

Note to Readers

The Acquisition Advisory Panel is posting the draft of its report for public comment. The findings and recommendations in the report have been adopted over the 18 months of the Panel's work. These collective findings and recommendations have been incorporated into the attached draft of the Panel's report and will not change. However, the Panel is providing the draft for comment to identify any errors of fact or problems with readability. While the Panel is not required to accept further public comment, we have tried to provide maximum transparency into the Panel's processes through 31 public meetings and through posting materials on our website. ***Comments on this draft should be submitted by January 5, 2007*** and should be addressed to the Panel's Executive Director/Designated Federal Officer by e-mail at Laura_G._Auletta@omb.eop.gov or FAX to (202) 395-5105. Comments submitted through regular mail should be addressed to Laura Auletta, Office of Federal Procurement Policy, 725 17th Street NW, Room 9013, Washington, DC 20503.

The Panel is grateful to the witnesses who testified before the Panel and to the many members of the public who submitted statements. The insight gained from the witnesses and the exchange of views has been invaluable in shaping this report. 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.

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**REPORT OF THE
ACQUISITION ADVISORY PANEL**

TO THE

OFFICE OF FEDERAL PROCUREMENT POLICY

AND THE

UNITED STATES CONGRESS

December 2006

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INTRODUCTION

The Panel Project

Background

The Federal government is the single largest buyer in the world. Each year Federal agencies spend nearly \$400 billion a year for a range of goods and services to meet their mission needs.¹ Some acquisitions are highly specialized – advanced fighter jets, precision munitions, nuclear submarines – for which there is no non-governmental or commercial demand. Other goods and services are readily available and purchased from the commercial marketplace. From laptop computers and off-the-shelf software to information technology (“IT”) consulting services, software development, and engineering services. Federal agencies rely upon common commercial goods and services to conduct their business. In addition, commercial products may be modified to meet government needs. In all of these circumstances government acquisition process intersects with the private sector and the Federal government can benefit from knowing how commercial buyers approach the acquisition process.

Importance Of The Commercial Market To Government Acquisition

Effective and efficient access to products and services available in the commercial market can help government agencies to achieve their various missions. The pace at which technology advances requires that government have access to commercial technology and technology based services. Agencies have a significant interest in acquiring such products and services at a reasonable price and without undue administrative burden. Of course, in light of the involvement of public funds, acquisition must be conducted in a manner that is fair and furthers the public interests in transparency and accountability.

Over the last two decades, significant study and effort has been dedicated to the acquisition of goods and services available in the commercial market by the federal government. For example, in 1986, the Blue Ribbon Commission on Defense Management highlighted the need for DOD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DOD contracts.²

Congress later chartered the “Section 800 Panel”³ to assess laws affecting defense procurement. In early 1993, the Section 800 Panel proposed a variety of reforms, including: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; and an expanded exemption for “adequate price competition” in the Truth in Negotiations Act.

¹ See <https://fpds.gov>; see also <http://www.whitehouse.gov/omb/procurement/index.html>.

² The President’s Blue Ribbon Commission on Defense Management (The Packard Commission), A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: The Packard Commission, June 1986).

³ The Section 800 Panel was chartered by Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

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Following the efforts of the Section 800 Panel, Congress enacted a series of procurement reforms in the mid-1990s that were intended to enable the government to streamline the acquisition process and to obtain greater access to products and services available in the commercial market. These reforms primarily were introduced through the Federal Acquisition Streamlining Act of 1994 (“FASA”)⁴ and the Federal Acquisition Reform Act of 1996⁵ (“FARA”).

FASA and FARA required, and were followed by, various changes to the Federal Acquisition Regulation (“FAR”). For example, FASA introduced a strong preference for the acquisition of commercial items.⁶ The statutory definition of commercial items refers to categories of products and services.⁷ The same is true of the regulatory definition in the FAR.⁸

Since the FASA and FARA reforms, agencies have sought to purchase commercial items and otherwise rely on the techniques addressed in those statutes with varying degrees of success. Those efforts were the subject of considerable analysis, including by GAO in reports regarding use of the Multiple Award Schedule, task and delivery order contracts, and interagency contracting.

Congress enacted further reforms. For example, Congress passed the Services Acquisition Reform Act of 2003 (“SARA”), which introduced other reforms related to commercial items as well as to the acquisition workforce. SARA also chartered this Panel to study current laws, regulations, and government-wide acquisition policies with regard to commercial practices, and to recommend appropriate reforms.

Trends In Acquisition

Since the FASA and FARA reforms were enacted a decade or more ago, a number of events have affected government contracting. For example, the events of September 11, 2001, and subsequent conflicts in Afghanistan and Iraq, as well as the Katrina aftermath, have influenced what the government buys and how much it spends. From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75% from \$219 billion to more than \$380 billion.⁹

Over the last decade, a number of trends have affected government contracting. Services now comprise a greater percentage of the government’s acquisition budget. Between 1990 and 1995 the government began spending more on services than goods.¹⁰ Currently, procurement

⁴ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁵ Pub. L. No. 104-106, 110 Stat 186 (1996). FARA was later renamed the “Clinger-Cohen Act.”

⁶ See 10 U.S.C. § 2577 (codifying preference).

⁷ See 41 U.S.C. § 403(12).

⁸ See FAR 2.101.

⁹ “Trending Analysis Report since Fiscal year 2000,”

http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

¹⁰ Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995.

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spending on services accounts for more than 60% of total procurement dollars.¹¹ In FY 2005, DOD obligated more than \$141 billion on service contracts, a 72% increase since FY 1999.¹²

While procurement spending has increased, products and services often are purchased through relatively large orders under contracts with broad scopes of work. Contracting agencies often rely on indefinite delivery contracts, such as interagency contracts, under which orders are issued for products or services. Orders under the types of contracts discussed above often can be larger in amount than individual contracts. Orders under such contract vehicles can be significant in terms of size, and may exceed \$5 million. Purchases under the Multiple Award Schedules also have more than doubled in value over the last decade.¹³

There also are fewer acquisition professionals in the government to award and administer contracts as the government's contracting workforce has reduced in size over the last decade. The federal acquisition workforce has declined by nearly 50 percent since personnel reductions in the mid-1990s.¹⁴ Despite recent efforts to hire acquisition personnel, there is an acute shortage of federal procurement professionals with between five and 15 years of experience. This shortage will become more pronounced in the near term because roughly half of the current workforce is eligible to retire in the next four years.¹⁵

Over the last decade or so, consolidation has occurred in certain parts of industry that contract with the government, including but not limited to aerospace and defense. As a result, certain contractors are now performing work that previously was performed by other companies.

