly appropriate and we welcome the opportunity to participate in them, overly simplistic statutory or regulatory language that ignores the policy, implementation, due process and other dimensions of these issues is the wrong way to start.

Section 5 of the bill requires the FAR to be amended six months after enactment to require that any bid for a federal contract or request for assistance include the offeror's disclosure in writing, covering the five years preceding the bid or request, of (1) all federal or state suspension or debarments; (2) all suspension and debarment show cause orders; (3) all civil, criminal and administrative proceedings; (4) all administrative, civil, and criminal settlements, agreements, consent decrees, enforcement actions, corrective actions, compelling reason waivers and other similar judgment, orders, decisions, and final dispositions with respect to federal contracts or assistance that the person is implementing; and (5) all federal contracts and assistance awarded to the person that were terminated for default. PSC opposes this provision because it is overly broad and unfairly links any proceeding against a company to an implication of bad behavior rather than solely for those where a judgment against, or admission of guilt, resulted. The mere existence of an action does not equate to substantial wrongdoing by the company; for example, a show cause order is not the same as a decision to debar or suspend. Settlements with no finding of guilt do not, under our system of laws, equate to guilt. Finally, the five year period is too long; it should be limited to three years and focus only on the performance history that is relevant to the immediate request for proposal, as is the case with the current regulations relating to the use of past performance information.

Acquisition Advisory Panel Recommendations

In 2003, as part of the Services Acquisition Reform Act (P.L. 108-136), Congress created the Acquisition Advisory Panel, sometimes referred to as the "1423 Panel" after the section of the law creating it and sometimes referred to as the "SARA Panel." The panel, appointed by the Administrator of the Office of Federal Procurement Policy, began its work in February 2005 and issued its final report in July 2007, although the report is "dated" January 2007. The panel made 89 discrete recommendations regarding federal acquisition practices in seven broad functional areas.

PSC was pleased to co-chair a multi-association working group comprised of six associations that was formed by industry to track the panel's work, ensure industry views were presented, and to provide the panel members and policymakers with industry's views on the panel's interim and final recommendations. Our industry working group presented over 1,000 pages of testimony and supporting information to the panel and we actively participated in the panel's public meetings and working group sessions, to the extent permitted by the panel, and at almost every stage of the panel's deliberations. PSC testified twice before the panel's public meetings.

We compliment Ms. Madsen, the chairman of the panel, and all of the members who served on the panel. The assignment given the panel was huge and its resources small. But its output was generally well documented and insightful. Panel members served with personal and professional dedication and with an honest commitment to address important federal procurement policy issues. Even though our working group did not agree with all of the panel's final recommendations, the panel's recommendations addressed many of the then current federal procurement policy issues.

We also compliment the Government Accountability Office for their extensive work in this area and their detailed December 2007 report (GAO 08-160; 12/20/07) on the panel's final recommendations.

GAO reported that the Office of Federal Procurement Policy (OFPP) opposed only two of the panel's final recommendations: one proposing to change the name of the current Contracting Officer Technical Representative (COTR) to Contracting Officer Performance Representative (COPR) and one allowing for protests of task and delivery order contracts over $5 million awarded under multiple award contracts. There are other panel recommendations that are still under OFPP review.

Our industry working group supports many of the panel's recommendations and we have been working with the Office of Federal Procurement Policy and others on the implementation of them. Attached for your information is the March 12, 2007 final package of detailed industry comments on all of the panel recommendations that had an effect on industry. In several instances, our recommendations provide alternatives for the Congress and others to consider when evaluating these specific recommendations. In addition, the associations in this working group and other associations submitted in early 2007, as we have for many years previously, a separate set of industry's legislative recommendations for improvements to the acquisition process.

However, many of the SARA Panel's final recommendations regarding commercial practices would, in our view, impede the federal government's use of an effective and appropriate commercial-like acquisition process. Several of the panel's recommendations relating to commercial practices also take a step backwards from the reforms of the Clinger-Cohen Act and subsequent congressional reform measures.

In your letter of invitation, you asked us to focus on that subset of the panel's final recommendations that require legislation. Based on the GAO's December 2007 analysis, 23 of the panel's 89 recommendations either "require legislative action" or "might be addressed by legislative action."

Even before the panel's report was finalized, legislation was introduced and considered acting on the topics addressed by the panel. For example, S. 680, introduced by Senators Collins and Lieberman on February 17, 2007 and that passed the Senate on November 7, 2007, addressed several of the panel's recommendations on the federal acquisition workforce and on protests of task and delivery orders under multiple-award contracts, among other provisions. The Defense Department submitted a legislative proposal in March 2007 to make changes to certain commercial item procurement provisions; these were incorporated into the original version of the fiscal year 2008 National Defense Authorization Act that was introduced on request and some were subsequently enacted.

Since the panel's final report was issued, the enacted version of the fiscal year 2008 National Defense Authorization Act (P.L. 110-181; 1/28/08) included several of the panel's recommendations for legislation, although not in identical form.

Section 805 requires DoD only, within six months after enactment, to amend its regulations concerning the procurement of commercial services for or on behalf of the department. Such services that are not sold competitively in substantial quantities in the commercial marketplace, but are "of a type" offered for sale and sold competitively in the commercial marketplace, may be treated as commercial items for purpose of the Truth in Negotiations Act only if the contracting officer determines that the offeror has submitted sufficient information to evaluate the reasonableness of price.

Section 815 amends provisions applicable to the Department of Defense to add the requirement that the offeror has submitted sufficient information to evaluate the reasonableness of the price for a major system.

Section 843 prohibits, on a government-wide basis, the award of a task or delivery order awarded more than four months after enactment that exceeds $5 million, unless the "fair opportunity to compete" includes five specifically provided statutory elements, including an opportunity for a post-award debriefing. In addition, for three years, the provision authorizes an offeror to protest exclusively at GAO the award of any task or delivery order valued over $10 million.

Finally, Section 855 mandates that OFPP create an Associate Administrator for Acquisition Workforce Programs in order to administer the acquisition workforce training fund, develop a strategic human capital plan for the acquisition workforce, review and provide input to individual agency acquisition workforce succession plans, and make recommendations regarding appropriate programs, policies and practices to increase the quality and number of acquisition officials.

Task Order Protests

Mr. Chairman, PSC and our multi-association working group strongly opposed provisions in the panel's report, in S. 680, and in the National Defense Authorization Act that would allow protests to be filed on task order awards under multiple award contracts. Before the enactment of the FY 08 NDAA, the law prohibited such protests except in limited circumstances, although protests were and are fully allowed when the initial master contract is competed and awarded. We recognize that task order buying now accounts for nearly half of all acquisitions in the services marketplace but this is one area in which the views of the industry are probably the most relevant! After all, if there is growing concern about the government's adherence to the rules of fair play contained in the FAR and administered by the agencies during the acquisition process, it is the companies that would be the first to call for more opportunity for redress. Yet across industry there is a resounding consensus that adding protests to task order awards is unnecessary and would be costly and time consuming. We did and do support that portion of the panel's recommendation, and Section 843 of the 2008 Defense Authorization Act, that, among other steps, requires post-award debriefings for task orders. We are pleased that the Congress provided for a subset of this protest authority to provide an opportunity to evaluate the true impact of this provision on the acquisition system.

Commercial Practices

One recommendation in the Commercial Practices section of the panel's final report recommends authorizing GSA to establish a new Information Technology Schedule for professional services under which prices for each order are established by competition and not based on posted rates. While the panel's description of this recommendation is confusing and it was the subject of numerous exchanges, we support a competitive environment for the schedules; many agency purchases are already being made through competition and, of course, GSA Schedule holders have broad authority to reduce prices to meet specific competitive opportunities. We did not believe that legislation is necessary for GSA to implement this recommendation.

Small Business

Several of the panel's recommendations in the Small Business chapter require legislation.

With respect to the recommendation to adopt legislation that would provide for parity between the 8(a), HUBZone, and Service-Disabled Veteran Owned small business programs, we believe the current mixture of statutory and administrative priorities adds significant policy obstacles to further orienting individual agency actions, but our working group took no position on what the specific hierarchy among the various small business programs should be.

We support the panel's recommendation to enact government-wide legislation to prohibit the use of the contracting technique for tiered evaluations commonly called "cascading." The panel's recommendation goes further than the current provision applicable only to the Defense Department that generally limits cascading. This cascading technique is inappropriate and a poor proxy for proper market research; it is also patently unfair to firms that submit offers that will never be considered, including particularly small business.

The panel recommended amending the Competition in Contracting Act to provide agencies with the discretion to reserve contracts for certain categories of small business, except for 8(a) awards. Our working group does not oppose providing guidance on the practice of agencies "reserving" prime contracts for small business in full and open competitions; we believe agencies are already familiar with the practice and are taking advantage of appropriate opportunities. However, over the past year, congressional actions have implicitly rejected this recommendation through legislative provisions to foster greater competition in federal procurement, to require full and open competition in certain circumstances, and to restrict agency flexibility on awards of certain task and delivery orders under multiple award contracts.

Appropriate Role of Contractors

We oppose completely the panel's recommendation to remove the current prohibition on awarding personal services contracts. In our view, only a limited, more targeted approach to the use of personal services contracts is called for. We do not support that portion of the panel's recommendation that would impinge on the business relationship between the government and the contractor and between the contractor and its employees.

Notwithstanding our objection to removing the prohibition on awarding personal services contracts, we support that portion of another recommendation that requests OFPP to develop

guidance on the circumstances that agencies should address in determining whether, and to what extent, targeted exceptions to the prohibition on personal services contracts might be appropriate. However, since this recommendation goes beyond procurement policy, others must be involved in the review, discussion and decision.

Conclusion

Mr. Chairman, the federal procurement system is a complete ecosystem; from requirements development to solicitation, award, performance and contract closeout, each phase of the process is interdependent on each other and on multiple parallel processes. The federal procurement rules are complex – often unnecessarily so – and provide many opportunities for honest mistakes. Intentional misconduct is rare and should be fully prosecuted, but even the allegations diminish the trust and confidence in the performance of the acquisition process. There must be urgent attention to the federal acquisition workforce and to the relationships between agency mission needs and acquisition outcomes. Problems must be thoroughly and factually analyzed to ensure that root causes are properly identified and its effect on the federal procurement ecosystem understood. Finally, to be beneficial, any legislative and regulatory changes must be narrowly targeted and address both the policy and the implementation issues.

On behalf of the Professional Services Council, I appreciate the opportunity to provide our comments on the important issues before the subcommittee. We look forward to working with the subcommittee as you continue your deliberations. I look forward to any questions you may have.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Committee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.

BIOGRAPHY

Alan Chvotkin is Executive Vice President and Counsel of the Professional Services Council, the principal national trade association representing the professional and technical services industry. PSC is known for its leadership in the full range of acquisition, procurement, outsourcing and privatization issues.

Mr. Chvotkin joined PSC in November 2001. He draws on his years of government and private sector procurement and business experience to facilitate congressional and executive branch knowledge of and interest in issues facing PSC's membership. Previously, he was the AT&T vice president, large procurements and state and local government markets, responsible for managing key AT&T programs and opportunities. Earlier at AT&T, he was vice president, business management, responsible for the government contracts, pricing, compliance and proposal development organizations. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Mr. Chvotkin also was a founding member of industry's Acquisition Reform Working Group.

Before joining Sundstrand, Mr. Chvotkin spent more than a dozen years working for the U.S. Senate. He first served as professional staff to the Senate Budget Committee and to the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee, and then counsel to the Senate Armed Services Committee.

He is a member of the Supreme Court, American and District of Columbia Bar Associations. He is also a member of the National Contract Management Association and serves on its national board of advisors and as a "Fellow" of the organization. Alan is also a two time "Fed 100" winner. He has a law degree from The American University's Washington College of Law, a master's in public administration and a bachelor's in political science.

Myth: There is insufficient oversight of federal contracting which leads to rampant waste, fraud and abuse.

The Facts:
According to the Government Accountability Office (GAO), various Inspectors General, and others, fraud and abuse is not nearly as prevalent in government contracting as some might believe.[3] The real challenges facing government acquisition are tied to the government's ability to plan, coordinate, and manage its programs from the outset, regardless of whether the work is performed by contractors or government personnel.

The Oversight System Works
The government has an effective interlocking system of oversight in place to weed out waste, fraud and abuse that includes agency contracting officials, auditors, Inspectors General, the Government Accountability Office, and Congress. In fact, in proportion to the size of government contracting—which comprises millions of transactions annually with a total value of more than $400 billion—the oversight system works well. This is demonstrated by the fact that almost all problem contracts that have emerged have been uncovered through existing management and oversight processes. But overall, there is little evidence of widespread fraud by government contractors. In fact, the Comptroller General told a Congressional hearing in 2007 that, "a vast majority of federal contractors do a good job."[4] And according to the Special Inspector General for Iraq Reconstruction (SIGIR), "fraud has not been a significant component of the U.S. contracting experience in Iraq."[5] In other words, a lack of after-the-fact oversight is not the real problem facing federal contracting.

The Real Challenges Lie in Sound Management, Planning and Resources
Clearly, problems do exist. Reports from the GAO, SIGIR, and almost every other objective source have all concluded that problems in contracting stem primarily from inadequate planning and communications, poor definitions of the government's needs, and a shortfall in acquisition personnel with the skills and training required to meet the government's increasingly complex missions.[6] These problems are likely to grow as the federal workforce ages and the government struggles to recruit, train, and retain its next generation of employees. These are important issues that merit significant attention, since sound management and upfront planning is the best form of contract "oversight."

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[3] Special Inspector General for Iraq Reconstruction Lessons Learned reports on Human Capital Management; Contracting and Procurement, and Program and Project Management, and the Nov 1, 2007 Gansler Commission Report, titled "The Commission on Army Acquisition and Program Management in Expeditionary Operations, and David Walker's testimony to the Committee on Homeland Security and Governmental Affairs hearing "Federal Acquisition: Ways to Strengthen Competition and Accountability" on July 17, 2007
[4] David Walker's testimony to the Committee on Homeland Security and Governmental Affairs hearing "Federal Acquisition: Ways to Strengthen Competition and Accountability" on July 17, 2007.
[5] Special Inspector General for Iraq Reconstruction speech, October 1, 2007
[6] Special Inspector General for Iraq Reconstruction Lessons Learned reports on Human Capital Management; Contracting and Procurement, and Program and Project Management, and the Nov 1, 2007 Gansler Commission Report, titled "The Commission on Army Acquisition and Program Management in Expeditionary Operations.

Myth: The government's reliance on contractors has exploded in the last five years, creating a "shadow workforce" consisting of nearly 8 million contractors.

The Facts:
According to the latest data available from the Federal Procurement Data System and the Office of Management and Budget, the government's reliance on contractors has grown roughly 15 percent since 9/11—a significant increase, but far from the explosion some suggest.[7] And claims about the size of the "shadow workforce" are both wildly exaggerated and based on faulty analysis.

Contract Growth in Context
While the total dollars spent on contracting have nearly doubled since 2001—mostly as a result of the government's need for new and increasingly complex capabilities in the post-9/11 world—that growth has come at a time when the overall budget and mission of the government has also grown substantially. Thus, when looked at proportionally, as a percentage of government operations, the role of contractors has grown about 15 percent—a significant amount but not quite the unconstrained growth some assume.

The Myth of the "Shadow Workforce"
The growth in contracting is often accompanied by the claim that government contractors make up a "shadow workforce" that is now nearly four times the size of the federal workforce. This claim is simply wrong because:

- The econometric model used in the analysis measures total economic impact, including direct and indirect employment.[8] While this model is useful for measuring the total regional impact of a new manufacturing plant, for instance, it is simply not an effective tool to measure the number of contractors actually doing work in support of the government.
- The analysis fails to distinguish between federal contract dollars spent on acquiring equipment, hardware and goods which the government has never produced, and those spent on acquiring services which might have been or could be performed by government employees.
- It requires acceptance of a mathematical impossibility—namely that for less total dollars expended on personnel, the private sector is providing the government with four times as many people.

When examined in the context of the growth of the government's mission and budget, and its growing human capital and technology challenges, it is not surprising to find an increase in the amount of work being done by the private sector. Addressing the challenges inherent in that growth requires a focus on people, resources, and organizational structure, and should be based on a factual and accurate baseline.

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[7] Federal Procurement Data System NG XML Files FY 1997-2006 Categories A-Z and Office of Management and Budget
[8] Regional Input/Output Modeling System, Department of Commerce

Myth: As federal contracting has grown, competition for federal contracts has diminished greatly.