In sum, a variety of trends and factors have influenced government contracting and continue to do so. Effective and efficient access to the commercial market place, and will continue to play, a major role in helping to enable agencies to purchase the products and services they need.

Current Commercial Practices: What Are They?

Because Congress tasked the Panel¹⁶ to assess current laws, regulations, and government-wide acquisition policies with a view toward "ensuring effective and appropriate use of commercial practices and performance-based contracting," the Panel considered it critical to identify current commercial practices.

¹¹ Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

¹² See Government Accountability Office, *Defense Acquisitions: Tailored Approach Needed to Improve Service Acquisition Outcomes*, GAO-07-20 (Nov. 2006), at 1.

¹³ See General Accounting Office, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OCG-00-7 (Mar. 7, 2000), at 6-7.

¹⁴ Report on the Federal Acquisition Work Force: Fiscal Years 2003 and 2004 (Federal Acquisition Institute Report 2003-2004), Executive Summary, p. vii.

¹⁵ Testimony before the Acquisition Advisory Panel of S. Assad, Director, Defense Procurement and Acquisition Policy, June 13, 2006, p. 57-58 (testimony on file with the Panel).

¹⁶ See Pub. L. No. 108-136, sec. 1423(c)(1).

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Rather than make assumptions regarding current commercial practices, the Panel sought input. Specifically, over the course of its eighteen months of study, the Panel broadly solicited and received substantial testimony and other input from government, industry, and other members of the public regarding acquisition practices. As part of its study, the Panel also issued questionnaires to private sector buyers and government buying agencies to assess current practices and to identify potential areas for improvement in the way the government buys.

The Panel thus was able to conduct its assessment of current laws, regulations, and government-wide acquisition policies with the benefit of an understanding of current commercial practices, as described by industry. Industry input included private sector buyers with experience in large, complex acquisitions of services, such as information technology services. Such buyers described the competitions that they conducted, and their efforts to ensure that prices were fair and reasonable. It is clear from the many private sector buyers who testified before the Panel that the bedrock principle of current commercial practice is competition.

The Panel also benefited from the experience and insights provided by government acquisition personnel regarding the various practices that were introduced or encouraged by procurement reforms in the last decade. The Panel inquired about what agencies were doing, what worked, and what did not. The inputs described above provided critical information for the Panel's work.

Commercial Purchases and Practices: The Special Challenge Of Government

Our Supreme Court has observed that when the government enters the commercial market, it generally subjects itself to the same contract rules as private parties.¹⁷ Although there are exceptions set forth in federal statutes regulations and the Constitution, this suggests that the Federal government take advantage of commercial practices where possible.

Due to its special status as the sovereign, and in light of the statutes and regulations that apply to government contracting, however, government agencies are not in a position to take full advantage of the practices of the private sector. For example, agencies generally may not award contracts based solely on consideration of a company's prior performance or enter into long-term strategic agreements. Agencies are subject to appropriations laws, and may be limited to use of annual appropriations. As discussed above, agencies also are required to abide by competition statutes and regulations.

On the other hand, government can take advantage of many approaches used in the commercial market. Doing so can foster effective and efficient access to products and services.

The Panel has made an effort to achieve balance, recognizing the time pressures on the acquisition system, but also has tried to implement current commercial practices regarding

¹⁷ *Lynch v. United States*, 292 U.S. 571, 579 (1934). See also *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000).

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competition, and to provide transparency and accountability necessary to expenditure of taxpayer funds.

Report Structure

This Report is divided into seven Chapters. Each chapter sets forth the background of the issues, followed by the Panel's findings and recommendations. We have provided a relatively detailed Executive Summary that explains the Panels findings and recommendations – as well as the Panel process. However, the Executive Summary is not the Report. The chapters are as follows:

Chapter 1 – Commercial Practices

Chapter 2 – Improving Implementation Of Performance-Based Service Acquisition (PBSA) In The Federal Government

Chapter 3 – Interagency Contracting

Chapter 4 – Small Business

Chapter 5 – The Federal Acquisition Workforce

Chapter 6 – Appropriate Role Of Contractors Supporting Government

Chapter 7 – Report On Federal Procurement Data

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EXECUTIVE SUMMARY

As the Panel's Findings and Recommendations took root in its working groups and were presented to and debated and adopted by the full Panel during public meetings, certain themes began to emerge and intersect across the working groups. This executive summary does not list all of the findings and recommendations. Instead, it is intended to share those key themes that became apparent over the course of the Panel's deliberations. For clarity and consistency, this material is presented in accordance with the Panel's statutory charter.

I. Statutory Charter: Ensure Effective And Appropriate Use Of Commercial Practices

While nobody expects the government to ever be a truly commercial buyer given Constitutional constraints on funding, the need to be accountable for the expenditure of public funds, the statutory constraints aimed at providing full and open competition, and achievement of certain social and economic objectives, the Panel's many commercial sector witnesses echoed recurring themes that could be adopted by the government.

A. Enhance Competition

1. Findings

Requirements Definition is Key to Achieving Benefits of Competition. Commercial firms testifying before the Panel described a vigorous acquisition planning phase when buying service solutions. Acquisition process governance is considered of equal importance to selecting the right contractor. They obtain "buy in" of the business case from all organizational stakeholders. These organizations invest the time and resources necessary to clearly define requirements first, in order to achieve the benefits of competition in an efficient market: high quality, innovative solutions at the best prices. They apply multi-functional resources to perform ongoing rigorous market research and are thus able to provide well-defined performance-based requirements conducive to a best value solution at fixed prices.

Government Frequently Fails to Invest in Requirements Definition. Public sector officials and representatives of government contractors testified that the government frequently is unable to define its requirements sufficiently to allow for fixed price solutions. Ill-defined requirements also fail to produce meaningful competition for services solutions, relying instead on time and materials ("T&M") contracts based on fixed hourly rates. The causes for this failure to define requirements were described by many witnesses, including the Government Accountability Office ("GAO") and agency inspectors general ("IGs"). Major contributors to this problem are a culture focused on "getting to award" and budgetary time pressures combined with a strained workforce and lack of internal expertise in the market. Additional problems associated with unclear roles and responsibilities in the use of interagency or government-wide contracts, another area under this Panel's statutory purview, also contribute. The government's difficulties in defining requirements are well documented. Recently, the GAO and IGs have found that orders under interagency contracts frequently contain ill-defined requirements.

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2. Recommendations

The Panel's recommendations seek to improve the environment for healthy competition using a 360 degree approach, providing tools to enhance transparency, requirements analysis and definition, requirements for greater use of competition, and positive pressures, in the form of protest authority and transparency that will result in agencies applying an appropriate level of discipline to the structure of their acquisitions.

The Panel could not make recommendations regarding competition without an aim toward nurturing a healthy environment conducive to achieving the benefits of competition. Therefore, the Panel recommends that agencies establish centers of expertise in requirements analysis and definition, and obtain express advance approval of the requirements from the key stakeholders (e.g., program manager and contracting officer) to closely resemble the buy-in obtained in commercial practice. Additionally, the Panel recognizes a need for a centralized source of market research information to facilitate more robust but efficient acquisition planning. Therefore, the Panel recommends that the General Services Administration ("GSA") 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. In addressing the GAO and IGs concerns about ill-defined requirements in orders under interagency contracts, the Panel recommends criteria for upfront requirements planning by ordering agencies before access to vehicles is granted.

Specific to the Panel's charter to provide recommendations for the efficient and appropriate use of performance-based acquisition ("PBA"), the Panel made several recommendations to the Office of Federal Procurement Policy ("OFPP") to provide more guidance on the use of this technique in order to assist agencies with defining their requirements and establishing measurable performance standards and appropriate contract incentives. A recommendation for a formal PBA educational certification program for technical representatives and other acquisition team members will enhance the efficiency and effectiveness of analyzing and describing requirements.

B. Encourage Competition

1. Findings

Commercial Buyers of Services Rely Extensively on Competition. The numerous commercial organizations invited to address the Panel expressed their strong preference for head-to-head competition. They use rigorous market research and requests for information ("RFIs") to identify capabilities and suppliers. They provide significant opportunities for information exchange with potential suppliers and typically ensure that they retain at least two or three suppliers throughout negotiations. Sole source engagements are rare. Even after the contract is signed, competition remains a distinct possibility. These commercial buyers reserve the right to re-compete or bring the service in-house before the contract has run full term. Six Sigma-style continuous monitoring and evaluation is used to measure performance and suppliers face the prospect of losing business if performance doesn't meet targets or if technology or strategic

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direction changes. Finally, these buyers use relatively short-term contracts, especially for services that involve complex technology requirements.

Competition for Government Contracts as well as its Approaches to Acquiring Commercial Services Differs Significantly from Commercial Practice. The Extent to which Each of these Approaches Achieves Competition Varies. Even where the government attempts to adopt commercial approaches, competition for government contracts differs in significant respects from commercial practice. Contributing factors include fiscal constraints imposed by the annual appropriations process, the need to accomplish urgent missions with limited time and personnel, policies and statutory requirements requiring transparency and fairness in expenditure of public funds, use of the procurement system to accomplish a host of government social and economic objectives, and the audit and oversight process designed to protect taxpayers from fraud, waste, and abuse. But there is an unequivocal mandate for competition that runs through the statutes and regulations governing federal procurement. Yet, the Panel found government implementation of competition varies from very structured processes on the one hand, to ill-defined requirements and minimal, if any, head-to-head competition on the other.

Comparing the emphasis on competition in commercial practice with actual government-wide competition statistics, the Panel found that nearly one-third of the government's dollars obligated in fiscal year 2004 was awarded without competition accounting for \$108 billion. About one-fourth, or \$98 billion was awarded noncompetitively in fiscal year 2005. Even when competed, the percent of dollars awarded when only one offer was received has doubled from 2000 to 2005. Spending on services was \$216 billion in fiscal year 2004 and \$220 billion in fiscal year 2005, accounting for more than 60% of total obligations for each year. At least 20% to 24% of these services were awarded non-competitively in fiscal years 2004 and 2005. However, the Panel believes that the amount of non-competitive awards is underreported for orders under multiple award contracts available for interagency use. This lack of transparency is significant given that 40% or \$142 billion of all government obligations were spent under interagency contracts in 2004. But even without visibility into the level of competition on orders, there is significant evidence to give cause for concern. Both the GAO and the DoD IG have found that agencies continue to award a large proportion of orders for services noncompetitively. The GAO placed interagency contracts on their High Risk Series for 2005, finding, in part, that the orders under these contracts frequently fail to comply with competition requirements.

In addition to the concerns regarding the level of competition for orders under interagency contracts, the Panel also has significant concern regarding the level of meaningful competition achieved. Interagency contracts are generally indefinite delivery/indefinite quantity and, based on a statutory preference, generally result in multiple awards. Where services are sought, the initial competition for these contracts typically includes a loosely defined statement of the functional requirements in the solicitation, focusing on hourly rates for various labor categories, with the expectation that more clearly defined requirements will be provided at the order level where more meaningful competition will occur. However, the Panel heard testimony and reviewed GAO and IG reports describing ill-defined requirements at the order level. Costly and complex services are procured using orders under these contracts. Of the \$142 billion obligated

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under interagency contracts in fiscal year 2004, \$66.7 billion was awarded in single transactions exceeding \$5 million, with services accounting for 64% or \$42.6 billion. For fiscal year 2005, interagency contract obligations totaled \$132 billion with \$63.7 billion in single transactions over \$5 million, with services accounting for 66% or \$42 billion.

So what has happened to dampen the expectation for this more rigorous competitive process at the order level? There appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment. For instance, except recently for DoD, it is not required that all eligible contractors be informed of an order requirement. Also, there is little transparency, even into sole source orders, as there is no public notification or synopsis requirement. Even where competition is used at the order level, there is no protest option for contractors under multiple award contracts, reducing transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade offs based on these criteria. And, finally, there is no requirement for a detailed debriefing at the task order level, denying contractors the opportunity to become more competitive on future order requirements.