The Facts:
Approximately 65 percent of federal contracts are awarded using competitive procedures—a percentage that has held steady since the late 1990s.[9] Claims that the system is rife with "no bid" contracts, or that the use of "full and open" competition has dropped dramatically, are based on inaccurate information or misperceptions.

Competition levels have remained steady
Federal contracting, along with the broader federal mission and budget, has grown significantly since 9/11, largely due to the increase in new, critical, national and homeland security challenges. Yet, while in absolute dollar terms the money spent using other than competitive procedures has grown in the past few years, proportionally the levels of competition today are just about the same as they were in the late 1990s.

Just as in the private sector, competition for government contracts is the best and preferred way to obtain the goods and services the government needs. Understanding the differing kinds of competition in federal contracting is essential to understanding how or where competition rules and policies warrant attention or change.

Defining "competition"
The terms "full and open competition," "competition" and "competitive procedures" are not synonymous.

In government contracting, "full and open competition" refers to contracts that are open to bidding by all qualified companies. However, there are significant portions of federal contracting that are usually very competitive but not available to all aspiring bidders and thus not awarded under "full and open competition."

Set Asides for Woman, Minority and Service-Disabled Owned Firms
For example, some contracts are specifically "set-aside" as part of the government's socioeconomic initiatives to help small and disadvantaged businesses compete for federal procurement dollars. Businesses qualified to compete for these contracts are limited to those in certain categories, such as small, disadvantaged, woman-owned, minority-owned, service-disabled veteran owned, and others. As such, while they are competing for work, work set-aside under these programs is not considered "full and open."

Multiple Award Contracts
Similarly, Multiple Award Contracts (MAC), under which a significant portion of government work is acquired, are overarching contracts awarded, usually under full and open competition, to a select number of winning firms. The actual work on a MAC is then competed again at the task-order level. Those competitions are not "full and open" because the competition is limited to only the companies who won the right to perform work under the MAC. For example, in July, GSA selected 29 firms who are now eligible to compete for task orders under the Alliant contract—a contract that provides federal government agencies a centralized source to acquire integrated information technology products and services worldwide.

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[9] Federal Procurement Data System NG XML Files FY 1997-2006 Categories A-Z and Office of Management and Budget

GOVERNMENT SERVICES Insider

JANUARY 2008

Policy & Regs: Moving Farther Away from the FAR

Alan Chvotkin, Executive Vice President and Counsel, Professional Services Council

On April 1, 2004, I joined with many in government and industry in unveiling and saluting the new, unified, Federal Acquisition Regulation (FAR). The FAR assembled in a single, comprehensive body the disparate procurement regulations that governed purchases by DoD, NASA, and other federal agencies. Its goal was to enhance consistency, uniformity and predictability across all federal procurements and minimize differences when doing business within agencies.

Even while agencies were authorized then (and still) to supplement the FAR with agency-unique requirements, the expectation was that they would narrowly address organizational reporting requirements or specialized contracting methods, not serve as a loophole for separate contracting regimes. Many agencies have issued their own substantive procurement regulations to overcome adverse publicity, bid protests or court decisions or to respond to critical reports from the oversight communities. With all these exceptions to the uniform FAR, the promise of consistency, uniformity and predictability has not been kept. Today, with federal procurement spending more than $400 billion, and despite continued efforts to maintain a unified FAR, we are coming full circle—back to the robust, agency-unique, procurement rules that characterized the federal procurement system more than two decades ago.

From its earliest days, some questioned whether the Defense Department fully appreciated the value of FAR integration. Its Defense Federal Acquisition Regulations Supplement (DFARS) has remained the most comprehensive of the agency supplements. And DoD has maintained its own acquisition regulations council to ensure that its perspectives are fully protected. USAID's longstanding unique procurement regulations were largely obscured from public attention and FAR integration until the agency assumed responsibility for early Iraq contracting.

GSA has also contributed to the problem. The Schedules program operates under only a few paragraphs of FAR regulations, while the preponderance of policy and acquisition regulations are in the GSA acquisition supplement.

Congress has also contributed significantly to undercutting the uniform FAR. For more than 20 years, the annual National Defense Authorization Act has included numerous acquisition policy provisions applicable just to the Defense Department — and requiring a plethora of DoD-specific acquisition regulations. In 1995, Congress granted the FAA an exemption from most procurement statutes and the FAR, letting the agency create its own regulations.

In 2002, Congress directed the new Transportation Security Administration to follow the FAA's alternative procurement system, although the fiscal year 2008 consolidated appropriations act repeals this exemption effective next fiscal year. More recently, Congress has imposed a raft of unique purchasing requirements on the Department of Homeland Security.

Impacts. These measures further fracture federal procurement policy into agency-size bites and create barriers across much of the government. This makes it harder to attract, retain and train a government-wide acquisition workforce, and it also limits the replicability of business practices and experiences. In addition, FAR fragmentation inhibits reducing barriers to competition, particularly for smaller businesses that can offer quality goods and services across agency boundaries.

For many firms, regardless of size, that specialize in work with only one agency, these agency-specific traits may not be of much significance. But more agencies are relying on other agencies' contracts, through a variety of inter-agency arrangements, to meet their requirements.

While larger firms may have sufficient staff or customer base to justify (and recover) the investment required to understand and comply with these specialized provisions, the cost likely outweighs the benefits to them. But it also reduces potential competition from firms that are new to the market, new to an agency, or just interested in expanding their business.

What's a contractor to do?

First, until there is a change, you will have to master the governmentwide rules as well as the ones unique to the agency where you

are seeking or doing business. This requires constant vigilance and study to keep up with the changes.

Second, climb on the advocacy train for minimizing agency-unique requirements—whether initiated by Congress or the Executive Branch. Make sure that senior agency acquisition officials and your trade associations join in the effort on your behalf.

Finally, critically review agency solicitations and raise questions about the need for agency-unique requirements and contract clauses. Issues raised during your market research and the pre-solicitation phase can be particularly valuable.

The 1984 vision of a single governmentwide, uniform, acquisition regulation remains within reach with the support of the acquisition community and a targeted effort. The entire federal procurement system can then benefit from a return to the original purpose of the FAR. ■

GOVERNMENT SERVICES Insider

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Final Response and Comment of the

Aerospace Industries Association
Contract Services Association
Electronic Industries Alliance
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the recommendations of the

Acquisition Advisory Panel

March 12, 2007













MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 1 - COMMERCIAL PRACTICE

Recommendation 1: The definition of stand-alone commercial services in FAR 2.101 should be amended to delete the phrase "of a type" in the first sentence of the definition. Only those services that are actually sold in substantial quantities in the commercial marketplace should be deemed "commercial." The government should acquire all other services under traditional contracting methods, e.g., FAR Part 15.

SUMMARY OF PANEL'S RATIONALE

The Panel observed that the regulatory definition of commercial services is broader than the statute and asserted that the regulatory definition can be read to include services not sold in substantial quantities in the marketplace. In fact, it asserted that, "Virtually all types of services are now deemed commercial (Final Draft Report Chapter 1, Pg. 1-1). The statute defining commercial services does not include the phrase "of a type." The regulatory drafters added the phrase "of a type" to the statutory definition of commercial services. The Panel stated that its research and basic statutory construction makes clear that when Congress used the phrase of a type for items, but not for services, it did not intend "of a type" to apply to services. The Panel further asserted that the "of a type" language allows the government to acquire under FAR Part 12 services that are not sold in substantial quantities in the market place, although the Panel provided no supporting examples. The Panel proposes that the FAR be revised to drop "of a type". See also Recommendation 6 [Time-and-Materials Contracts].

The Panel concluded that the current statutory definition of "commercial services" was adequate and does not need to be changed because it correctly focuses on the key concept - whether the services are sold in substantial quantities in the marketplace. Also, the Panel concluded that the current statutory definition of "commercial items" was adequate and does not need to be changed.

MULTI-ASSOCIATION RESPONSE

We begin by noting that the Panel's recommendations do not enumerate the benefits commercial type contracting has brought to the federal procurement process. Instead its recommendations on commercial procurement focus on restricting the use of commercial practices, particularly when procuring services.

A key recommendation with which we must disagree is the Panel's recommendation to delete the phrase "of a type" in the first sentence of the definition of "stand alone" commercial services at FAR 2.101. The Panel mistakenly concludes that services sold in substantial quantities to the general public are no longer sold in substantial quantities to the public when they have been modified slightly to meet government needs, that is, they are "of a type" of service and thus should not be procured as commercial services.

The Panel's recommendation could require that the service provided to the government must be *exactly* the same as that provided in the commercial market.

MULTI-ASSOCIATION DISCUSSION

The Panel makes no case for removing the "of a type" provision from FAR 2.101. This provision was adopted when FASA was initially implemented in the FAR in 1995. At that time, the government reasoned that stand-alone services existed that were ***not*** based on catalog (or market) prices but still were "clearly commercial in nature and should be eligible for streamlined acquisition" (FAR Case 94-970). Now, without any reported justification, the Panel challenges this reasoning by observing that, at that time, the Commercial Item Drafting Team referred only to "grass cutting and janitorial" services. The Panel is mistaken about the context of those examples, as used by the Commercial Item Drafting Team. The Commercial Item Drafting Team, the FAR Council, and the FAR Secretariat understood that "grass cutting and janitorial" services were only examples of a variety of stand-alone services that were clearly commercial in nature and that otherwise fall under the "of a type" provision. If the services the government procures are generally of the same types sold commercially, the government should use the FAR's commercial procurement techniques as the most cost effective and efficient process available to it. Indeed, the Panel's recommendation would cause the government to impose FAR Part 15 government-unique requirements (including certified cost or pricing data, Cost Accounting Standards compliance, unilateral change order provisions, etc.) whenever the services being procured are not exactly the same as those provided in the commercial marketplace, often because the government has somewhat different needs. Many commercial service providers, including most small businesses, do not have the infrastructure in place to comply with the government-unique requirements applicable to non-commercial acquisitions. The Panel's recommendation will dampen competition and opportunities for small business service providers.

Congress understood, as well, that the "of a type" phrase used in the regulations accomplishes Congress' purpose of promoting reliance on the commercial marketplace, including, in particular, the Report of the House Committee on National Security, National Defense Authorization Act for Fiscal Year 1996, House of Representatives Report No. 104-131 (June 1, 1995). The Committee was commenting on the Administration's proposed regulations for implementing FASA, which included the "of a type" provision for stand-alone services, and noted:

> In the first category - ***accomplishing what was intended*** - the draft commercial contracting regulations clearly were drawn on a clean slate, rather than just making patchwork changes to existing regulations. Rather than being risk adverse, this approach relies on the forces of the commercial marketplace for quality, terms, prices, and other critical factors ... (emphasis added)

Section 1432 of the Services Acquisition Reform Act further demonstrates that Congress accepted the use of "of a type" in defining commercial services. Specifically,

section 1432 authorized the government to procure commercial services using time-and-materials or labor-hour contracts for those categories of services determined by the Office of Federal Procurement Policy to be **of a type** of commercial services that are commonly sold to the general public through use of time-and-materials or labor hour contracts." Accordingly, the current FAR language matches Congressional intent and adopting the Panel's recommendation would depart from that intent.

The "of a type" language does not allow the government to acquire under FAR Part 12 services that are not sold in substantial quantities in the market place. The Panel's report provides no evidence that for services, the "of a type" language is leading to abuses. The Panel's analysis also rests on the weak foundation of Finding #8, "Statutory and Regulatory Definitions of Commercial Services," which inaccurately traces the history of FAR 2.101 and omits information material to these issues in the process[1]. The importance of the "of a type" language for services is no more apparent than in the Aalco Forwarding decision (B-277241)(October 9, 1997). In this case, the GAO notes that the MTMC was encouraged by Congress to reengineer the processes for military household goods moving. MTMC completed extensive market research and established a reengineered process based on commercial business "best practices." MTMC released a solicitation based on these best practices and utilizing the flexibilities provided by Part 12 and the "of a type" language in the commercial item definition. A protest was filed on the basis that the movement of household goods of military personnel is not like the movement of household goods of civilian personnel. The GAO denied the protest and noted that while there are unique military requirements, the moving services provided to military personnel "...are **essentially** the same moving services provided in the commercial market." This point is important because without the "of a type" language in the services portion of the commercial item definition, MTMC would have been prohibited from using Part 12 because the services were not exactly the same as those in the commercial market, but only "essentially the same..."

The rationale for using the "of a type" provision within the definition of stand-alone commercial services at FAR 2.101 is as sound today as it was in 1995 and is supported by the Panel's own observation that the government tends to not buy what is exactly sold in the commercial marketplace. Without the "of a type" phrase, the commercial services definition could be read as requiring that a stand-alone service be exactly the same as that sold in substantial quantities in the commercial market, notwithstanding the fact that government-unique requirements and needs require slight changes in how the service is provided. It is a virtual certainty that the Panel's recommendation for a more restrictive definition of commercial item as it applies to stand-alone services will impair federal agencies' ability to procure professional and technical services from the commercial marketplace to meet their mission requirements.

The clearest and most appropriate definition of commercial items services is to remove the distinctions between commercial supplies and commercial services within the

[1] These errors were noted in our comments to the Panel on July 19, 2006, Multi-Association Comments on Working Draft of Parts I & II from the Commercial Practices Working Group, (particularly pp.33, 35, 36), available on the Panel's website at http://www.acquisition.gov/comp/aap/psr.html. Errors continue to be reflected in the draft Final Report.

definition of commercial items. Industry made such a recommendation at the request of DoD and previously provided it to the Panel. We specifically recommended striking references to services at 41 U.S.C. § 403(12)(E) and (F) and revising 41 U.S.C. § 403(12)(A) to read as follows:

> Commercial item means - (1) Any item, ***including any supply or service***, other than real property, that is of a type customarily used by the general public or by non-*Governmental* entities for the purposes other than *Governmental* purposes and—
>
> > (i) Has been sold, leased, or licensed to the general public; or
> >
> > (ii) Has been offered for sale, lease, or license to the general public; . . .

This definition would simplify the FAR definition and rightly focuses on whether the type of service is customarily sold to the general public or non-governmental entities. Moreover, the requirement that the contracting officer determine that the government's awarded price is reasonable and in the government's best interest – and the analysis to support that determination – are already provided for in the price reasonableness provisions of the FAR.

Recommendation #2: Current policies mandating acquisition planning should be better enforced. Agencies must place greater emphasis on defining requirements, structuring solicitations to facilitate competition and fixed-price offers, and monitoring contract performance. Agencies should support requirements development by establishing centers of expertise in requirements analysis and development. Agencies should then ensure that no acquisition of complex services (e.g., information technology or management) occurs without express advance approval of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used.

SUMMARY OF PANEL'S RATIONALE

The Panel's recommendations are based on its findings that the government's requirements process for services acquisition is deficient in several respects. This recommendation is intended to put "teeth" into the process of defining requirements for services contracts. Without review and sign off from the senior program executive and the contracting officer (CO), no acquisition may be conducted. This approach is consistent with commercial practice that requires "buy-in" by those portions of the company with an interest in the transaction. The sign-off may occur at the time of the initial business clearance memorandum, or an equivalent point - but must be accomplished without regard to the type of procurement process or vehicle used.

MULTI-ASSOCIATION RESPONSE

While we support aspects of this recommendation, such as enforcing existing policies for acquisition planning, emphasizing using better requirements definitions and better structuring of solicitations, we do not believe that passing another law or inserting another approval layer is necessary to achieve these goals.

MULTI-ASSOCIATION DISCUSSION

Agencies need to better manage the process of defining requirements to meet existing policies and goals, which will result in better contracts awarded after more robust competition. Adequate procedures are already in place, but better acquisition workforce training is needed to ensure that these procedures are followed. Simply adding procedures to those that already exist but that will not be followed will not result in better requirements documents. The Panel's recommendation is also unduly vague in failing to define key terms including "complex services" and "statement of requirements." It also sets no limits on how this new approval process is to apply to acquisition of supplies, i.e., all supplies, complex supplies or commercial supplies. With respect to complex services, we suggest that the term be tied to an appropriate dollar threshold, such as $50 million, which is the threshold for full EVMS implementation in the FAR.

Recommendation #3(a): The requirements of Section 803 of the FY 2002 Defense Authorization Act regarding orders for services over $100,000 placed against multiple award contracts, including Federal Supply Service schedules, should apply uniformly government-wide to all orders valued over the Simplified Acquisition Threshold. Further, the requirements of Section 803 should apply to all orders, not just orders for services.

SUMMARY OF PANEL'S RATIONALE

The Panel believes that there is no logical basis for having two sets of "fair opportunity" regimes - one subject to Section 803 and one not, especially given that DoD orders account for approximately 55 to 60 percent of all orders under the Schedules as well a majority of the orders under multiple award multi-agency contracts. Further the Panel believes there is no logical basis for limiting the requirements of Section 803 to services.