But the Panel does recognize that these multiple award contracts provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs. Multiple award contracts are an effective tool allowing a strained acquisition workforce to meet mission needs in a streamlined fashion. However, there was never an expectation that these streamlined vehicles would not produce meaningful competition. Therefore, the Panel sought to achieve a balance – one that would introduce more pressure to encourage competition but not unduly burden these contracts as tools for streamlining. While nearly half of the dollars spent under these contracts are awarded in single transactions over \$5M, the majority of the transactions fall under this threshold. Therefore, in addition to its other recommendations, the Panel recommends applying additional requirements at this threshold, thereby impacting a significant dollar volume but not the majority of transactions.

2. Recommendations

To emphasize the importance of competition to achieving the best outcomes, the Panel recommends expanding government-wide the current DoD requirements to notify all eligible contractors under multiple award contracts of order opportunities or to ensure the receipt of three offers. The Panel also felt that while a pre-award notification of sole source orders might unduly burden the streamlined purpose of these multiple award contracts, post-award notification would suffice in providing transparency and the positive pressures that transparency imparts while bolstering public confidence. And for single orders with an expected value in excess of \$5 million where a statement of work is required, the Panel recommends that agencies 1) provide a clear statement of the requirements; 2) disclose the significant evaluation factors and subfactors and their relative importance; 3) provide a reasonable response time for proposal submissions, and; 4) document the selection decision to include the trade off of price/cost to quality in best value awards. Additionally, the Panel recommends post-award debriefings for disappointed

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offerors for orders in excess of \$5 million where statements of work and evaluation criteria are used in the selection. The Panel found that contractors expend significant bid and proposal costs in competing for individual orders under multiple award contracts and that debriefings encourage meaningful competition by providing disappointed offerors information that assists them in becoming more competitive on future orders. Concerned that the government is purchasing costly and complex services without a commensurate level of deliberation, transparency and review to ensure an appropriate level of discipline, the Panel recommends limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at \$5 million or less.

With respect to the GSA Federal Supply Schedules Program, the Panel recommends a new services schedule for information technology that would reduce the burden on contractors normally resulting from a lengthy process of negotiating labor rates with GSA that produce little meaningful price competition because services of this type are requirement specific. 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. This new services schedule would *require* competition at the order level.

C. Adopt More Commercial Practices

1. Findings

Commercial Buyers Rely on Competition for the pricing of goods and services, using well-defined requirements that facilitate competitive, fixed price offers. Commercial practice strongly favors fixed-price contracts in the context of head-to-head competition in an efficient market. In the absence of competition, which is relatively rare, commercial buyers rely on their own market research, and benchmarking, and often seek data on similar commercial sales. In some cases, they may obtain certain cost-related data, such as wages or subcontract costs, from the seller to determine a price range.

While commercial buyers avoid time-and-materials (“T&M”) contracts, viewing them as too resource intensive to monitor, they do use them for specific types of work, for instance, repair, building capital equipment designed in-house, and engineering/development work. When T&M contracts are used, commercial buyers plan for and apply the necessary in-house resources to effectively monitor these contracts.

2. Recommendations

The Panel’s statutory charge requires it to make recommendations with a view toward protecting the best interests of the Federal government. These recommendations seek to improve the government’s ability to establish fair prices. The Panel recommends restoring the statutory definition of commercial services found in the Federal Acquisition Streamlining Act (“FASA”). FASA intended for services that were offered and sold in substantial quantities in the commercial marketplace to be defined as commercial, thereby allowing more streamlined purchasing per FAR Part 12. This would mirror how commercial buyers purchase in an efficient market using

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competition. However, the regulatory implementation of the definition of commercial services allowed services not sold in substantial quantities in the commercial marketplace, or those “of a type,” to nonetheless be classified as commercial and acquired using the streamlined purchasing procedures of FAR Part 12. This can leave the government at a significant disadvantage by restricting the available tools for determining fair and reasonable prices when limited or no competition exists. Restoring the statutory definition would not preclude purchasing services not sold in substantial quantities in the commercial marketplace, but would require that such services be purchased using FAR Part 15 procedures.

The Panel also recommends specific regulatory revisions that would provide a more commercial-like approach to determining price reasonableness when no or limited competition exists. The recommendation revises what “other cost or pricing data” the contracting officer can request when no or limited competition exists for a commercial item or service. To protect contractors from contracting officers who might be tempted to default immediately to seeking cost data from the contractor before attempting other means to establish price reasonableness, the Panel has provided an order of precedence, favoring market research first and limited information from the contractor last. In no event may the contracting officer require detailed cost breakdowns or profit, and shall rely instead on price analysis. The contracting officer may not require contractor certification of “other cost or pricing data,” nor may it be the subject of a post-award audit or price redetermination.

The Panel’s concerns regarding the use of T&M contracts are based largely on price and contract management. However, in considering a recommendation in this area, we had to balance our concerns for the risk these contracts place on the government, especially given GAO findings that the government does not provide sufficient surveillance, with our concern to protect the government’s ability to perform its mission uninterrupted. The Panel, therefore, recommends enforcing the current policies limiting the use of T&M contracts. This includes the recently enacted Section 1432 of SARA that allows the use of these contracts using FAR Part 12 procedures if they are competed. The Panel also recommends, whenever practicable, establishing procedures to convert work being done on a T&M basis to a performance-based effort. Finally, to limit the government’s risk under these contracts, the government should not award a contract or task order unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the T&M resources and to provide effective government oversight of the effort. While a written public statement from association representing contractors advised the Panel to recommend repealing the competition requirement for commercial item T&M contracts under SARA, the Panel could not ultimately support this given its findings regarding competition.

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D. Equality Under Legal Presumptions

1. Findings

Government Contractors Not on a Level Playing Field. Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Current precedent provides that the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

2. Recommendation

In addition to protecting the best interests of the government, the Panel's statutory charter also called on it to make recommendations with a view toward ensuring fairness. The Panel recommends legislation to ensure that contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection 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. 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.

II. Statutory Charter: Review Laws And Regulations Regarding The Performance Of Acquisition Functions Across Agency Lines Of Responsibility, And The Use Of Government-Wide Contracts

A. Enhance Accountability And Transparency

1. Findings

Accountability and Transparency Lacking. Government-wide contracts are referred to in this report as interagency contracts and multi-agency contracts interchangeably. The performance of acquisition functions across agency lines is almost exclusively accomplished through the use of interagency contracts. The Panel finds that interagency contracts play a critical streamlining role, allowing agencies to achieve their missions with fewer resources devoted to procurement while affording the government the opportunity to leverage its buying power. But in 2005, GAO placed interagency contracts on its High Risk series due, in part, to ordering under these contracts that failed to adhere to laws, regulations, and sound contracting practices, and for a lack of oversight and accountability. GAO found that the causes of such deficiencies stem from the increasing demands on the acquisition workforce, insufficient training, and in some cases inadequate guidance. GAO also noted that the fee-for-service arrangement used for interagency contracts create incentives for the contracting agency to increase sales volume that results in too great a focus on meeting customer demands and not enough on complying with fiscal rules ordering procedures. GAO raised concerns that the lines of responsibility for key functions such

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as describing requirements, negotiating terms, and conducting oversight are not clear among: (i) the agency that manages the interagency contract, (ii) the ordering agency, and (iii) the end user.

The Comptroller General of the United States told the Panel that while it is known that these contracts are proliferating, outside of the GSA Schedules program and the Government-wide Acquisition Contracts (“GWACs”), there is no reliable data on how many such contracts exist, how much money is involved and the nature of the services acquired under them. As evidence of their popularity, interagency contract obligations in fiscal year 2004 totaled \$142 billion or 40% of the government’s obligations in that year.

With the proliferation has come extensive oversight by Congress, GAO, the IGs, outside organizations and the media of various federal agencies. Among the GAO and IG findings on ordering deficiencies is a significant failure to comply with competition requirements, use of ill-defined requirements and T&M pricing without sufficient government surveillance. Some GAO and IG findings identify “interagency assisting entities” that use interagency contracts. These interagency assisting entities provide fee-for-service acquisition support to other agencies. The Panel recommendations address these entities. The Panel also found a trend in agencies establishing enterprise-wide contract vehicles that operate much like an interagency contract, except their use is restricted to a single agency. While the Panel recognizes that some competition among agencies for these requirements is good, inefficient duplication threatens to dilute the overall value of interagency contracts to the government.

With the rapid growth in public funds spent under these interagency contracts and with the assisting entities that use them, the Panel believes it is critical to confront the lack of accountability and transparency to improve public confidence in these vehicles and ensure they fulfill their promise for reducing overall administrative costs to the government. It is notable that despite the significant dollars spent under these contracts, there is no consistent, Government-wide policy regarding their creation and reauthorization (or continuation).

2. Recommendations

Many of the issues identified by the GAO, agency IGs and Panel witnesses on the misuse of these vehicles are related to the internal controls, management and oversight, and division of roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of procedural requirements and transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, based on short term, transaction related benefits instead of on their ultimate value as a tool for effective government-wide strategic sourcing. The Panel recommends that under guidance issued by OMB, agencies formally authorize the creation or expansion of multi-agency contracts, enterprise-wide contracts, and assisting entities. The Panel’s recommendations maintain approval for the creation and expansion at the agency level (except for GWACs). The

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Panel provides a list of considerations to be included in this OMB guidance to address responsible management of these contracts and assisting entities.

The Panel also made recommendations to improve transparency regarding these contracts. First, the Panel recommends 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 includes the appropriate vehicles and data elements. The Panel believes that establishing a database identifying existing contracts and assisting entities as well as their characteristics is the most important near-term task. It is the view of the Panel the most expeditious means of assembling such information is in the form of a survey as currently drafted by OFPP in support of the OMB task force examining Interagency and Agency-Wide Contracting. The information gathered should allow for agency and public use. This survey is already underway.

From the outset of the Panel's work, we have been frustrated by the lack of data available to conduct a thorough analysis of interagency contracts and the orders placed under them. The Federal Procurement Data System ("FPDS") has traditionally been a transactions-based database, collecting information only on transactions that obligate funds. Therefore, while agencies input their order information, there was no efficient way to identify it as an order under an interagency contract, except for the GSA Schedules program.

In 2004, FPDS-Next Generation ("FPDS-NG"), a new technology solution, replaced FPDS. Twenty-seven years of collected contract data was migrated into the new system. But at the same time as the system migration, new reporting elements were added. For instance, FPDS-NG now collects information on interagency contracts. However, adding a new collection requirement on any ongoing contract or order creates a myriad of unavoidable migration issues. Moreover, information on the extent of competition at the order level is not reliable due to a number of issues including: (i) automatic DoD coding of all GSA schedule orders as full and open competition, (ii) coding of other orders as full and open based on the contract, and (iii) system migration rule failure.

The Panel also is concerned with the amount of incorrect data entered into the system by agencies, such as the ultimate value (base plus options) requiring the Panel to rely solely on the transaction value of an order, significantly less than the estimated value.

The data section of the report documents a long history of inaccurate data input by agencies. For example, the Panel's survey of PBA contracts and orders found that of the sample reviewed, 42% that were entered in FPDS-NG as performance based, clearly were not (with some agencies admitting to FPDS-NG coding errors). Among other recommendations for data improvement, the Panel has made several to focus attention on the importance of agencies inputting accurate data, including a statutory amendment assigning Agency Heads the accountability for accurate input. In those limited circumstances where the Panel and FPDS-NG staff were able to obtain data on interagency contracts, the Panel recommends providing public access to that data online.

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III. Statutory Charter: Ensuring Effective And Appropriate Use Of Performance-Based Contracting

Performance-based Contracting, now called Performance-based Acquisition (“PBA”), is an approach to obtaining innovative solutions by focusing on mission outcomes rather than dictating the manner in which the contractor’s work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved.