MULTI-ASSOCIATION RESPONSE

We support this recommendation with the additional step of requiring civilian agencies to implement procedures that parallel those developed by the DoD in response to the requirements of Section 803.

MULTI-ASSOCIATION DISCUSSION

The DoD has developed procedures that meet the intent of Section 803 while providing the acquisition activities some operational flexibility in meeting the competition requirements. These procedures have been found to be operationally sound and effective. The Panel's call for uniform application can best be implemented if the established DoD processes apply to individual agencies and bureaus.

The Panel's call that the Section 803 requirements apply to all orders might be better understood by field personnel if the recommendation stated more explicitly that orders for both products and services were subject to the competition requirements.

In addition, we support competition. We urge, however, that as the government relies more and more on competition to establish price reasonableness and best pricing, there is no longer the need for those clauses that have caused allegations of "defective pricing" and Price Reductions Clause noncompliance. These clauses are incredibly difficult to administer and often require vendors to invest tens of millions of dollars in compliance systems that still cannot possibly catch every deviation for commercial sales practices or often every sale. The government would experience even more competitive pricing if it eliminated these government-unique requirements from the Multiple Award Schedule Program.

Recommendation #3(b): Competitive procedures should be strengthened in policy, procedures, training, and application. For services orders over $5 million requiring a statement of work under any multiple award contract, in addition to "fair opportunity," the following competition requirements as a minimum should be used: (1) a clear statement of the agency's requirements; (2) a reasonable response period; (3) disclosure of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including cost or price, and their relative importance; (4) where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price. The requirements of FAR 15.3 shall not apply. There is no requirement to synopsize the requirement or solicit or accept proposals from vendors other than those holding contracts.

SUMMARY OF PANEL'S RATIONALE

The Panel believes that a clear unambiguous statement addressing the specific standards to be applied should be included in the revised regulations implementing Section 803 across the government. Where acquisitions under multiple award contracts become significant procurement actions in their own right, essential attributes of source selection requirements should be applied at the order level. The Panel believes that these recommendations are not inconsistent with their Small Business recommendations regarding award of contracts and task or delivery orders.

MULTI-ASSOCIATION RESPONSE

We generally agree with the identification of the specific activities that should be strengthened to support competitive procedures. However, the Panel's recommendation that FAR Subpart 15.3 requirements not apply is itself ambiguous and requires clarification.

MULTI-ASSOCIATION DISCUSSION

FAR Subpart 15.3 makes reference to other FAR Parts, most particularly those associated with debriefings. While the Panel's recommendation speaks to these matters, it would provide clarity if a more specific reference to the embedded requirements of FAR Subpart 15.3 were made. It would also be beneficial if the exceptions for synopsis in FAR Part 5 were noted as well.

Recommendation #3(c): Regulatory guidance should be provided in FAR to assist in establishing the weights to be given to different types of evaluation factors, including a minimum weight to be given to cost/price, in the acquisition of various types of products or services.

SUMMARY OF PANEL'S RATIONALE

No specific Panel rationale was provided.

MULTI-ASSOCIATION RESPONSE

We oppose this recommendation.

MULTI-ASSOCIATION DISCUSSION

The Panel has presented no findings that bear on this recommendation or pointed to any studies that demonstrate agencies have been giving "too much weight" to non-price evaluation factors or not enough weight to cost/price. The Commercial Practices Working Group Preliminary Draft stated cost/price should almost always be more important than all other factors. While we commend the Panel for its revisions to the Working Group draft, the proposal remains seriously flawed. The Panel recommendation would limit the discretion an agency has to establish the basis on which it will evaluate offers to meet the requirements the agency defines. It is the procuring agency and the customer who are responsible for ensuring their needs are met economically. Selecting and ranking evaluation factors comes within the agency's discretion (see, e.g., *Encompass Group, LLC*, B-299092, 2006 WL 3872864 (December 22, 2006) ("It is the agency's role to define both its underlying needs and the best method of accommodating those needs."); *Hydra Research Sci., Inc.*, B-230208, 88-1 CPD ¶ 517 (May 31, 1988) ("It is well settled that a determination of an agency's minimum needs and the selection and weights of evaluation criteria used to measure how well offerors meet those needs are within the broad discretion entrusted to agency procurement officials."). Indeed, recognizing competition based on non-price factors as a legitimate, approved form of competition, on par with "formal advertising," was one of the principle achievements of the Competition in Contracting Act of 1984.[2] It is impossible to establish a one-sizes-fits-all, minimum weight for cost/price that could be applicable to all or even a category of purchases.

To the extent this is an effort to promote acquisition through minimally acceptable, lowest cost, awards, we strongly oppose making such a fundamental change in procurement philosophy. Neither the Panel nor the FAR Councils should consider substituting their judgment of the proper evaluation methodology for the award evaluation decision for the judgment of those making the procurement.

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[2] *See* Response and Comments of Aerospace Industries Association, Contract Services Association, Government Electronics and Information Technology Association, Information Technology Association of America, National Defense Association, and the Professional Services Council to the Preliminary Working Draft of the Commercial Practices Working Group of the Acquisition Advisory Panel, page 40 (July 13, 2006) ("Multi-Association Comments on Working Draft from Commercial Practices Working Group").

Recommendation #4: GSA be authorized to establish a new information technology (IT) schedule for professional services under which prices for each order are established by competition and not based on posted rates.

SUMMARY OF PANEL'S RATIONALE

The recommended new IT schedule would be limited to terms and conditions other than price. Instead, prices would be determined at the order level based on competition for the specific requirement to be performed. This recommendation recognizes that pricing for services is requirement specific and depends on the level of effort and mix of skills necessary to meet the agency's specific needs at the order level. Presently, schedule labor rates play a role but in practice are more often determined based on the specifics of the requirement and current market conditions.

According to the Panel, the recommended new IT schedule would work in the following manner:

- Negotiation of labor rates the schedule level based on GSA's Most Favored Customer (MFC) pricing methodology would be eliminated.
- The "Price Reductions" clause would be eliminated.
- To obtain the new IT schedule offerors would be required to meet the following terms: (1) offer a commercial service that meets the FAR definition, as recommended by the Panel (i.e., sold in substantial quantities); (2) have a suitable record of past performance; and (3) agree to the terms and conditions imposed by GSA for the MAS program.
- Successful contractors would be contractually required to post their labor rates on GSA Advantage!, which the contractor could change at any time. Proposed prices in response to a task order solicitation would be binding on the contractor in the manner agreed upon in the task order.
- Contracting officers would use the posted labor rates, along with key terms and conditions, to perform market research and comparing proposals at the order level.

The Panel believes that the posting of rates at each contractor's discretion will create a more dynamic market for services. The inherent competition created by the transparency of the "electronic marketplace" will benefit buyers who will be better able to compare and contrast the associated labor rates and services offered under the recommended new IT schedule.

MULTI-ASSOCIATION RESPONSE

We opposed an earlier version of this recommendation on the basis that we believed that GSA already possessed the necessary authority to establish new schedules. GSA also has the authority to adopt this new approach. However, the idea of a competitive

services schedule as broadly outlined by the Panel in its revised discussion supporting the recommendation has merit and we would like to work with GSA and other interested parties to mature this concept.

MULTI-ASSOCIATION DISCUSSION

GSA already has the necessary authority to establish new schedules so that no new authorization is required. Moreover, the current FAR rules for ordering require the use of competition. See FAR 8.405-1 and 8.405-2. We agree that as the focus is more on competition as a result of Section 803 and related regulatory initiatives, there is no longer the need for onerous administrative requirements such as the Commercial Sales Practices Format and the Price Reductions clause. The key to successful schedule contracting is focusing on the buying agency's processes, as FAR Part 8.4 does, not necessarily by eliminating stated hourly rates in the base contract.

Recommendation #5(a): Adopt the following synopsis requirement.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold placed against multiple award contracts.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold placed against multiple award Blanket Purchase Agreements.

Such notices shall be made within ten business days after award.

SUMMARY OF PANEL'S RATIONALE

Transparency into government requirements by the public serves two important purposes. First, it promotes competition by familiarizing the public with what the government buys and identifies opportunities for vendors of similar products and services to sell to the government thus providing for new entrants into the government market place and greater competition. Second, transparency promotes public confidence in the awarding of government contracts.

Currently, once an indefinite delivery indefinite quantity (IDIQ) or a MAS contract is awarded, there is no provision for pre-award publishing of information concerning the task order or delivery order placed against such contracts. The growth of IDIQ contracts since FASA and the growth of the MAS program over the last decade have reduced the visibility that the public has into more than 10% of the non-defense system procurements made annually and that percentage continues to grow. This lack of transparency into the placement of orders has led some, according to the testimony received by the Panel, to question whether the government complied with its own procedures, whether competition was obtained in placing the order and whether the taxpayer received best value.

The Panel believes that sole source orders under these vehicles should not be subject to a lesser standard of transparency. The synopsis proposed here would be post-award only, providing the positive pressure that transparency offers and bolstering public confidence, while not delaying the award or imposing any further restrictions, on urgent requirements for instance, than the current fair opportunity regime.

MULTI-ASSOCIATION RESPONSE

We agree with the Panel's recommendation; however, the Panel has not provided any flexibility from the mandatory publication to allow for specialized circumstances such as for classified orders or when publishing such awards would affect an agency's mission (such as in contingency contracting) or when timing of the notice is impracticable (such as during the initial response in a Presidentially-declared emergency).

MULTI-ASSOCIATION DISCUSSION

Therefore, we recommend that the Panel's recommendations be modified to permit exceptions to the mandatory posting to align with the exceptions for posting already provided for in FAR 5.202. We also recommend that agencies be provided authority for reasonable delay in the publication of such notices based on unusual circumstances.

Recommendation #5(b): For any order under a multiple award contract over $5 million where a statement of work and evaluation criteria were used in making the selection, the agency whose requirement is being filled should provide the opportunity for a post-award debriefing consistent with the requirements of FAR 15.506.

SUMMARY OF PANEL'S RATIONALE

Where agencies are making acquisitions of goods or services under a negotiated process involving a statement of work and evaluation criteria, the Panel sees no basis for not providing a debriefing to the unsuccessful offeror(s), regardless of the contract type involved. Companies expend significant bid and proposal costs in response to order solicitations, just as they do in response to other solicitations. The Panel believes that debriefings are a good business practice. It is important that the government share its rationale regarding a task order award with losing offerors in order to create a climate of continuous improvement. Offerors need to understand where they can improve their approaches to meeting the government's needs. While FAR 8.405-2(d) requires an agency to offer "a brief explanation of the basis for the award decision" for Schedule orders when requested, there is no requirement for debriefings for orders under multiple award contracts. The Panel believes providing debriefings will increase confidence in the integrity of the procurement process.

MULTI-ASSOCIATION RESPONSE

We support providing meaningful debriefing opportunities for bidders, even for significant orders against multiple award contracts. We further believe that the threshold for providing the opportunity for a post-award briefing should be tied to the applicable threshold found in FAR Part 15.

MULTI-ASSOCIATION DISCUSSION

We are concerned, however, that debriefings would be provided in a purely mechanical manner by agencies to avoid conveying any information that could be used against the agency in a subsequent protest, if protests are allowed under the Panel's recommendation R-7. If this is the case, the primary benefit of debriefings - improved future competition - may be lost.

Recommendations #6: The Panel makes the following recommendations with respect to time & materials contracts.

(a) Current policies limiting the use of time-and-materials contracts and providing for the competitive awards of such contracts should be enforced.

(b) Whenever practicable, procedures should be established to convert work currently being done on a time-and-materials basis to a performance-based effort.

(c) The government should not award a time-and-materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time-and-materials resources and to provide for effective government oversight of the effort.

SUMMARY OF PANEL'S RATIONALE

The issues that give rise to concern by the Panel over the use of time & materials (T&M) contracts in the government are price and contract management. The Panel has carefully considered how best to deal with these issues so as to protect the government's interests and allow the government to continue to perform its mission uninterrupted. Clearly, an arbitrary limitation on the use of T&M contracts is not appropriate nor is a solution that shifts all of the risk to the private sector.

However, it is not unreasonable to require the government when it chooses to use T&M contracts to obtain price competition by defining its requirements and requiring the competitors for the work to define their labor categories so that adequate price comparisons can be performed. Similarly, it is not unreasonable for the government to ensure up-front in its acquisition planning process that it has sufficient resources to manage T&M contracts and that those resources are identified as already required by FAR Part 7 or that T&M contracts not be used.

Finally, in order to get a firm grasp on how much T&M contracting is being done throughout the government and to ensure that it is being managed aggressively, the government should account for its use of T&M contracts through the budget execution process, reporting annually at the conclusion of the fiscal year the dollars and personnel purchased through the use of T&M contracts.

MULTI-ASSOCIATION RESPONSE

We do not agree with the Panel's recommendation, nor do we believe that additional regulations would increase contract management efficiency. However, we generally support the final rule issued by the FAR Council on December 12, 2006 concerning T&M contracts for commercial items (FAR Case 2003-027). It is not clear if the Panel took the final rule into account in their deliberations. We had previously made our concerns known to the Panel through the public comment process, such as with certain access to records and audit right matters.

MULTI-ASSOCIATION DISCUSSION

The FAR's existing guidance at FAR 16.601 is quite stringent and would serve the government well as paragraph (a) of Recommendation 6 seems to recognize. FAR 16.601 provides that a T&M contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. To the extent there are enforcement concerns, we would agree with improvements in this area. However, it is important to note that the statistics provided to the Panel by the DoD IG contradict the Panel's findings concerning overuse of T&M contracts for services. Representatives from the DoD IG testified on May 17, 2005 that, roughly, only 6% of contracts for services awarded in FY 2004 were T&M contracts

The new FAR regulations published on December 12, 2006 (71 Fed Reg. 74667) resolve many of the Panel's concerns.

The "Findings" section of the Panel's report fails to accurately reflect testimony and other evidence demonstrating that T&M contracts are commonly used in the commercial market. For example, according to the *Federal Register* notice published on December 12, 2006, 71 Fed. Reg. 74,668, the GAO conducted a survey that represented the buying practices from a relatively wide range of industries, "including airline, automotive and truck manufacturers, automotive and truck parts, business services, communications equipment, computer hardware, computer services, electric utilities, insurance, major drugs (pharmaceutical), money center bank, non-profit financial services, oil and gas, regional bank, retail (grocery and technology), scientific and technical instruments, and semiconductor." Based on this survey and testimony offered to the Panel, the OFPP concluded that commercial services "are commonly sold on a T&M and LH basis in the marketplace when requirements are not sufficiently well understood to complete a well-defined scope of work and when risk can be managed by maintaining surveillance of costs and contractor performance." The Panel's point with regard to competitive awards is unclear yet the issue of competition has been addressed in the commercial T&M rule. While we support competition in contracting, we do not support changes to the competition rules as they are presently being applied to T&M contracts. That is, the circumstances for making competition decisions for T&M should be no different than that for other contract types. Competition brings benefits no matter what type of contract is awarded. It is unclear how competition is more beneficial or more necessary for T&M contracts than any other type of contract.

We conceptually support converting work currently being done on a T&M basis to a performance-based effort. In our view, performance-based effort does not necessarily require a fixed priced contract. If the use of performance-based contracts assumes the use of a fixed price contract, it must also assume that the offerors understand the associated risks and are willing to accept those risks. It is often the case that where a T&M contract is used, neither the government nor the offerors fully understand the scope of the work that will be required. In such cases, conversion from T&M to fixed price, performance-based contracts may increase prices to value the risks, or create

performance problems because of a mutual lack of understanding of the scope of the requirement.

Finally, Recommendation 6(c) is confusing. The Panel's intention in encouraging "efficient use" of time and materials resources is not explained. Moreover, the Panel's recommendation for a sufficient scope and objective definition to be in place before the award of any T&M contract is even more unclear, especially considering that the Panel makes no attempt to reconcile this recommendation with the existing FAR 16.601 language that mandates that a T&M contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. This recommendation in practice will eliminate or severely curtail the ability of the contracting officer to contemplate the use of T&M contracts, even in instances when it is appropriate as identified above. When the scope of work progresses to a point where it is sufficiently defined to permit a reasonable estimate of the cost of performance, it is at that point that a firm-fixed price contract may be suitable. The Panel seems to be recommending a different approach, although one that is not adequately explained. This point has not been addressed by the Panel, notwithstanding industry's comments to the Panel calling this issue to its attention. This also leaves hanging the question of what contract type to use when a definitive scope cannot be defined.