During the Panel’s public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure. Despite the difficulty, it remains the preferred commercial technique seen as critical to obtaining transformational and innovative solutions. Ultimately, the Panel determined that in view of a lack of data supporting either that the technique is unworkable in the federal government sector or that PBA’s costs outweigh its benefits, the Panel’s statutory mandate was clear: improve the effectiveness and appropriate use of PBA. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBA. Rather the Panel aims are directed at improving current implementation and at providing a solid basis for a more thorough assessment of its value. Thus, the Panel agreed that the overall statement of the issue is “Why has PBA not been fully implemented in the federal government?”

A. Improve PBA Implementation

1. Findings

Uncertainty Remains on How and When to Apply PBA. Government officials testifying before the Panel related the challenges they face in applying PBA that included when and how to apply it and the time and resources required for the technique. They also spoke to the cultural emphasis of “getting to award” that shortchanges both the requirements definition process and effective post-award contract management. A 2002 GAO survey of 25 contracts reported as PBA found while most contained at least one PBA attribute, only 9 contained all of the required elements and may have used extremely restrictive work specifications. GAO concluded that the study raised concern about whether agencies have an understanding of PBA and how to maximize its benefits. A Rand Corporation study of the U.S. Air Force Air Logistics and Product Centers in 2002 found uncertainty over which services were suitable for PBA, confusion with the use of “Statement of Work” and “Statement of Objectives,” and about what constitutes a measurable performance standard. The Panel’s own survey of randomly selected PBAs from the

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top ten contracting agencies reflect similar problems, including an inability to identify and align performance measures and contract incentives to ensure desired outcomes are achieved. A multi-association group representing government contractors told the Panel that many of the solicitations they receive that would be appropriate for PBA are still not described in terms of outcomes and those that are frequently do not identify measures to achieve those outcomes. This multi-association group provided the Panel with a sampling of such solicitations. As a result of these findings, the Panel concluded that PBA's potential for generating transformational solutions to agency challenges remains largely untapped.

FPDS-NG data are insufficient and perhaps misleading regarding use and success of PBA. At the suggestion of a written public statement, the Panel conducted its own survey of contracts and orders that were coded in FPDS-NG as performance-based. Of the 76 contracts and orders randomly selected from the top ten contracting agencies, the Panel received 55 that contained sufficient documentation to support the review. While 36% were determined to have the elements of a PBA, another 22% required significant improvement. And of the sample reviewed, 42% were clearly not PBA with some agencies admitting that the contracts were mistakenly coded as performance-based in FPDS-NG. Finally, it is important to note that FPDS-NG data is collected at the time of contract or order award and is not designed to collect information to assess cost savings or other similar measures of success.

2. Recommendations

Based on these findings, the Panel recommended more guidance to assist agencies in the efficient and appropriate application of PBA, including

- An Opportunity Assessment Tool that acknowledges the resource investment required by PBA and helps agencies identify those acquisitions likely to derive the most immediate benefit from such an investment;
- A Best Practices Guide on developing measurable performance standards; and
- Improved guidance on types of incentives appropriate for various contract vehicles

Other Panel recommendations seek to provide a framework for a discipline in defining outcomes and appropriate measures during acquisition planning, and with monitoring post-award. The recommendation for a Baseline Performance Case, prepared by the government, would assist agencies in developing and communicating appropriate outcomes, measures and expectations to prospective offerors. The Panel recommends a Performance Improvement Plan, prepared by the contractor, to serve as a tool to ensure that the contractor and agency are regularly assessing performance, expectations, and the need for continuous improvement to respond to shifting priorities

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As a signal of the cultural change PBA requires throughout the contract life cycle, the Panel recommends redesignating the traditional Contracting Officers Technical Representative (“COTR”) as a Contracting Officers Performance Representative (“COPR”). The COPR should receive training in PBA and be involved in the development of the Baseline Performance Case and key measures. The Panel recommends that the Federal Acquisition Institute and the Defense Acquisition University jointly develop a formal educational certification program for COPRs.

Finally, in recognition of the concerns raised by some regarding the appropriate use of and cost-benefits of this technique, the Panel makes two recommendations. First, the Panel recommends improved data on PBA usage and enhanced oversight by OFPP on proper implementation using an “Acquisition Performance Assessment Rating Tool” or “A-PART.” Currently, OMB uses a “Program Assessment Rating Tool” or “PART” as a systematic method for measuring program performance across the Federal government. It essentially includes a series of questions that help the evaluator determine whether a program is meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act (“GPRA”) as well as engaged OMB more aggressively in reviewing its implementation. The Panel recommends that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of a PBA to provide a more methodological and accountable approach to PBA implementation. While the Panel anticipates the need for such rigor until agencies are comfortable and competent in using the tool, we believe the requirement should sunset after three years unless its continued use is deemed useful by OMB and the agencies. Second, the Panel recommends that OFPP undertake a systematic study on the challenges, costs and benefits of using PBA techniques five years from the date of the Panel’s final report.

IV. Statutory Charter: Review All Federal Acquisition Laws And Regulations, And . . . Policies . . . Make Recommendations . . . Considered Necessary . . . To Protect The Best Interests Of The Federal Government [And] To Ensure The Continuing Financial And Ethical Integrity Of Acquisition

Because the state of, and the problems of, the federal acquisition workforce was not one of the topics specifically identified by Congress in the legislation establishing the Panel, some might wonder why the Panel addressed this topic. From the beginning, the Panel clearly understood that providing the insight and assistance that Congress sought could not be accomplished without addressing the federal acquisition workforce. Through the Panel’s review of numerous GAO and IG reports and extensive witness testimony, it is clear that the knowledge and skill base necessary to successfully operate the acquisition system and to secure good value for the government and taxpayers has outstripped the resources available to operate the system.

Without an analysis and recommendations on the state of this workforce, there is a risk that problems stemming from the shortcomings of the acquisition workforce would be misunderstood. And certainly, addressing the specifics of the Panel’s statutory charter, PBA, commercial practices, and interagency contracting, inevitably have an impact on the acquisition workforce, both in terms of identifying problems with these techniques and the recommendations

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to improve them. Finally, those readers who are familiar with the 1972 Commission on Government Procurement, and more recently, the National Performance Review, will recall that these initiatives recognized the importance of an effective workforce to the acquisition system.

A. Focus On The Acquisition Workforce

1. Findings

Even though there are now available a variety of simplified acquisition techniques, the demands on the workforce, both in terms of the complexity of the federal acquisition system as a whole as well as the volume and nature of what is bought, has markedly increased since the 1980s. A qualitatively and quantitatively adequate and adapted workforce is essential to the successful realization of the potential of the procurement reforms of the last decade. Without such a workforce, successful federal procurement is unachievable. But demands on the workforce have grown. Just since 9/11, the dollar volume of procurement has increased by 63 percent. And while acquisition reform made low dollar purchases less complex, high dollar purchasing became more complex with the emphasis on best value, past performance evaluations and PBA, placing greater demands on the workforce including requiring more sophisticated market expertise. The streamlined purchasing vehicles, such as purchase cards and interagency contracts, we now know are subject to management challenges associated with appropriate and effective use. Accompanying these trends is a structural change in what the government is purchasing, with an emphasis on high dollar complex services. In general, the demands placed on the acquisition workforce have outstripped its capacity. And while the current workforce has remained stable in the new millennium, there were substantial reductions in the 1990s accompanied with a lack of attention to providing the training necessary to those remaining to effectively operate the more complex buying climate. There are currently too few people in the pipeline, with between 5 and 15 years of experience to mitigate the eventual retirements of the most experienced acquisition workforce.

Lack of a Consistent Definition for and Accounting of the Workforce. Assessing workforce needs and proposing solutions for these challenges has been made difficult by the continued inconsistent definitions and accounting of the workforce. An accurate understanding of the key *trends* about the size and composition of the federal acquisition workforce cannot be had without using a consistent benchmark and none is currently available. The definitions for the DoD workforce and the civilian workforce are not consistent and have changed or been reported differently over time. The reports on the workforce, therefore, do not facilitate trend analysis.

The Panel recognized that these issues about the acquisition workforce have long roots. To assist the Panel in analyzing the available information about the size, composition, competencies and effectiveness of the acquisition workforce, and to help identify gaps and inconsistencies in the data, the Panel engaged a contractor, Beacon Associates, to collect and analyze the voluminous available data. Beacon created a report that has been used extensively by the Panel in developing its recommendations.

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Agencies have not Engaged in Systematic Human Capital Planning to Assess their Acquisition Workforce in the Present or for the Future. While the GAO has recognized improved progress in this area, there is a wide variance between agencies in terms of their progress. And while some agencies have undertaken an analysis of the competencies necessary for the workforce, they do not attempt to address the demands these competencies place on the workforce of the future nor the degree to which their existing workforce possess these competencies. In fact, GAO found that the civilian agencies generally lacked reliable, consistent and complete data on the composition of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.

Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce. Witness testimony before the Panel, a 2006 DoD IG Report, and the experience of members of the Panel makes clear that many agencies make substantial use of contractor resources to carry out their acquisition functions. But because there is no count of such contractor support, much of which is accomplished outside of the bounds of OMB Circular A-76, the government lacks information on which to make a determination of whether this reliance is cost effective.

While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments. Testimony before the Panel point to two reasons for this disparity. First, the most successful commercial organizations have built a procurement workforce on the understanding that smart buying is important to profitability. Second, the private sector pays better, has superior approaches to recruitment and retention, and considers procurement integral to business success.

2. Recommendations

Remedying what the Panel found as the structural barriers to assessing the acquisition workforce is an important first step to assessing how the acquisition workforce can better fulfill its mission. Therefore, the Panel provides a specific recommendation to OFPP to prescribe a single, consistent government-wide definition of the acquisition workforce using a combined methodology designed to address the broader understanding of the functions outside of procurement that must be addressed while preserving a count that does not overstate the resources available to conduct and manage procurement. The Panel's belief in the urgency of accurately assessing the acquisition workforce on a government-wide basis is reflected in its recommendation that using this combined methodology, OFPP should collect this data within a year of the issuance of Panel's final report. Consistent with this recommendation, OFPP should also be responsible for the creation, implementation and maintenance of a mandatory government-wide database for members of this acquisition workforce. The Panel notes that the Commission on Government Procurement recommended a similar system in 1971.

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Human capital planning requires prompt attention. Chief Acquisition Officers (“CAOs”) should be responsible for assessing the current and future needs of their agencies, including forthrightly identifying and acknowledging gaps, and taking immediate steps to address these gaps through hiring, allocation of resources, and training. The CAO should be responsible for developing a separate Acquisition Workforce Human Capital Strategic Plan as part of the overall Human Capital Management Plan. This plan should assess the effectiveness of contractor personnel supplementing the acquisition workforce. OFPP should be delegated the responsibility for reviewing and approving agency Human Capital Plans regarding the acquisition workforce and for identifying trends, good practices, and shortcomings.

The Panel recommends identifying and eliminating obstacles to the speedy hiring of new talent and a government-wide acquisition intern program to attract first-rate entry level personnel into the acquisition career fields. Concurrently, incentives to retain qualified, experienced personnel need to be created. To address the training needs of the acquisition workforce, the Panel recommends the statutory reauthorization of the SARA Training Fund and provision of direct funding/appropriations for it. Additionally, OMB should issue guidance directing agencies to assure that funds in agency budgets identified for acquisition workforce training are actually expended for that purpose and require Agency Head approval before such funds are diverted for other uses. OFPP should also conduct an annual review of whether agency acquisition workforce training funds are sufficient to meet agency needs per the agency’s human capital plan.

Because both DoD and the civilian agencies provide for waivers to the congressionally established training and education standards, such waivers should be guided by sufficient oversight. The Panel recommends that permanent waivers be granted by agencies only after an objective demonstration that the grantee possesses the competencies and skills necessary to perform the duties and that temporary waivers should only be granted to allow sufficient time to acquire any lacking education or training. And CAOs (or equivalent) should report annually to OFPP on the agency’s usage of waivers, justifying their usage and reporting on plans to overcome the need to rely excessively on waivers. Upon review of these reports, OFPP should provide an annual summary report on the use of waivers of congressionally established training and education standards. In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12-month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training. And finally, in light of OFPP’s unique government-wide focus, the Panel recommends establishing in OFPP a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.