We do not agree with the notion that the government should account for its use of T&M contracts through the budget execution process, reporting annually at the conclusion of the fiscal year the dollars spent and personnel purchased through the use of T&M contracts as discussed by the Panel. We do not envision any value in imposing such a reporting burden on the government.

Recommendation #7: Permit protests of task and delivery orders over $5 million under multiple award contracts. The current statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than or equal to $5 million.

SUMMARY OF PANEL'S RATIONALE

The Panel has serious concerns about the use of task orders to conduct major acquisitions of complex services without review. The Panel has obtained and analyzed data from FPDS-NG that show that nearly half of the dollars spent under interagency contracts are expended on single transactions valued over $5 million. Agencies are using competitive negotiation techniques to make best value type selections under these multi-agency, multiple award contracts. The panel believes that these procurements are of sufficient significance that they should be subject to greater transparency and review.

MULTI-ASSOCIATION RESPONSE

We oppose this recommendation.

MULTI-ASSOCIATION DISCUSSION

Under current law and regulations (FAR 16.505(a)(9)), no protest may be filed against any order placed against a multiple-award/IDIQ contract except for a protest that asserts that the order increased the scope, period or maximum value of the contract. In addition, under limited circumstances, the Government Accountability Office has considered protests based on the narrow additional ground where an agency fails to follow its own procedures in the placement of an order.

This long-standing congressional decision to strictly limit the grounds for protest of task orders was an intentional act to carefully balance the desire for timely ordering with an appropriate check on arbitrary agency action that violates the formation of the underlying core contract. In our view, opening up protests for any additional reason at the task order level (even for seemingly large orders) significantly changes that balanced equation and creates a different market dynamic at both the contract formation and order placement phases. Unilateral action cannot be taken on only one side of the business/risk equation. We are not aware of any significant concerns raised by industry, contracting officials or procuring activities seeking to expand the protest right or about the limited circumstances now permitted for protests.

Furthermore, the expansion of protest rights would ultimately cost the taxpayer and it hurts the government's ability to get the contracted work accomplished on schedule. Protests cost the government because of the additional expense related to the preparation of protest responses, soliciting revised bids, and the reevaluation of offers. The Armed Services Board of Contract Appeals has held recently on two separate occasions that an offeror may sue the government for breach of contract under multiple-award ID/IQ contracts when a "fair opportunity to be considered" has not been provided.

See L-3 Commc'ns Corp., ASBCA No. 54920; 2006 WL 2349233 (July 27, 2006); *Community Consulting Int'l*, 02-2 BCA ¶ 31940, ASBCA No. 53489. Under the Panel's recommendations, a disappointed offeror under a multiple-award ID/IQ contract will be able to protest the government's action at the GAO or sue at the Court of Federal Claims. Such litigiousness in the procurement system is not helpful to either the government or those wishing to provide the best solutions to the government on a timely basis.

Recommendation #8: For commercial items, provide for a more commercial-like approach to determine price reasonableness when no or limited competition exists. Revise the current FAR provisions that permit the government to require "other than cost or pricing data" to conform to commercial practices by emphasizing that price reasonableness should be determined by competition, market research, and analysis of prices for similar commercial sales. Move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15.

Establish in FAR Part 12 a clear preference for market-based price analysis but, where the contracting officer cannot make a determination on that basis (e.g., when no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), allow the contracting officer to request additional limited information in the following order; (i) prices paid for the same or similar commercial items by government and commercial customers during a relevant period; or, if necessary (ii) available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs. The contracting officer shall not require detailed cost breakdowns or profit, and shall rely on price analysis. The contracting officer may not require certification of this information, nor may it be the subject of a post-award audit.

SUMMARY OF PANEL'S RATIONALE

Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. However, if the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), the contracting officer should be able to request the following information: (i) Prices paid for the same or similar commercial items or services by its commercial and government customers under comparable terms and conditions for a relevant time period, and (ii) available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs.

In requesting this information, the contracting officer should limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. The contracting officer should not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis. The contracting officer should not request that this information be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit or price redetermination with regard to price reasonableness. This information would be exempt from release under the Freedom of Information Act (5 U.S.C. 552(b)).

MULTI-ASSOCIATION RESPONSE

We do not agree with the Panel's recommendation, taken as a whole.

MULTI-ASSOCIATION DISCUSSION

We disagree with the Panel's recommendation to move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15. As the Commercial Item Drafting Team indicated when issuing the final rule on FAR Part 12 on September 18, 1995:

> Commercial Item Pricing - Commentors suggested that Part 12 should discuss the techniques for pricing commercial items. The policies and procedures for determining the price reasonableness of commercial items are contained in Subpart 15.8 and the Team did not want to conflict with those policies. However, a brief summary of pricing considerations used when contracting by negotiation under Part 15 has been included in Part 12.

The Panel makes no case for moving the pricing rules for commercial items from Part 15 to Part 12 nor is it apparent that the Panel has considered the possible unintended consequences from a bifurcated commercial pricing policy. When the FAR was first published in 1984, one of its key improvements was the consolidation of related policy into a single FAR Subpart. Subsequent government regulatory initiatives have been in the interests of further consolidation and simplification. Moving the pricing policy, as it applies to commercial items, from Part 15 to Part 12 would be contrary to such goals.

The Panel's analysis with respect to commercial pricing matters is weak (Finding No. 5, "Pricing of Commercial Contracts by Commercial Buyers"). It is important to note that the Panel did not find that prices presently paid by the government for commercial items are not fair and reasonable. Commercial buyers do rely on competition, market research, benchmarking, and in some cases, cost related data. The FAR and DoD's Contract Pricing Reference Guide (ref. FAR 15.404-1(7)) likewise provide for the use of these tools. However, with regard to the use of cost data, there is a vital difference between submission to another commercial customer and the government. When an offeror submits cost data its exposure to fraud charges goes far beyond commercial practices. This includes the Truth in Negotiations Act, Cost Accounting Standards, contract cost principles, etc. The architects of FASA and the related regulations understood this and developed the commercial pricing rules accordingly.

For the most part, what the Panel recommends as a basis for determining price reasonableness is presently provided for under existing guidelines in FAR Subpart 15.4 and the DoD's Contract Pricing Reference Guide. The contracting officer should obtain information that is in the form regularly maintained by the offeror as part of its commercial operations - ***before contract award***. However, we are concerned that the Panel may be encouraging government contracting officers to obtain any form of cost information, that is, available information regarding price or limited cost related

information to support the price offered such as wages, subcontracts or material costs. This is not required in FAR Subpart 15.4 and we would not support such a change to the FAR.

We strongly agree with the Panel on the prohibition on certifying information provided by the offeror and subjecting such information to post-award audit with regard to price reasonableness on contracts for commercial items or release under FOIA. We recommend that post-award pricing audits should not be conducted at all, including such audits currently being conducted by the GSA and VA. GSA's defective pricing clause at GSAM 552.215-72 "Price Adjustment - Failure to Provide Accurate Information," should be rescinded.

Recommendation #9: GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. This information should be available across the government to assist with acquisitions.

SUMMARY OF PANEL'S RATIONALE

This internal government group should collect data regarding significant services buys regardless of whether they are made in the private sector or by government and regardless of whether they are made through Part 15, the Schedules or task/delivery order contracts. The data should include size of the transaction, whether it is competitive, the type of competition, the scope and elements of work, the type of contract (e.g., fixed price, T&M or cost-based) the price or prices paid, the period of performance, the terms, and other data that affects the value of the transaction. This group will make its expertise and data available to other civilian and military agencies to assist in analysis and design of services acquisitions, and to provide current market data for comparison of price and terms.

MULTI-ASSOCIATION RESPONSE

The Coalition supports this recommendation but makes suggestions for clarification.

MULTI-ASSOCIATION DISCUSSION

The recommendation essentially frames GSA as a "center of excellence" for the establishment of a market research capability. It must be pointed out that a funding source for this activity would need to be established as this capability is above and beyond what GSA is staffed for today. The data should be prospectively collected and reporting requirements must not be imposed on the already overburdened government contractor community. Finally, every effort should be made to develop this capability internally so as to build consistency and knowledge from prior experiences.

Recommendation #10: (a) Legislation should be enacted providing that contractors and the government shall enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection with the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

(b) In enacting new statutory and regulatory provisions, the same rules for contract interpretation, performance, and liabilities should be applied equally to contractors and the government unless otherwise required by the United States Constitution or the public interest.

SUMMARY OF PANEL'S RATIONALE

When the government acts in a sovereign or regulatory capacity, either under its Constitutional authority or pursuant to an Act of Congress, the courts have held that those actions are entitled to a strong presumption of regularity when they are challenged in court. Indeed, this approach is specified in the statutory provisions that Congress has enacted authorizing judicial review of government action in most contexts, and it is meant as a safeguard against what we today might call inappropriate "judicial activism." On the other hand, when the government enters into contractual relations, it is frequently engaged in the kinds of actions that might be taken by any party to a contract. In the latter situation, we do not believe there is any sufficient policy or legal justification for extending to the government an extraordinary presumption of good faith or of regularity that is well-nigh impossible to overcome. Yet some judicial decisions have done just that. Our recommendation would not mean that the rights of the government and of the contractor under government contracts are identical in all respects, however. Congress and its authorized delegates have concluded that public policy requires the inclusion in most government contracts of provisions giving the government certain special prerogatives deemed necessary for the protection of the public interest. Nonetheless, to the extent permitted by the terms of the government contract, we see no reason not to make any presumptions of regularity and good faith even-handed in their application to the government and the contractor.

This recommendation would not place the burden on government contract officials of showing that they have acted in good faith. Nor would it make the good faith of either party an issue to be litigated in every case. Rather, our recommendation simply requires that any presumption of good faith and regularity be applied equally to the government and to contractors in disputes arising from the performance of a government contract. Thus, where good faith is relevant to any issue in a government contract dispute, the party claiming that the other failed to act in good faith would bear the ordinary civil litigation burden of proof by a preponderance of the evidence and would also bear the burden of going forward with evidence to prove the allegation of failure to act in good faith.

The parties to any contract should expect and receive fair dealing from others. It is sometimes said that, in order for there to be fair dealing, "the door must swing both ways." In order for this to occur, the same rules must apply to both the government and contractors unless there is a compelling public interest requiring a different rule. This principle should be applied in enacting new statutory and regulatory provisions.

MULTI-ASSOCIATION RESPONSE

We take no position on this recommendation at this time.

MULTI-ASSOCIATION DISCUSSION

The discussion supporting the recommendation is lacking in details to explain how the Panel proposes implementing this broadly stated recommendation. Therefore, we would want to consider specific proposals before taking a position on the recommendation.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 2 - PERFORMANCE-BASED ACQUISITION

Industry has reviewed Chapter 2 of the Acquisition Advisory Panel report on Performance-Based Acquisition and is in agreement with the findings. The Acquisition Advisory Panel has captured points and issues raised by the Multi-Association Working Group in our comments as well as our testimony. The Panel has also captured in the Findings significant failures, challenges, cultural barriers and organizational constructs that inhibit Performance-based Services Acquisition (PBSA) success. Industry supports these findings.

The Panel's recommendations are a start but require much investment and OFPP intervention in order for PBSA to succeed; however, the recommendations address some, but not all, of the findings.

Finding 1: Despite OMB Target, Agencies remain unsure when to use PBSA.

Recommendation 1: OMB's government-wide quota of requiring 40% of acquisitions be Performance-based should be adjusted to reflect individual agency assessments and plans for using PBSA.

MULTI-ASSOCIATION RESPONSE

Industry supports this recommendation, agreeing that a one-size-fits-all quota should be abandoned. It is not clear, however, how OMB plans to review each agency's analysis of its unique acquisition portfolio based on clearer OFPP PBSA guidance as reflected in the agency's Acquisition Performance Plan. It is also unclear to what extent plans are tied to transformational versus transactional engagements.

Recommendation 2: FAR Part 7 and 37 should be modified to include two levels of Performance-based Acquisitions: Transformational and Transactional. OFPP should issue more explicit implementation guidance and create a PBSA "Opportunity Assessment" tool to help agencies identify when they should consider using performance-based acquisition vehicles.

MULTI-ASSOCIATION RESPONSE

Industry supports the recommendation to create two categories of PBSAs to distinguish transformational from transactional acquisitions. We also support the development of an "Opportunity Assessment" tool for determining when PBSA is appropriate, but are concerned about how the tool will be developed and would caution against the development of a simple check box-type tool. There are too many variables that can determine the appropriateness of a PBSA. For example, while an agency might have a "transformational" requirement, it may not be possible for the agency to baseline their

particular measurement and whether the measurement is even realistic and important to the end goals.

Industry is also concerned that the transactional acquisition as described too closely resembles the current PBSA practice of calling an acquisition performance-based and then directing what work is to be done by the contractor. The cost is already constrained by the contract price and quality and timeliness are reflected in the hoped for past performance evaluation. These are not true performance-based acquisitions. The Panel report states that under this type of PBSA, the government would be "willing to assume the risk that the work being done may not solve the baseline need/ problem." But this assumption is contrary to the purpose for PBSA, where the goal is to identify a problem or need and have the contractors determine the best means for finding a solution.

Finding 2: PBSA solicitations and contracts continue to focus on activities and processes, rather than performance and results.

Finding 3: PBSA's potential for generating transformational solutions to agency challenges remains largely untapped.

Finding 4: Within federal acquisition functions, there still exists a cultural emphasis on "Getting to Award."

Finding 5: Post-award contract performance monitoring and management needs to be improved.

MULTI-ASSOCIATION RESPONSE

Industry believes that Transformational PBSA and OFPP guidance must focus on the Panel's comment to Finding 3: "The Panel concedes that defining a strategic vision and compelling an institution to coalesce around it are extremely difficult endeavors. Stove-piped organizations and institutional and cultural conservatism greatly inhibit the ability to define and execute against strategic objectives. The right people must be involved, including senior leadership and vital stakeholders, to bring a broad perspective on what to buy, as well as which vehicle to use. If the critical parties are not at the table, it is extremely difficult to break through cultural barriers that inhibit success."

We also note the Panel's concern for the tendency of contractors to "not to be open to a broader set of responses outside the government's original SOW." The reason for this "tendency" is because contractors are fearful of losing a bid if they do not closely mimic the government's statement of work in their responses. As a result, many competitions are reduced to careful alignment of proposals with the government's specific approach and/or price shoot-outs, and the potential for innovation is largely forfeited. Industry does not see any recommendation or required direction to OFPP to insure that these concerns are addressed.

Recommendation 3: Publish a best practices guide on development of measurable performance standards for contracts.

MULTI-ASSOCIATION RESPONSE

Industry generally supports the recommendation for OFPP to issue a Best Practices Measurements Guide but such a recommendation requires more clarification.

The references to a "Measurement Chain" and "Logic Model" frameworks are unclear. The discussion in the last paragraph on Baseline & Outcome Measurement is also unclear. Baselines are essential for any successful PBSA and must always be a measurement that can be well articulated in a final contract. Further, the Panel recommends under Limiting Measures setting a limitation on the scope of performance measures in PBSA's, which seems to be reasonable. However, the recommendation never defines what measures are acceptable and which ones are not necessary. It simply says that measures should be limited to a "sampling."

Finally, the evolution of measures is a topic emphasized in the recommendations as "WILL and MUST" changes over time. This is a significant topic that requires focused understanding and sophistication. Expectations must be realistic and not set to arbitrary hurdles.

Recommendation 4: Modify FAR Part 7 and 37 to include an identification of the government's need/requirements by defining a "baseline performance case" in the PWS or SOO. OFPP should issue guidance as to the content of Baseline Performance Cases.

MULTI-ASSOCIATION RESPONSE

Industry supports the creation of a Baseline Performance Case. However, establishing the baseline performance state and state-of-practice assessments will require in-depth training as well as overcoming a cultural hurdle in that understaffed contracting activities will seek the "easiest" way to answer the Baseline Performance Case requirements. Unless done diligently, the resulting Baseline Performance Case will not solve the underlying problem of clearly defining needs and requirements upfront.

Recommendation 5: Improve post-award contract performance monitoring and management, including methods for continuous improvement through the creation and communication of a "Performance Improvement Plan" that would be appropriately tailored to the specific acquisition.

MULTI-ASSOCIATION RESPONSE

Performance Improvement Plans as described are found in industry practices and industry would support the development of these plans in the course of post-award management of PBSA contracts. Such plans allow the contractor to provide evolving

input as to how they should be assessed for performance, while allowing the objectives of the contract to evolve with changing needs. However, OFPP needs to provide crisp guidance as to when and how performance improvement plans are used and advise how such plans provide a diminishing return in multi-year contracts. This recommendation requires focused understanding and sophistication that may not be present in current usage of PBSAs.

Recommendation 6: OFPP should provide improved guidance on types of incentives appropriate for various contract vehicles.

MULTI-ASSOCIATION RESPONSE

Industry supports this recommendation for OFPP to take the lead by using the PBSA interagency working group to catalogue the various types of incentives appropriate for use in PBSA efforts, critique how the incentives are being applied, assess the applicability of award fee and award term approaches to PBSA and discuss the challenges posed in managing PBSA's under existing budget and appropriation rules that limit multi-year financial commitments and incentive-based budget projections. In addition, in order to maximize the use of PBSA's to their fullest, industry recommends a legislative solution to these budgeting problems.

Recommendation 7: OFPP should revise the seven-step process to reflect the Panel's new PBSA recommendations.

MULTI-ASSOCIATION RESPONSE

Industry agrees with this recommendation to revise the 7 Step process subject to these comments.

Recommendation 8: Contracting Officer Technical Representatives (COTR's) in PBSA's should receive additional training and be re-designated as Contracting Officer Performance Representatives (COPR's).

MULTI-ASSOCIATION RESPONSE

Industry strongly agrees with Recommendation 8, but questions how OFPP plans to address the comment in Finding 3 regarding cultural change to enable transformational PBSAs. While training and designating a COPR will facilitate better transactional PBSAs, additional training and oversight does not address fundamental organizational and cultural barriers of a transformational PBSA.

Finding 6: Available data suggests that contract incentives are still not aligned to maximize performance and continuous improvement.

MULTI-ASSOCIATION RESPONSE

This finding is more closely related to Recommendations 5 and 6 regarding continuous improvement and guidance on incentives.

Finding 7: The FPDS Data are insufficient and perhaps misleading regarding use and success of PBSA.

Recommendation 9: Improved data on PBSA usage and enhanced oversight by OFPP on proper PBSA implementation using an "Acquisition Performance Assessment Rating Tool" or A-PART.

MULTI-ASSOCIATION RESPONSE

Requiring agencies to use the A-PART tool with an enhanced checklist will not be a panacea of successes. Transactional/Transformational PBSA contracts requires understanding and sophistication and a checklist will only provide OFPP with data that shows agencies in fact followed a process.

Industry supports the recommendation that FPDS be amended to better capture data regarding PBSAs and to adequately differentiate between transformational and transactional performance-based acquisitions and their task and delivery orders.

Recommendation 10: OFPP should undertake a systematic study on the challenges, costs and benefits of using performance-based acquisition techniques five years from the Panel's delivery of its final report.

MULTI-ASSOCIATION RESPONSE

Industry supports the recommendation for a study on PBSA but analyses must be more regularly done to provide value to policymakers.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S

FINAL PANEL RECOMMENDATIONS
CHAPTER 3 - INTERAGENCY CONTRACTING

ISSUE: GUIDANCE IN USING INTERAGENCY CONTRACT VEHICLES

The Acquisition Advisory Panel provided recommendations on the performance of acquisition functions across agency lines of responsibility and the use of government-wide contracts. The Panel recommended changes to laws and regulations to include improving competition, establishing data collection tools for improved vehicle management and oversight, and addressed systemic issues identified in Government Accountability Office (GAO) and Inspector General (IG) reports.

DISCUSSION

Interagency contract vehicles play a key role in allowing agencies to accomplish their missions. This is especially critical with the increased workload and the aging workforce challenges being faced by the federal acquisition community. Over 40 percent of all government obligations were spent under interagency contracts in 2004, and a significant amount of these obligations were non-competitive actions. In 2005, the GAO placed interagency contracts on its "High Risk" series due, in part, to the ordering under these contracts that in many cases failed to adhere to laws, regulations, and sound contracting practices, as well as lack of oversight and accountability. The causes vary, but most are attributed to the increasing demands on the acquisition workforce, insufficient training and, in some cases, inadequate guidance. Additionally, the rapid growth in the amount of contracts and the public funds spent under these interagency contracts is an emerging problem.

The Panel made 9 recommendations primarily focused on improvements in the following areas:

a. Proliferation of interagency contracts
b. Improving the oversight of and insight into the creation and continuation of these vehicles.
c. Aligning the vehicles to better leverage the government's buying power
d. Diversity of the vehicles
e. New guidance for improvements on the development and use of interagency contracts

MULTI-ASSOCIATION RESPONSE

Overall, we agree with the Panel's recommendations and support the Panel's intent to improve the creation, use and oversight of government wide, multi-agency and interagency contract vehicles. The emphasis on increased competition in a transparent environment will improve the use of these vehicles. Additionally, improved

management oversight with enhanced data collection will increase the quality of future contracts, providing value for both the vendor and the requiring agency.

However, there are several items that should be further clarified. Since many of the Panel's recommendations were given to OMB to implement using administrative or regulatory procedures, industry anticipates having an opportunity to provide input during a public comment phase prior to issuing final regulatory guidance. In addition to comments on the nine recommendations listed below, we offer the following comments on the Interagency-related portions of the Executive Summary.

a. Page 4, item 2 "Recommendations" - While we support the panel's concerns about improving competition at the task order level of multi-agency award contracts, we are very strongly opposed to the Panel's recommendation to address this concern by allowing protests on task and delivery orders exceeding $5M under multi-agency contracts. This option would create an additional layer of protests; add to the workload for the contracting workforce and their industry counterparts; and reduce the efficiency of these vehicles and impact agency mission by delaying the delivery of goods and services to the government. It would also increase the risk for both the agencies and the vendors, driving up the costs for these goods and services for the government and the taxpayer.

b. Page 5, "Recommendations" - The panel recommended a new Information Technology Services Schedule that would reduce the burden on contractors from negotiating labor rates with GSA that produce little price competition. The meaningful competition results from an offeror responding to a specific order requirement with an appropriate and well-priced labor mix resulting in a quality solution.

The Panel's recommendations, if implemented, are a significant step in the right direction to improve the creation, use and management of interagency vehicles. We concur that increased competition and improved use of contract data to analyze and determine the government needs earlier should eliminate redundant vehicles, as well as reduce needless bid and proposal costs from unnecessary vehicles. Finally, increased oversight and management of existing vehicles will improve efficiency and allow agencies to maximize the effectiveness of their acquisition workforce. As we noted in our comments in Chapter 1, the recommendation has merit and we would like to work with GSA and other interested parties to mature this concept.

Recommendation 1: Increased transparency through identification of vehicles and Assisting Entities. Office of Management and Budget (OMB) conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the working group's deliberations should include the appropriate vehicles and data elements.

MULTI-ASSOCIATION RESPONSE

We applaud the Office of Federal Procurement Policy's (OFPP) data collection effort initiated in the memo dated February 24, 2006 to Agencies Senior Procurement Executives and Chief Acquisition Officers. This is a necessary first step to identify and categorize existing Interagency contract vehicles. We look forward to examining the survey results and discussing the initial implementation steps OFPP will undertake to improve oversight for Interagency contracts and processes.

Recommendation 2: Make available the vehicle and assisting entity data for three distinct purposes.

a. **Identification of vehicles and the features they offer to agencies in meeting their acquisition requirements (yellow pages).**
b. **Use by public and oversight organizations to monitor trends in use.**
a. **Improved granularity in fee calculations.**
b. **Standard FPDS-NG reports.**
c. **Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.**

MULTI-ASSOCIATION RESPONSE

The market survey of existing vehicles, scope and price structure is critical to effective acquisition planning for both industry and government use. We share the panel's view that a consolidated, accurate, database for all vehicles may eliminate redundancy and reduces industry bid and proposal costs associated with responding to duplicative government offerings.

Recommendation 3: OMB institutionalize collection and public accessibility of the information, for example through a stand-alone database or transaction module within the Federal Procurement Data System – Next Generation (FPDS-NG).

MULTI-ASSOCIATION RESPONSE

This recommendation aligns with the Panel's recommendation #9 in Chapter 1, "Commercial Practices," which states:

> "GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information and maintain a database of information regarding transactions. This information should be available across the government to assist with acquisitions."

In addition to our comments in Chapter 1, this capability would be an effective tool to improving the market research and acquisition planning of both industry and government. The personnel and technology investment cost of establishing and

maintaining this database will be offset by efficiencies found in improved acquisition strategies, clearer requirements definition and improved industry responses to government needs.

Recommendation 4: OMB direct a review and revision, as appropriate, of the current procedures for the creation and continuation/reauthorization of GWACS and franchise funds to require greater emphasis on meeting specific agency needs and furthering the overall effectiveness of government-wide contracting. GSA should conduct a similar review of the Federal Supply Schedules. Any such revised procedures should include a requirement to consider the entire landscape of existing vehicles and entities to avoid unproductive duplication.

MULTI-ASSOCIATION RESPONSE

We agree with this recommendation that regular reviews of existing vehicles' use and effectiveness will improve the management and oversight of contract vehicles. The OMB review criteria and procedures developed for this review are critical to its success. Although this requirement could potentially be manpower resource intensive, an annual review of all vehicles within its first 3 years would add value to evaluating contract effectiveness.

Recommendation 5: For other than the vehicles and entities described in #4 above, institute a requirement that each agency, under guidance issued by OMB, formally authorize the creation or expansion of the following vehicles under its jurisdiction:

a. **Multi-agency contracts.**
b. **Enterprise-wide vehicles**
c. **Assisting entities**

MULTI-ASSOCIATION RESPONSE

Industry concurs with the recommendation to develop uniform procedures to guide the continuation/re-authorization of contract vehicles. We further recommend industry participation in the development of these uniform procedures and an opportunity for public comment on the final approved recommendations. We also concur with the Panel's recommendation in #4, which provides: "OMB reconsider the current requirement for annual review and re-authorization of these vehicles." We feel a review after a minimum of 3 years is reasonable to offset the investment costs related to this effort.

The term "expansion" should have more clarification, since the recommendation suggests "a significant increase in scope or size of contracts under an interagency or enterprise-wide vehicle". It is assumed that any expansion of an existing vehicle is considered a scope change and thus subject to regulatory guidance on public notification or synopsis requirement, competition, etc.

Recommendation 6: Institute a requirement that the cognizant agency, under guidance issued by OMB, formally authorize the continuation/reauthorization of the vehicles and entities addressed in #5 on an appropriate recurring basis consistent with the nature and type of the vehicle or entity. The criteria and timeframes included in the OMB guidance should be distinct from those used in making individual contract renewal or option decisions.

MULTI-ASSOCIATION RESPONSE

We support a disciplined, coordinated, periodic, review of all interagency contracts to assess their effectiveness in meeting government requirements. Industry, as a major stakeholder, would welcome the opportunity to contribute to the development of clear, concise criteria and an implementation approach to support this recommendation.

Recommendation 7: Have the OMB interagency task force define the process and the mechanisms anticipated by recommendations #5 and #6.

MULTI-ASSOCIATION RESPONSE

We noted in our comments to Recommendation #1 that OMB has already undertaken the effort to identify all existing vehicles and we look forward to the opportunity to analyze the results of that survey with an eye toward developing an effective implementation strategy.

Recommendation 8: OMB promulgation of detailed policies, procedures, and requirements should include:

d. **Business case justification analysis (GWACs as model)**
e. **Projected scope of use (products and services, customers, and dollar value)**
f. **Explicit coordination with other vehicles/entities**
g. **Ability of agency to apply resources to manage the vehicle**
h. **Projected life of vehicle, including the establishment of a sunset, if appropriate**
i. **Structuring the contract to accommodate market changes associated with the offered supplies and services (e.g. market research, technology refreshment and other innovations).**
j. **Ground rules for use of support contractors in the creation and administration of the vehicle**
k. **Criteria for upfront requirements planning by ordering agencies before access to vehicles is granted**
l. **Defining post-award responsibilities of the vehicle holders and ordering activities before use of the vehicles is granted. These criteria should distinguish between the different sets of issues for direct order type**

vehicles versus vehicles used for assisted buys, including data input responsibilities.

m. **Guidelines for calculating reasonable fees including the type and nature of agency expenses that the fees are expected to recover. Also, establish a requirement for visibility into the calculation.**
n. **Procedures to preserve the integrity of the appropriation process, including guidelines for establishing bona fide need and obligating funds within the authorized period.**
o. **Require training for ordering agencies personnel before access to vehicle is granted.**
p. **Use of interagency vehicles for contracting during emergency response situations (e.g., natural disasters).**
q. **Competition process and requirements.**
r. **Agency performance standards and metrics.**
s. **Performance monitoring system.**
t. **Process for ensuring transparency of vehicle features.**
    i. **Ombudsman as Point of Contact for the public.**
u. **Guidance on the relationship between agency mission requirements/core functions and the establishment of interagency vehicles (e.g., distinction between agency expansion of internal mission-related vehicles to other agencies vs. creation of vehicles from the ground up as interagency vehicles).**

MULTI-ASSOCIATION RESPONSE

Consistent government-wide standards for the creation and continued use of vehicles, with clear performance standards, will improve the business and acquisition processes. We urge OMB to quickly initiate an effort to develop guidance, with industry input, to agencies.

Recommendation 9: OMB conduct a comprehensive, detailed analysis of the effectiveness of the Panel recommendations and agency action in addressing the findings and deficiencies identified in the Acquisition Advisory Panel report. This analysis should occur no later than three years after initial implementation with a continuing requirement to conduct a new analysis every three years.

MULTI-ASSOCIATION RESPONSE

We concur that a subsequent review of the Panel's recommendations would be in order, but would suggest a clarification that such a follow-up would occur three years, "after OMB's receipt of the Panel's Final Report."

Summary

We concur that enhanced oversight and management of existing contract vehicles will improve efficiency and allow agencies to maximize the effectiveness of their acquisition.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 4 - SMALL BUSINESS

In Chapter 4, the Acquisition Advisory Panel highlighted recognition given by the congressional and executive branches to the fundamental role played by small businesses in government contracting. That recognition has led to the development of policies and guidance, and the passage of numerous laws governing preference programs. The Panel made several distinct recommendations related to small business contracting.

While not a formal recommendation, in its "Statement of Issues," the panel also highlighted the need to reform the system for defining and applying size standards in government contracting – and indicated its support for efforts of the Small Business Administration (SBA) to simplify small business size standards. Industry recognizes SBA's efforts to address significant reform of the size standards. However, we remain opposed to SBA's actions in its 2004 proposed rule and follow-on 2005 Advance Notice of Public Rulemaking.

DISCUSSION

After conducting its own review of the policies and laws related to small business programs, the Panel determined that there is inadequate guidance and even inconsistency in the application of the governing guidance. To address the inadequacy of the guidance and the confusion surrounding implementation of the various laws and policy, the panel made the following recommendations:

- **Amend the Small Business Act to ensure there is no hierarchy among various small business contracting programs. Specifically, the statute should provide for parity between the 8(a), HUBZone, and Service-Disabled Veteran Owned small business programs. The panel noted that a change to the HUBZone statute would be required. Also, the SBA and FAR regulations would need to be amended to fully implement this recommendation.**
- **Provide greater discretion to the contracting officer to meet agency specific small business goals as appropriate.**

MULTI-ASSOCIATION RESPONSE

Industry generally supports the goal of clarifying the regulatory guidance regarding the contracting officers' discretion to achieve agency small business goals. However, we believe the current mixture of statutory and administrative priorities adds significant policy obstacles to further orienting individual agency actions.

- **Direct the Government Accountability Office (GAO) to perform a review of the FPDS-NG to examine the data being collected; how agencies use the data; and whether agencies have real-time access to goaling data.**

MULTI-ASSOCIATION RESPONSE

Industry supports a comprehensive review of the FPDS-NG capabilities and of department and agency ability to input data on a real-time basis, including an analysis of agencies' ability to identify and report on contract bundling. We recommend, however, that this analysis should occur before any policy changes are made.

- **Stop the use of cascading procurements. To accomplish this, the panel recommends replacing Section 816 of the FY06 National Defense Authorization Act (P.L. 109-163) that required the Department of Defense to develop guidance on cascading procurements in limited circumstances with language that would create an outright prohibition on the use of cascading on a government-wide basis.**

MULTI-ASSOCIATION RESPONSE

We support the Panel's recommendations to prohibit the use of the contracting technique for tiered evaluations commonly called "cascading". Industry has opposed the use of cascading and supported the provision in the FY06 National Defense Authorization Act that required guidance to be developed on the use of tiered evaluations as a means to control its use. We agree that the use of this contracting technique is inappropriate and is a poor proxy for proper market research. Additionally, this technique is patently unfair to firms that submit offers that will never be considered for award, be they large businesses or small businesses with lower set-aside priority.

However, to implement the panel's recommendations, many agencies need to be involved and coordinate their efforts.

ISSUE: GUIDANCE WITH CONTRACT CONSOLIDATION

The Acquisition Advisory Panel noted that the use of contract bundling and consolidation is not new. Many agencies have consolidated or bundled contracts in order to streamline the procurement process, reduce administrative efforts and costs and leverage buying power. More recently, it is being used by agencies pursuing strategic sourcing opportunities.

DISCUSSION

The Panel noted that while both the president and Congress have expressed concern about contract consolidation, and several statutes address contract bundling, there is inconsistency in implementation of the applicable laws and regulations by contracting

officials. To address this concern, the panel recommended that the Office of Federal Procurement Policy (OFPP):

- **Create an interagency taskforce to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling;**
- **Coordinate the development of a government-wide training module for all Federal agencies on the legislative and regulatory requirements related to minimizing contract bundling.**

In adopting and implementing the recommendations of the Panel, it is expected that all Federal agencies would be impacted by any policies developed by OFPP.

MULTI-ASSOCIATION RESPONSE:

No civilian agency (nor OFPP for that matter) has issued guidance to civilian agency contracting and program offices on best practices to implement statutes addressing the practice of contract bundling. Therefore, we strongly support creating a government-wide database of best practices for understanding the statutory and regulatory requirements relating to "contract bundling" (as defined in the statute) and for mitigating its effects. We also support the development of training courses specifically aimed at helping contracting officials understand, and minimize, contract bundling and consolidation.

Several associations have been meeting regularly with the Department of Defense's (DoD) Office of Small Business to further identify appropriate, updated guidance that can be issued to contracting officers, small business advocates and industry, to better understand the statutory and regulatory requirements. We recommend that those efforts be continued on a government-wide basis, possibly under the auspices of OFPP.

In addition, Congress has imposed on DOD an additional set of procedures when the Department proposes to use "contract consolidation." DOD has issued limited guidance in the DFARS to implement this statutory requirement.

ISSUE: COMPETITION FOR MULTIPLE AWARD CONTRACTS

The Acquisition Advisory Panel noted that statutory changes, as well as internal changes within the General Services Administration Multiple Award Schedules, has led to an increase in the use of multiple award indefinite delivery/indefinite quantity contracting vehicles. Small businesses have been able to compete on these contracts because of the innovative procurement methods used by contracting officials.

DISCUSSION

According to the Panel's findings, reserving multiple award contracts for small businesses may help agencies achieve their goals. However, such actions may be contrary to the requirements of the Competition in Contracting Act (CICA). Furthermore, there has been inconsistent and confusing use of these vehicles.

Therefore, the Panel recommended that CICA be amended to provide agencies with the discretion for reserving contracts for HUBZones, small disadvantaged businesses, service-disabled small businesses and women-owned small businesses. The amendment would not cover the 8(a) program, however.

MULTI-ASSOCIATION RESPONSE

While we do not oppose providing guidance on the practice of agencies "reserving" prime contracts for small business in full and open competitions, we believe agencies are already familiar with the practice and are taking advantage of appropriate opportunities. A current example is the Department of Homeland Security's information technology systems procurement (EAGLE) where a number of awards in each of the major categories of work solicited on a full and open basis were "reserved" for and awarded to small business.

ISSUE: COMPETITION FOR TASK ORDERS

The findings and recommendations by the Acquisition Advisory Panel related to competition for task orders is similar to those related to multiple-award contracts.

DISCUSSION

The panel noted that limiting competition to small businesses helps agencies achieve their goals – but may be contrary to requirements for competition for the Department of Defense as required by Section 803 of the FY2002 National Defense Authorization Act. Therefore, the panel recommends that contracting agencies, including DOD, be given the statutory discretion to limit competition for task orders to small businesses.

MULTI-ASSOCIATION RESPONSE:

Industry has consistently supported the application of Section 803 on a government-wide basis. However, we believe that public comment should be sought to ensure proper implementation beyond current use at DoD.

ISSUE: SUBCONTRACTING WITH SMALL BUSINESS (APPENDIX)

In the appendices to Chapter 4, the Panel did a cursory review of small business subcontracting issues.

DISCUSSION

The Panel recommended improving the new electronic subcontracting reporting system (eSRS) that might provide the necessary information to contracting officials to ensure proper compliance with subcontracting requirements.

MULTI-ASSOCIATION RESPONSE

Industry supports a thorough review of subcontracting issues. Since the eSRS program is not yet in effect (as of March 1, 2007), it is too early to address improvements.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 5 - THE WORKFORCE

The Acquisition Advisory Panel's recommendations regarding the status of the federal contracting workforce are welcome and much needed. Many of the events of the last several years that have brought about increased criticism and enhanced oversight of federal contracting are in many ways the direct and indirect result of shortcomings in the federal contracting workforce.

Recommendation#1-1: Data Collection and Workforce Definition

MULTI-ASSOCIATION RESPONSE

Industry concurs that there is a need to create and apply workforce definitions that can be sensibly and consistently applied to contracting/procurement staffs as well as the broader acquisition community in both the civilian and DOD workforce. We also believe such efforts and this recommendation need to be more directly linked and keyed to the Human Capital Planning recommendations of the Panel's report. Otherwise, there is a possibility that collecting and aggregating the workforce data will become a circular and unproductive activity.

Policymakers should consider a companion activity related to the collection of meaningful transaction data. Such transactional data, when considered in conjunction with the workforce data, will provide a more holistic and dimensional perspective to staff and workload relationships. Building upon the report's discussion of this matter, policymakers should make it clear that the objective in writing definitions is to fashion an effective tool of measurement and assessment, not an exacting and all encompassing description of duties and responsibilities. . .

Recommendation #1-2: Data Collection and Workforce Definition

MULTI-ASSOCIATION RESPONSE

Industry agrees with the need for a standard definition and suggests that policymakers consolidate Recommendation #1-1 and #1-2.

Recommendation#1-3: Acquisition Workforce Database

MULTI-ASSOCIATION RESPONSE

This database builds on Recommendation #1-1 such that, once identified as being part of the Acquisition Workforce, additional information concerning each individual will be collected. This appears to establish a system of records duplicative of existing systems and may need to be authenticated in terms of Privacy Act provisions.

In order for such a database to maintain currency and relevancy for its intended use, it will require extraordinary effort. Most of the identified elements of the database have a short shelf life requiring frequent updating, in all likelihood by the individual, in order for the information to have any bearing on its use in making decisions. Given the Panel's concerns with extraneous demands on Acquisition Workforce time and effort, there appears to be minimal immediate return on the investment of time to maintain such a centralized database. Policymakers should consider the use and possible expansion of records systems currently maintained at the agency level for warranted Contracting Officers.

The expressed purpose of the database, as identified in the Discussion, would be to "offer a valuable tool to try to attract our most talented and capable acquisition personnel to the most demanding positions within the federal acquisition mission". How this might be accomplished or achieved is not detailed in the Discussion or in the material posted on the Panel's web site. It does, however, suggest centralized management of the Acquisition Workforce. While we do not believe the case has been made for a single, government-wide Acquisition Corps, there may be a benefit to establishing select teams of contracting/procurement and acquisition professionals to handle more complex contract requirements at a Departmental level.

Recommendation #2-1: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The use of the existing Human Capital Planning process as a foundational activity for more particularly assessing the capacity, capability, professional maturity and competency of the existing workforce is a good recommendation. It minimizes process duplication while specifically furthering the assessment of critical metrics related to the acquisition workforce. What is not clear is how the Chief Acquisition Officers will be afforded the opportunity to leverage these assessments for purposes of assuring training, recruitment and retention of acquisition workforce personnel. The Panel's recommendation would be furthered if policymakers establish objectives for a process similar to that followed for Capital Programming activities on major IT and facilities. The Panel has correctly recognized the importance of investing in the acquisition workforce and the suggested process would allow the CAOs to present the investment case as part of the budget and appropriations process as opposed to an administrative pleadings process during operational budget allotments and allocations.

Recommendations #2-2 and #2-3: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The discussion associated with these recommendations suggests they are more statements of expectations and outcomes associated with Recommendation #2-1 than

they are stand-alone recommendations. Predicting the need for acquisition staff and forthrightly stating the gap in human resources and capability between what is available and what is expected to be required are integral components of a meaningful Human Capital Planning activity. These recommendations should be incorporated into Recommendation #2-1 to further strengthen the Acquisition Workforce Human Capital Strategic Plan.

Recommendation #2-4: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The Panel has correctly identified the need to assess the extent to which contractor personnel are performing acquisition roles and responsibilities and whether such involvement is efficient and beneficial. Incorporating these findings into the Acquisition Workforce Human Capital Strategic Plan will facilitate creating a single and encompassing analysis of all resources dedicated to the acquisition process.

Of concern, however, as evidenced in the Discussion, is the Panel's inclination to presume such resource dependency may not be beneficial to the government based on anecdotal information and predispositions to the same. Recommending the study of a matter need not be predicated on a presumption that something isn't working correctly when in fact it might really be working very well when considered from another perspective.

As the Panel's Discussion pointed out, contractors should not perform inherently governmental functions. But care is needed to address the practical difference between the exercise of authority from related activities that may be undertaken to facilitate the exercise of such authority. Decision-making is distinctly separate from gathering information and making recommendations to the decision-maker. The issue appears to be who does them, not whether they need to be done. A review the Federal Activities Inventory Reports [FAIR] indicates that not all agencies view the support of acquisition and procurement decisions makers as inherently governmental.

Concerns about possible organizational conflicts of interest [OCI], clearly a legitimate concern that needs to be addressed, are themselves not a reason for precluding support. OCI can be dealt with through a number of mitigating actions, all of which can be focused on protecting the government's and taxpayer's interests.

One particular opportunity that surprisingly did not receive greater consideration is the re-employment of qualified retired acquisition and procurement professionals. Individuals who qualify for retirement frequently transition to alternative careers in private industry for financial considerations. Such individuals frequently are not retiring; they are changing jobs because it makes financial sense. Policymakers are encouraged to consider recommending or endorsing legislation that would permit individuals who have "retired" but are willing to return to Federal services without a loss of pension. Industry is just as aware of the very uncertain future the government faces in regard to its capability and capacity to service and support its contracting and purchasing requirements. Stabilizing the situation by returning qualified individuals to Federal service would be a very positive, productive and effective solution.

The Panel's observation that time and materials contracts are disfavored is irrelevant to the specific issue of contracting for acquisition and procurement support. The use of T&M contracts speaks to a broader issue. The contract type used for acquisition support

services needs to be considered on the merits of the instant case, not as a matter of policy. As the Panel recognizes, the complexity and volume of workload is creating extraordinary demands. To the extent agencies choose to address the demand by seeking contractor assistance, it is the circumstances of the demand that should be considered in selecting contract type.

Recommendation#2-5: Qualitative Assessment

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation focuses on a critical element of consideration when assessing the adequacy and demand for acquisition personnel. The full lifecycle of the Federal contracting process needs to be accounted for when the current and future staffing assessments are done. Lack of staffing or reduced staffing competency in any phase of the acquisition lifecycle will jeopardize the government's interests and will have its own distinctive impact on phases preceding or following the area in which the shortfall is experienced.

The Panel's stated specific intent to optimize the contribution that private sector capabilities can make to the successful accomplishment of Federal Agency missions seems misplaced by inclusion in this recommendation. This objective would appear to be more consistent with an assessment related to performance based contracting than lifecycle staffing issues.

Recommendation #3: Workforce Improvements Need Prompt Attention

MULTI-ASSOCIATION RESPONSE

The Panel's stated intent is to communicate clearly the urgent attention that should be given to strong measures to improve the acquisition workforce. We concur with the intent but believe this statement fails to constitute a recommendation. While Findings #5 through #5-5 detail the factual basis for the urgent call to immediate action, the discussion supports the Human Capital Planning activities called for by the Panel in Recommendations #2-1 through #2-5 or in the subsequent #3 recommendations.

Recommendation #3-1: Need to Recruit Talented Entry Level Personnel

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to establish a government-wide internship has our strong endorsement. The absence of such programs in many government agencies is a contributing factor to the government's failure to attract personnel to acquisition careers. Additionally, the absence of such programs has undoubtedly contributed to the lack of needed skill sets in today's acquisition environment.

While the creation of a government-wide internship program is fully merited, the focus on entry level personnel overlooks the possibility that experienced industry personnel might seek a government career. In establishing the intern program, consideration should be given to including experienced non-Federal personnel who have needed skills but lack the experience of representing the government.

Policymakers are encouraged to consider the recruitment of *qualified* as opposed to "first rate" personnel. The existing standards for the 1102 series establish a reasonable minimum set of qualifications. Suggesting a higher standard seems counterproductive to the intent of the recommendation.

Recommendation #3-2: Hiring Streamlining Necessary

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to accelerate the hiring process by removing obstacles is well founded. The government must be able to identify, select and offer employment to qualified candidates in a much more timely manner. The administrative and budgetary considerations that impact the process must be minimized.

Recommendation #3-3: Need to Retain Senior Workforce

MULTI-ASSOCIATION RESPONSE

Given the Panel's supporting narrative for Finding #5-2 and Discussion of this recommendation, it is disappointing that the Panel chose not to directly confront the sources of some of the staffing issues now being faced in the acquisition workforce. The Panel would have served its concern for the workforce more forcefully if it had chosen to identify impacts of the past and recommended some guiding principles for legislative and political consideration when addressing issues impacting or affecting the acquisition workforce.

Nonetheless, as recommended, there exists a demanding need to retain the experienced and senior acquisition personnel and leadership. While the need to retain personnel is not exclusive to acquisition, the incentives created must address the reasons that prompt personnel to leave or retire from Federal service.

Recommendation #3-4: Training

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to institute a vigorous workforce training program is clearly merited. Assured funding is critical to successfully implementing this recommendation. Establishing a protective environment for these funds would be beneficial by outlining budgetary reprogramming provisions that would govern funds. Having OFPP assess the adequacy of the training funds using the Acquisition

Workforce Human Capital Strategic Plan should work to assure OMB sensitivity to the demands for funds and their effective use.

Recommendation #3-5: Acquisition Workforce Education and Training Requirements

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation essentially calls for a more disciplined environment within which education and training waivers would be granted. The framework already exists and the process apparently is being followed. The Panel's recommendation appears to be based on perception and anecdotal information, bringing into some doubt the concerns expressed and the actions proposed. The Panel states it is concerned with assuring the waiver program is used to achieve compliance with education and training requirements and not a means of having to avoid complying. Disagreeing with the decisions thought to have been made does not justify a recommendation to change the existing process.

Recommendation #3-6: Acquisition Workforce University

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to establish an OFPP study panel to evaluate the need for a government-wide Federal Acquisition University is, as stated, a compromise. The inability of the Panel to come to consensus on the matter suggests this recommendation may be unnecessary. Recent efforts to facilitate the coordination of training between the Defense Acquisition University and the Federal Acquisition Institute need to be given the opportunity to succeed before concluding that the effort is failing or without merit.

Recommendation #4: An Acquisition Workforce Focus is Needed in OFPP

MULTI-ASSOCIATION RESPONSE

The Panel's call for OFPP oversight of the Acquisition Workforce Human Capital Strategic Plan properly places the responsibility with the office that should be most cognizant of the acquisition workforce and workload issues. Whether this responsibility justifies a senior executive position is better determined by other parties. Using this recommendation to aggregate OFPP responsibilities identified in this Chapter may be convenient but not necessary.

Recommendation #5: Reporting Waiver Requirements

MULTI-ASSOCIATION RESPONSE

The recommendation is justified as a means of controlling the workload for the workforce and the administrative burden for agencies that are already experiencing difficulties that have been described in Recommendations #1-4.

**MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 6 - APPROPRIATE ROLE OF CONTRACTORS
SUPPORTING GOVERNMENT**

Chapter 6 of the Acquisition Advisory Panel's final report addressed the appropriate role of contractors supporting government. This is a new area of attention in the federal acquisition landscape and the Panel's work adds to the body of knowledge about the issue and the challenges that both government and contractors face.

On January 31, 2006, our Multi-Association Group provided the Panel with our initial observations about the ethical matters being discussed by the Panel, including internal controls, standards of conduct, and the emerging policy issues relating to the "blended workforce." Since that industry initiative, the Panel addressed these matters in their final meetings.

The Panel's final recommendations and our multi-association comments are provided.

Recommendation 1: The Office of Federal Procurement Policy should update the principles for agencies to apply in determining which functions must be performed by government employees.

MULTI-ASSOCIATION RESPONSE

We generally support this recommendation although the Office of Federal Procurement Policy has already taken these actions. In May 2003, OFPP issued a revised OMB Circular A-76 relating to competitive sourcing that incorporated essentially unchanged the definition of the phrase "inherently governmental" from its 1992 OFPP Policy Letter 92-1. Little has changed that would call for a further update. In addition, since the 1998 passage of the Federal Activities Inventory Reform ("FAIR") Act, agencies have, under OMB guidance, prepared and publicly published annually their FAIR Act inventories identifying in detail the specific functions within each agency that are "inherently governmental" that should still be performed by federal employees and those functions that are "commercial activities" that could be performed by the private sector. Any future OFPP guidance must provide the flexibility for each agency to determine which functions "must" be performed by government employees. An advantage to using the FAIR Act inventory process for making these important determines is the ability of the public to review the agency decisions and contest inappropriate determinations.

Regrettably, while the Panel approached this matter objectively, Congress has enacted legislation to restrain agency decision-making by imposing procedural hurdles or by specifically categorizing certain functions as "inherently governmental" that are required to be performed by government employees. This politicization of the review and decision-making process subverts the ability of agencies to address these important

workforce issues substantively and with due regard for agency-unique human capital needs and plans.

These additional categories add to the already problematic interpretations put on the phrase "inherently governmental." In acting on the Panel's recommendation, we suggest that OFPP determine whether or not the phrase "inherently governmental" is the best terminology to be used. Amending or replacing the phrase to better connote the services that are appropriately performed by employees in the private, public or both may better achieve the Panel's objective. The application may differ from agency to agency depending on the mission of each and the expertise already in the agency.

Recommendation 2: Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with Federal employees.

MULTI-ASSOCIATION RESPONSE

We fully support this recommendation. In addition to having adequate numbers of staff, the workforce – whether performing these designated functions or not – must be well trained, well compensated and well equipped to fully perform their work.

Recommendation 3: In order to reduce artificial restrictions and maximize effective and efficient service contracts, the current prohibition on personal service contracts should be removed. Government employees should be permitted to direct a service contractor's workforce on the substance of the work performed, so long as the direction provided does not exceed the scope of the underlying contract. Limitations on the extent of government employee supervision of contractor employees (e.g. hiring, approval of leave, promotion or performance ratings, etc.) should be retained.

MULTI-ASSOCIATION RESPONSE

We do not support a complete repeal of the existing statutory prohibition on the use of personal services contracts. While the Panel has made a case that the blended workforce has created a new workplace that combines the resources of both government and industry that calls for special attention and it has provided an exhaustive recitation of concerns raised by the legislative and regulatory history of the prohibition, the Panel has not made a compelling case for complete repeal of this long-standing statutory restriction on the use of personal services contracts. It also appears that this issue reflects shortfalls in the government workforce that are not primarily a procurement issue, but could reflect gaps in human resources that personal services contracts are filling for lack of alternatives.

In our view, only a limited, more targeted approach to the use of personal services contracts is called for. Indeed, Congress has been willing to provide specific agencies with specific limited authority to use personal services contracts to address agency-

identified needs. Industry is concerned that the outright repeal of the prohibition will give rise to more problems than benefits to the acquisition system. The Panel properly noted its concerns about issues relating to the government's supervision of contractor employees, including directing work outside the scope of the contract under which those contractor employees are working, and the government's intervention into employer responsibilities such as performance evaluations and working conditions – issues which go to the very heart of the business relationship between government and industry and industry and its employees. These sorts of interventions could impinge on the responsibility of contractors to perform the contract and manage its workforce. Thus, we do not support this recommendation but would support efforts by OFPP and the HR offices of individual agencies to identify agency needs for personnel and how to resolve them in both the short term and long term.

Recommendation 4: Consistent with action to remove the prohibition on personal services contracts, the Office of Federal Procurement Policy should provide specific policy guidance which defines where, to what extent, under which circumstances, and how agencies may procure personal services by contract. Within five years of adoption of this policy, the Government Accountability Office should study the results of this change.

MULTI-ASSOCIATION RESPONSE

Notwithstanding our objection to Recommendation 3 that would completely repeal the statutory prohibition on personal services contracts, we support the portion of this recommendation that requests the Office of Federal Procurement Policy to develop guidance on the circumstances that agencies should address in determining whether, and to what extent, targeted exceptions to the statutory prohibition might be necessary or appropriate. We believe, however, this recommendation goes beyond procurement policy and would, therefore, require the involvement of both the Office of Personnel Management and agency human capital planners. At this time, we do not see the need for any GAO study on this matter.

Recommendation 5: The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with Organizational Conflicts of Interest, Personal Conflicts of Interest, and Protection of Contractor Confidential and Proprietary Data, as described in more detail in the following sub-recommendations.

MULTI-ASSOCIATION RESPONSE

Our specific comments are addressed in each of the sub-recommendations. As a general matter, we do not believe that more laws or regulations are necessary. We do support greater government and private sector leadership and greater attentiveness to the high-risk areas particular to these emerging business relationships. In addition, industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate

regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-1: Organization Conflicts of Interest (OCI).
The FAR Council should consider development of a standard OCI clause, or a set of standard OCI clauses, if appropriate, for inclusion in solicitations and contracts that set forth the contractor's responsibility to assure that its employees and those of its subcontractors, partners and any other affiliated organization or individual), as well as policies prescribing their use. The clauses and policies should address conflicts that can arise in the context of developing requirements and statements of work, the selection process, and contract administration. Potential conflicts of interest to be addressed may arise from such factors as financial interests, unfair competitive advantage, and impaired objectivity (on the instant or any other action), among others.

MULTI-ASSOCIATION RESPONSE

The existing FAR provisions require the government to be alert to issues of potential organizational conflict and to take action to prohibit or mitigate its effects. Numerous GAO bid protest decisions over the past three years have reinforced the importance of contracting officer attention to and action regarding this important matter, from the acquisition strategy phase through contract administration. However, there is little evidence that a "standard" clause is necessary or that the absence of such a clause has led to any greater risk to the government. Indeed, the specific areas of concern the Panel recommended be addressed are already the core elements in the current FAR OCI provision. Nevertheless, industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry. We are, however, skeptical that a standard clause is appropriate since OCIs and potential OCIs are completely fact specific.

Recommendation 5-2: Contractor Employees' Personal Conflicts of Interest (PCI). The FAR Council should determine when contractor employee PCI need to be addressed, and whether greater disclosure, specific prohibitions, or reliance on specified principles will accomplish the end objective of ethical behavior. The FAR Council should consider whether development of a standard ethics clause or a set of standard clauses that set forth the contractor's responsibility to perform the contract with a high level of integrity would be appropriate for inclusion in solicitations and contracts. The FAR Council should examine the DII and determine whether an approach along those lines is sufficient. As the goal is ethical conduct, not technical compliance with a multitude of specific and complex rules and regulations, the rules and regulations applicable to Federal employees should not be imposed on contractor employees in their entirety.

MULTI-ASSOCIATION RESPONSE

The Panel has identified an emerging and appropriate area of attention in the government/ contractor relationship: any personal conflict of interests (PCI) of a contractor employee that might impinge on that employee's performance of a government contract, particularly in a "blended workforce" environment or where the employee is providing material judgmental information to governmental decision makers. Needless to say, we support measures that will materially enhance the likelihood of ethical behavior. We also support efficient and economical procurement processes that reflect the differences between public and private employment. As a new area of attention, we also appreciate the flexibility the Panel demonstrated in its recommendation that the FAR Council evaluate this issue to determine when PCI should be taken into account and how best to address this important matter. Industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-3: Protection of Contractor Confidential and Proprietary Data. The FAR Council should provide additional regulatory guidance for contractor access and for protection of contractor and third party proprietary information, including clauses for use in solicitations and contracts regarding the use of non-disclosure agreements, sharing of information among contractors, and remedies for improper disclosure.

MULTI-ASSOCIATION RESPONSE

The Panel has identified another emerging and appropriate area of attention in the government/contractor relationship: the protection of contractor and third party proprietary information. As a new area of attention, we also appreciate the flexibility the Panel demonstrated in its recommendation that the FAR Council evaluate this issue to determine the additional guidance necessary to protect such proprietary information. Several agencies have already taken regulatory action that could undercut these important contractor rights. Industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-4: Training of Acquisition Personnel.
The FAR Council, in collaboration with the Defense Acquisition University (DAU) and the Federal Acquisition Institute (FAI), should develop and provide (1) training on methods for acquisition personnel to identify potential conflicts of interest (both OCI and PCI), (2) techniques for addressing the conflicts, (3) remedies to apply when conflicts occur, and (4) training for acquisition personnel in methods to appropriately apply tools for the protection of confidential data.

MULTI-ASSOCIATION RESPONSE

We support this recommendation. We strongly recommend that industry be included in the development of the training material and, to the extent appropriate, participate in the delivery of the training. We also encourage the government to periodically re-evaluate the key skills and attributes it uses to assess and train the contracting workforce to assure they reflect current needs.

Recommendation 5-5: Ethics Training for Contractor Employees.
Since contractor employees are working side-by-side with government employees on a daily basis and because government employee ethics rules are not all self-evident, consideration should be given to a requirement that would make receipt of the agency's annual ethics training (same as given to government employees) mandatory for all service contractors operating in the multisector workforce environment.

MULTI-ASSOCIATION RESPONSE

As we noted in our January 31, 2006 comments, most companies that serve as government contractors already have extensive systems in place that address ethical standards and behaviors for their employees. Companies working with government agencies in a multi-sector workforce environment have developed an increased level of sensitivity to appropriate standards of business conduct. We recognize that the government's standards of conduct and training are different from contractor standard of conduct and training; both government and industry would benefit from a greater understanding of each other's obligations and implementing actions, although we do not believe that such benefit can only be obtained by making the government's annual ethics training mandatory for contractor employees.

Recommendation 6: Enforcement.
In order to reinforce the standards of ethical conduct applicable to contractors, including those addressed to contractor employees in the multisector workforce, and to ensure that ethical contractors are not forced to compete with unethical organizations, agencies shall ensure that existing remedies, procedures and sanctions are fully utilized against violators of these ethical standards.

MULTI-ASSOCIATION RESPONSE

We support this recommendation for enforcement where the violations and appropriate remedial or punitive actions are determined after appropriate due process procedures.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 7 - FEDERAL PROCUREMENT DATA

Panel Recommendation

The Panel makes several specific recommendations to improve and expand upon the current Federal Procurement Data System–Next Generation (FPDS-NG), including:

Office of Federal Procurement Policy (OFPP) shall ensure that reporting of task and delivery order information reflects the level of competition.

- OFPP shall make sure that data reporting and validation procedures are the same across agencies.
- An Independent Verification and Validation should be undertaken to review validation rules.
- Congress should amend the OFPP Act to assign Head of Executive Agency responsibility for timely and accurate data reporting.
- Agencies should focus on training employees on accurate data reporting.
- Office of Management and Budget (OMB) should establish a standard operating procedure to designate procedures and allocate resources to test changes to FPDS-NG.
- Agencies should conduct internal reviews to compare FPDS-NG data to the contract file or order file.
- OFPP Interagency Contracting Working Group should address data entry responsibility for agency-wide contracts.
- Government Accountability Office (GAO) should audit the quality of FPDS-NG data as well as agency compliance with accurate and timely reporting.
- OFPP should require data reporting for orders under interagency and enterprise-wide contracts.
- FPDS-NG report provided to the Panel should be provided to the public.
- OFPP should study ways to enhance the information available on FPDS-NG.
- OMB shall ensure that agencies provide sufficient funds to finance data reporting systems.

MULTI-ASSOCIATION RESPONSE

We agree generally with the Panel's draft recommendations for improving the Federal Procurement Data System – Next Generation. We also agree with the Panel's findings that the FPDS-NG is beset by inaccurate and incomplete data and that efforts to improve the FPDS-NG should focus on timely, accurate, and complete data reporting. The specific steps laid out by the Panel appear to provide a reasonable approach to addressing many of the current problems with FPDS-NG.

As the Panel recognized, the Federal Funding Accountability and Transparency Act of 2006 (the Act) supersedes some of the Panel's recommendations concerning FPDS-NG. The problems with FPDS-NG and the need to improve the system will only be magnified in light of the passage of the Act, which was signed into law on September 26, 2006. The Act directs OMB to establish a publicly-available online database containing information about the award of federal contracts, grants, and loans. The online database prescribed by the Act will include the following information for each Federal award over $25,000, with certain exceptions for classified information and federal assistance payments made to individuals:

(1) the name of the entity receiving the award;

(2) the amount of the award;

(3) information on the award, including transaction type, funding agency, the North American Industry Classification System (NAICS) code or Catalog of Federal Domestic Assistance number (where applicable), program, source, and an award title descriptive of the purpose of each funding action;

(4) the location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country;

(5) unique identifier of the entity receiving the award and of the parent entity of the recipient, should the entity be owned by another entity; and

(6) any other relevant information specified by OMB.

This online database will consolidate data from various sources, including the FPDS-NG. Much of the information that must be in the online database required by the Act overlaps with information that is captured (or is supposed to be captured, as the case may be) by FPDS-NG. A complete and accurate FPDS-NG, therefore, is crucial to implementing the database envisioned by the Act, which must be up and running by January 1, 2008. Some have already suggested that the weaknesses of FPDS-NG, such as the incomplete and inaccurate information detailed in the Panel's report, could hinder OMB's efforts to implement the Act. Deficiencies in FPDS-NG, therefore, will only gain more attention going forward if not remedied, and any recommendations to improve FPDS-NG should focus on how FPDS-NG will be used to implement the online database required by the Act.

Notably, the Act also directs OMB to include information on subcontractors and subgrantees in the database by January 1, 2009. Data on subcontracts currently is not contained in FPDS-NG, but instead is reported in a different database, the Electronic Subcontracting Reporting System (eSRS), maintained by the Small Business Administration. The eSRS does not appear to capture all of the information on subcontractors required by the Act.

Finally, and most importantly, we believe it is imperative when considering changes to the FPDS-NG and any federal procurement data system that the proprietary and commercial information of offerors and contractors be protected from unauthorized and unlawful disclosure. It is of utmost importance that the current laws governing the protection of such information remain in effect and that the government continues to vigorously enforce those laws in order to protect the information. All bid and proposal information must be protected in accordance with 41 U.S.C. § 423, FAR 3.104-4, *Disclosure, protection, and marking of contractor bid or proposal information and source selection information*, FAR 14.401, *Receipt and safeguarding of bids*, and FAR 15.207, *Handling proposals and information*. Likewise, contractor commercial and proprietary information – which is exempt from disclosure under the Freedom of Information Act, including unit price information under the exemption in 5 U.S.C. § 552(b)(4) – should be protected from disclosure. Just as the interests of transparency and accountability are furthered by disclosure of award information through an effective procurement data system (the purpose of the FPDS-NG and the Act), the interests of robust competition in the government space will only be accomplished through protecting the proprietary information of competitors and contractors.

About AIA
The Aerospace Industries Association represents the nation's leading manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial vehicles, space systems, aircraft engines, missiles, materiel, and related components, equipment, services, and information technology. The association, originally known as the Aeronautical Chamber of Commerce, was founded in 1919 with a charter membership of 100 "to foster, advance, promulgate and promote: aeronautics, and "generally, to do every act and thing which may be necessary and proper for the advancement" of American aviation. Early members included such aviation pioneers as Orville Wright and Glen H. Curtiss, as well as representatives of major aircraft manufacturing units in the United States.

About CSA
By way of background, CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to Federal, state, and local governments. CSA members perform over $40 billion in Government contracts and employ nearly 500,000 workers, with nearly two-thirds of CSA companies using private sector union labor. CSA members represent the diversity of the Government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HubZone, Native American owned firms and global multi-billion dollar corporations. CSA promotes Excellence in Contracting by offering significant professional development opportunities for Government contractors and Government employees, including the only program manager certification program for service contractors. For more information on CSA, go to: www.csa-dc.org.

About EIA
EIA, headquartered in Arlington, Va., comprises nearly 1,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. The Alliance is composed of four sector organizations: the Electronic Components, Assemblies and Materials Association; the Government Electronics and Information Technology Association; the JEDEC Solid State Technology Association; and the Telecommunications Industry Association.

About GEIA
The Government Electronics & Information Technology Association (GEIA) promotes the interests of the U.S. electronics, communications and information technology industries with regard to government markets, requirements, and technical standards. GEIA represents companies that create and apply innovative products, services, practices, technologies and integrated solutions to meet government needs. Our activities encompass most business disciplines of the government electronics, communications and information technology industries, including market planning, forecasting, manufacturing, procurement, support services, standards, and government specifications. GEIA programs include ongoing interaction with Congress and civil and military agencies of the Executive Branch.

About ITAA
Founded in 1961 as the Association of Data Processing Services Organizations (ADAPSO), the Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 325 corporate members throughout the U.S., and is secretariat of the World Information Technology and Services Alliance, a global network of 67 countries' IT associations. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, digital content, systems integration, telecommunications, and enterprise solution fields. For more information visit www.itaa.org.

About NDIA
NDIA is a non-partisan, non-profit organization with a membership that includes 1,285 companies and nearly 39,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Our members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors. For further information, visit our web site at http://www.ndia.org.

About PSC
The Professional Services Council (PSC) is the principal national trade association of the federal government's professional and technical services industry. PSC is widely regarded as the most respected and effective advocate and resource on the full scope of legislative, regulatory, and business policy issues affecting the federal services industry—both on Capitol Hill and throughout the federal agencies. PSC's more than 200 member companies are among the leading small, mid-tier, and large companies providing the full range of professional services to every federal agency. These services include, but are not limited to, information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services.

Mr. TOWNS. Thank you.

Let me thank both of you for your testimony.

Let me begin with you, Mr. Chvotkin. You oppose H.R. 3033 in its current form. That is my understanding, and you said you do not oppose a Government-wide data base on factual, Government-provided input. Then what needs to be done in order for you to come onboard?

Mr. CHVOTKIN. Well, I think Mr. Davis pointed out some of the issues that are of interest and concern to us where I think real progress could be made. I mean, there is a lot of information that is dispersed throughout the Government, and we don't mind bringing existing information into a more convenient form, readily available to the contracting officers so that they are not out there searching for relevant information. There is already significant information in the online representations and certifications system that lists information about a company's compliance with numerous laws. Mr. Davis mentioned the suspension and debarment list. There is other debarment information. So bringing those kinds of factual informations from a Federal level together into a single data base we have no objection to.

Mr. TOWNS. You know, New York City already has a data base, of course. Are you familiar with that one?

Mr. CHVOTKIN. I am, sir.

Mr. TOWNS. Why don't we just copy that?

Mr. CHVOTKIN. Well, I am familiar with it. Much of the information asked of Vendex, both the companies and principals, is very similar to the information that is already available at the Federal level. The Vendex system asks for the information that maybe should be asked at the Federal level, and it has other questions that may not be appropriate. I think it is an appropriate model.

There are some legitimate concerns raised about the timeliness of information, how information may be stale, making sure that contractors, or anybody who has information in that data base, just like your personal credit reporting, you have an opportunity to look at it, submit comments. That protection needs to be in there. So if the Vendex data base model is a starting point, we understand that and we could be supportive of it.

Mr. TOWNS. All right.

Mr. Amey, I understand you get a lot of your information about lawsuits from SEC filings where companies are required to disclose information on pending cases. Could we just write a provision in H.R. 3033 saying that if a lawsuit is required to be disclosed to the SEC, it is required to be included in the contractor data base also?

Mr. AMEY. Mr. Chairman, I think that is a wonderful solution, because that has already been vetted and debated for many years, and I know that clause that discusses what legal proceedings have to be disclosed has been a huge, debatable issue. There are lawsuits over it. Many companies have fought it.

I think the tide has turned where companies have erred on the side of caution in wanting to disclose information to the SEC, because they are fearful of what their shareholders will do. That would be a wonderful way to take a look at this.

But, then you also need to look at, I think, some additional items in addition to what is included in the SEC data base, because that

is not picking up administrative agreements, it is not picking up contracts terminated for default, and that is where the other language in H.R. 3033 picks up to ensure that the Government has as much information to make its responsibility determination as they can.

Mr. TOWNS. Right. On November 14, 2007, the FAR Council issued a proposed rule that would make a number of changes aimed at reducing fraud in Government contracting. First, it would require contractors to notify the Inspector General when they have reasonable grounds to believe one of their employees has committed a violation of criminal law in connection with their Government contract.

Second, it would add failure to disclose such violations as a cause for suspension and debarment.

Third, it would require full cooperation with Government audit and investigative agencies.

I would be interested in hearing your views on this proposed rule.

Mr. AMEY. The Project on Government oversight submitted a public comment supporting the rule, but also asking that it be expanded to include the other types of issues and the other misconduct that has been proposed in H.R. 3033. The one fear—and I have read other comments that have been submitted—is the same issue that Representative Davis has raised on the allegations. Even the clarity of the definition for when a violation is known creates some problem. Even as a lawyer, it creates a problem for me as far as work product issues and whether you are being held guilty before you prove your innocence. But overall, I think that information is necessary to disclose to contracting officers and to the Government to make sure that we are not awarding contracts to risky contractors.

We can debate on what is included at what point. I think final adjudications is a nice way to go, but there are many different types of misconduct that aren't being captured at all, whether in the performance retrieval system—and we provide grades in that throughout that system. Why can't we do the same thing with some type of responsibility grade so that when a contracting officer can go to one specific location and see a grade for a contractor and be able to factor out right away whether they are risky or responsible? If not, we might as well take the responsibility determination requirement right out of the law and we might as well do away with it, because currently the suspension debarment list doesn't get that information, and neither does the excluded parties list or the performance information retrieval system, so at that point we have a huge gap of information that is currently not being presented to the government.

Mr. TOWNS. The light is on red, but very quickly, Mr. Chvotkin, what do you think of that rule?

Mr. CHVOTKIN. We also commented extensively on that regulation. We are a strong supporter of mandatory, Government-wide ethics programs that are suitable to the size and the nature of the business that companies provide to the Federal Government. We were troubled by the mandatory disclosure. We have not been con-

vinced that changes to the current voluntary disclosure process couldn't improve the process considerably.

Like Mr. Amey, we raised a number of questions about definitions. As I said at the beginning, definitions and words are so important in this business.

In the area of cooperation, there are already Federal laws regarding cooperation, and we recognize the value of doing that. Here, again, companies have some due process rights, and we weren't sure that the regulations, themselves, clearly recognized those due process rights.

Mr. CHVOTKIN. And if I may add one thing, that rule primarily came from the Department of Justice, who feels they don't have the tools necessary in their toolbox——

Mr. AMEY. Right.

Mr. CHVOTKIN [continuing]. In even receiving voluntary disclosures from the contractors to be able to prevent and prosecute fraud, so it wasn't something that came from POGO or the private sector. This is something where the DOJ is saying, "hey, we don't have enough in our toolbox to be able to go after some people, and we need those tools." I think that is vital.

Mr. TOWNS. Right.

Mr. Murphy.

Mr. MURPHY. Thank you very much, Mr. Chairman. Thank you both for your testimony.

Mr. Amey, I want to get at, if I can, some of your inner turmoil over 3928. I think what you posited was a challenge in reconciling the benefit of the more transparent information regarding how much private companies are pulling out of these contracts and what you term as private information.

I certainly understand that the proprietary nature of salary data, of profit numbers for truly private companies that are deriving their investment sources from private individuals and private companies. In this case, this bill—and I think we had some good suggestions on how to, maybe, further limit it today—is getting at companies that get the lion's share of their investment of their revenue from the taxpayers, from the citizens of the United States. I don't look at that in the same way that I look at private proprietary data in truly private sector companies.

So I guess I want you to just elaborate on sort of why you come to a less than conclusive statement in support of this bill.

Mr. AMEY. Thank you for the opportunity. I think in our written testimony we called it tepid. Obviously, we are always supportive of disclosure. I am afraid of the floodgates that would open, and I don't mean to make the industry's argument in this case, but I think the limited nature of the bill makes it more than adequate and appropriate bill to sign on to.

I have additional problems with the executive compensation bills overall, and I think that is also why we are tepid, because currently, as was discussed earlier with the first panel, there are caps. The Government sees the information. DCA audits the information. So you are creating a bill that would just be publicly available on the public procurement data system, but I have more problems with the fact that it is limited to the top five executives. So at the part where you get to executive six, all of the sudden that contrac-

tor can fully bill the Government and the taxpayer for that entire salary and not the capped $597,000.

So I don't mean to throw the baby out with the bath water to get to greater reform when it comes to executive compensation, but I think the Government has the necessary tools, and it collects the information that they need to ensure that private contractors aren't taking advantage of taxpayers with those salaries, even the private contractors that are in cost reimbursement type contracts.

Mr. CHVOTKIN. I believe there may be an incorrect statement. I don't want to leave the record. No salary in excess of the compensation amount is reimbursable. It doesn't matter whether you are the 1st, the 6th, the 26th, or the 106th. The Government on cost reimbursement contracts is not—the contractors cannot bill the Government for that salary. Doesn't matter.

Mr. MURPHY. Let me then ask the next question to both of you. It is my understanding from the previous panel that compensation limit applies to cost contracts, not to fixed-price acquisition contracts; is that correct?

Mr. CHVOTKIN. That is correct, sir.

Mr. MURPHY. And do we have a sense as to what percentage right now of competitive contracts are fixed-price acquisition contracts?

Mr. AMEY. There was a recent study that was done—I think I cite to it in my testimony—where, I think, they came up with a figure of the majority of contracts—well, not the majority, but 40 percent of contracts—were in the cost reimbursement section, and that was also one of the Advisory Panel's recommendations: We need to get into more competitive fixed-price contracting. The percentage of fixed-price contracting is a lot lower. So it would apply to more contracts than in the fixed-price sector.

Mr. MURPHY. Mr. Amey, doesn't it concern you that if you are talking about such a large number of projects not being subject to that compensation limit, that if on fixed-price acquisition contracts we don't have a compensation limit—I mean, what is our control on those contracts with regard to compensation?

Mr. AMEY. When they are fixed-price contracts, the control is just the overall result. Did you feel you got a fair and reasonable price for the overall contract? And you are just looking at the bottom-line figure.

Mr. MURPHY. So let me just ask a question to both of you, the final question to both of you. Let's say in a hypothetical we have a $10 million contract and we found out through some means a year later that there was a $3 million salary to the executive of that company. Wouldn't that be incredibly relevant data to provide a red flag that what we thought was a reasonable price, what we thought was the best deal we could get, actually wasn't, because somehow that company found a way to pay its executives much more than would be reasonable?

It seems to me that the amount of money that you are taking off the top of the contract is incredibly relevant in determining whether or not we got as good a deal as we though we were going to get at the outset.

I will ask that to both of you.

Mr. AMEY. Well, the executive compensation threshold is also proportional, so if they only have 85 percent of their work with the Federal Government, they can only charge out of that threshold 85 percent to the Federal Government, so it won't be all. Obviously, contractors find loopholes in every law that we pass and find their way around them, but I think there is adequate information currently with the Government that exposes the issue when it comes to the fact that it is reported to contracting officers and DCA is checking and enforcing it.

So, I don't know what we win in the disclosure world, but overall to have it there POGO would support it.

Mr. CHVOTKIN. Thank you, sir. Let me just make sure, for clarity, the contract price does not equal company profits or salary, so there is a lot of components that go into price. And, on the fixed price, we hope that there are strong supporters of competition. We would hope that the competitive environment would help ensure that the Government is getting a fair and reasonable price for the goods and services that it is contracting for, and the Government would retain its rights across evaluated companies to know where that information was coming from. So, they do have tools to get at that. We want to be very careful about opening up repricing fixed-price contracts. I think that is a very dangerous precedent.

Mr. MURPHY. Congresswoman Maloney from New York.

Mrs. MALONEY. Thank you, Mr. Chairman, for your leadership on these issues.

I would like to ask Mr. Chvotkin, on your comments on due process protections, I believe the safeguards that exist in the current FAR are unchanged in H.R. 3033. In your testimony today you have repeatedly said that this impairs due process protections in some way.

Can you explain in detail how H.R. 3033 changes current FAR due process protections, especially in view of the fact that the bill has provisions and provides for rebuttal and allows the contractor to show mitigating or remedial factors?

Mr. CHVOTKIN. Yes, ma'am. Thank you.

As you point out, today, with respect to the past performance information retrieval system, the Government's twin data bases that are collecting information on ongoing work, that kind of information, the contractor is given the opportunity to review the file and to submit comments, very much like the fair credit reporting that applies to you and I in the private sector information.

That same kind of opportunity to review and comment does not exist today in FAR for other kinds of information that the Government may have. Your bill does provide for some of that kind of due process, and we strongly support that. It is to make sure that it covers across the universe of information that we are going to collect from the data base. If the bill does that in its final form, we would be supportive of it.

Mrs. MALONEY. Well, specifically, if you could get back to the committee how you would propose that this answers it, it seems to me that it does have room or provides for rebuttal, mitigating, remedial factors, and a response from the contractor.

Mr. CHVOTKIN. Yes, ma'am, I would be happy to get back to the committee with those details.

Mrs. MALONEY. And on the issue of objective criteria, which you brought up, why would you say H.R. 3033 does not establish objective criteria? H.R. 3033 uses the FAR standards and clearly states the standard of the same offense or similar offense twice within a 3-year period. What objective criteria would you suggest?

Mr. CHVOTKIN. It is the issues of the allegations. It is the unsupported audit reports. It is the GAO——

Mrs. MALONEY. What do you mean unsupported audit reports? Audit reports are audit reports. What is an unsupported audit report?

Mr. CHVOTKIN. An unsupported audit report would be the initial conclusions of a DCA auditor that has not been reviewed and commented on by the contractor and a decision made by the contracting officer. That would be an unreviewed, unsupported audit report. In our view, simply because an auditor can raise questions about cost, legitimately so, there are other factors that go into the—other information that goes into the final determination of whether the costs are legitimately questioned or doubted, and if so at what stage of the process that information comes forward.

This committee addressed that——

Mrs. MALONEY. So you would support it if it had comments from the contractor on the auditing and the decision by the contract officer?

Mr. CHVOTKIN. Yes, ma'am. In fact, in the final version of legislation that this committee approved and the House passed early last year by Mr. Waxman, H.R. 1362, that same issue was addressed, and the committee concluded—and the House adopted provision that provides for a final audit report, which includes the recommendations of the auditor, the information response from the contractor, and a final decision by the contracting officer. With that stage, no objection. That is the final report.

Mrs. MALONEY. And also on the issue of complex legal issues, you said that H.R. 3033 would require contracting officers to make complex judgments, but wouldn't you say that contracting officers now already have to make a lot of pretty very complex judgments? And are you saying more comprehensive data in a single place would make their job harder or their judgments more difficult to make?

Mr. CHVOTKIN. No, I am not saying that at all. On the contrary. We support having the factual information that we talked about more conveniently available to a contracting officer. The Government already has the data, so we see no reason not to make that more readily available. The factual judgments or the complex legal judgments that some have proposed—again, it is not in 3033, but my caution here is that some are asking contracting officers, whose primary mission is to evaluate the opportunities for buying goods and services, to decide whether a company is in violation of the labor laws or the environmental laws or the tax laws. They are not trained to do that. They don't have sufficient information. Those are the complex legal questions that we are concerned about.

Again, we are not concerned about having information. If there is a conviction by the Justice Department for tax evasion, that information ought to be available to the contracting officer.

Mrs. MALONEY. Are you saying that if a contractor doesn't pay their taxes that should not be part of the information? I mean,

there have been reports on how many people are getting Government contracts that aren't paying their taxes.

Mr. CHVOTKIN. There are a lot of reports of a lot of things going on. If there is a finding of tax liability and the contractor is not——

Mrs. MALONEY. Finding by whom? The IRS?

Mr. CHVOTKIN. By the IRS. They are the agency that the Congress has charged with responsibility for implementing the tax laws. The IRS concludes that there is a tax liability that is not subject to an agreement or offset, absolutely, that information should be made available to the Government.

Mrs. MALONEY. Finally, are you aware that the disclosure standards in H.R. 3033 closely mirror the standards in the private sector for the construction industry? I have reviewed construction industry-wide forms. They are qualifications disclosure forms for construction general contractors and subcontractors, consensus forms, 221 and 721. These documents from the private sector ask for comprehensive contract compliance and legal compliance going back 5 years. Why wouldn't or shouldn't the Federal Government, Federal purchasing function, mirror the best practices of the private sector?

Mr. CHVOTKIN. I am not familiar with those documents in the construction industry.

Mrs. MALONEY. OK. Can we get them to you and could you get back to us in writing?

Mr. CHVOTKIN. Yes, ma'am. It would be my pleasure.

Mrs. MALONEY. We have to go vote, so I would like to reserve the opportunity to put other questions to you in writing. I know the chairman is telling me my time is up and has been up for a long time, so thank you, Mr. Chairman.

Mr. TOWNS. And we will hold the record open to receive that information. Thank you very much.

At this time the committee is adjourned.

[Whereupon, at 12:27 p.m., the subcommittee was adjourned.]

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