V. Statutory Charter: Protect The Best Interests Of The Government...Amend Or Eliminate Any Provisions That Are Unnecessary For The Effective, Efficient, And Fair Award And Administration Of Contracts

The Panel recognized early in its deliberations that the Panel’s statutory charter would necessarily impact small business. In terms of ensuring the fair award of contracts, certainly

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with respect to government-wide contracts, the interests of small business must be represented. The statutory requirement that agencies afford the maximum practicable small business participation in federal acquisition reflects the critical role of small businesses in stimulating the Nation's economy, creating employment, and spurring technological innovation. The Panel identified findings and recommendations that impact efficient and effective acquisition planning and fairness in the competition of multiple award contracts.

A. Improve Small Business Participation

1. Findings

Inconsistent Statutory and Regulatory Framework Governing the Use of Various Small Business Preference Programs Hinders Efficient and Effective Use of the Programs. The Panel found potentially conflicting guidance between the statutory and regulatory provisions governing the priority of the various small business contracting programs. For example, the Small Business Act appears to mandate a priority for the HUBZone program by providing that contracting officers "shall" use the HUBZone contracting mechanism in certain circumstances "notwithstanding any other provision of law." At the same time, other provisions of law appear to suggest parity between the HUBZone and 8(a) programs. The potential inconsistency between the statutory framework and the regulatory guidance has created confusion among contracting officials and has hindered the proper application of these programs to ensure small business goal achievements.

But the Panel also found that there are no express guidelines governing a contracting officer's decision in selecting the appropriate small business contracting techniques. This lack of guidance not only deprives a contracting official of published standards against which to exercise discretion, but also obfuscates that decision-making process.

The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions. Continuing its focus on ensuring small businesses are afforded sufficient opportunities to participate in government contracting and that acquisition planning is efficient and effective, the Panel found that there continues to be confusion about what constitutes contract bundling and the procedures that apply for addressing it. Furthermore, the reporting and review provisions contain little in the way of clear procedures, instructions, or techniques for mitigating the effects of bundling once such acquisitions are identified and justified during the acquisition planning phase. This lack of guidance contributes to the workload pressures facing our acquisition workforce, undermining its ability to plan and award acquisitions efficiently.

Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses. The Panel found that because senior program managers play such an important role in shaping an acquisition during the planning stages, it is imperative that they understand the governing small business contracting requirements as well as the benefits of contracting with small business. Such an understanding would also serve to

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lessen the pressure on contracting officials to explain such requirements, thereby improving efficiency and the overall effectiveness of agencies in meeting small business goals.

Cascading procurements fail to balance the Government's interest in quick and efficient contracting with governing requirements for the maximum practicable small business contracting opportunities. Cascading procurements (sometimes called tiered procurements) are a costly substitute for government market research. Essentially, these procurements tier the evaluation of offers based on the socioeconomic status of the offeror. For example, an agency may establish a four-tiered evaluation, beginning with 8(a), HUBZone, small business, and finally large business offerors. The contracting officer's evaluation of offers will then cascade to each succeeding tier until a winning offeror is identified. If the winner is found in tier one, then the proposals of all other tiered offerors will never be considered for award. This controversial contracting technique, fails to balance the interests of the government and contractors. Proposal preparation is costly for government contractors, large and small alike. As a result, recent legislation limits their use in the Department of Defense. The new legislation requires the contracting officers to first conduct the required market research, and to document the contract file before engaging in cascading procurements. But the Panel has determined that the recent enhancements to the Central Contractor Registration database have improved the contracting officer's capability to conduct this type of market research, thereby obviating the need for such procurements. Cascading procurements place an undue financial burden on small and large contractors that is not outweighed by the administrative convenience of this technique.

There is No Explicit Statutory Authority For Small Business Reservations in Otherwise Full and Open Competitions for Multiple Award Contracts. While the Panel recognizes the great efficiencies offered by these contracts, especially those available for multi-agency use, the desire for efficiency must be balanced against the sometimes negative impact these contracts can have on small business opportunities. The Panel found that, often, these contracts have such broad coverage, either geographically, functionally, or both, that they effectively preclude small businesses from competing with large businesses under full and open competitions for the multiple awards. And if there are small businesses that receive awards under these contracts, there is no specific statutory or regulatory authority for agencies to reserve orders under these contracts for small business competition in order to achieve agency goals.

2. Recommendations

The Panel recommends a simple and specific amendment to the Small Business Act that would provide consistent statutory language enforcing the intended parity among the various small business programs and affording contracting officers the discretion and flexibility to develop acquisition strategies appropriate to agency small business goal achievements. The Panel also recommends specific statutory and regulatory revisions clarifying that contracting officers should exercise their discretion to select the appropriate small business contracting methods based on agency small business goal achievements and market research on the availability of small business vendors. With respect to the concerns over the implementation of contract bundling requirements, the Panel recommends additional training and the creation of an interagency group

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to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.

Finding that acquisition planning and compliance with requirements would be better served if all stakeholders in the acquisition planning phase were better trained, the Panel recommends that OFPP coordinate the development of a government-wide small business contracting training module targeting program managers and acquisition team members. The training module should not only educate these officials on the requirements, but also the value and benefits of contracting with small businesses, including acquainting them with the substantial capabilities, sophistication and innovation of the Nation's small business concerns. The Panel also recommends a statutory prohibition on the use of the cascading procurement technique, finding that they place an undue financial burden on contractors, thereby limiting their participation in government procurement.

Finally, with respect to multiple award contracts, the Panel recommends specific statutory amendments that would allow contracting officers to reserve, for small business competition only, a portion of the multiple awards in a competition not suitable for a total small business set-aside. The Panel further recommends express authority to reserve certain orders under these multiple award contracts for competition by the small business multiple awardees only. These authorities will afford contracting officers who wish to take advantage of these streamlined acquisition vehicles greater opportunities in meeting agency small business goals as well.

VI. Statutory Charter: Ensure The Continuing Financial And Ethical Integrity Of Acquisitions

The government has realized for some time that it cannot achieve its mission without the support of contractors. A 1991 GAO report stated that contractors were "essential for carrying out functions of the government." Since this report, the government's spending on services has exceeded that spent on goods. Spending on services in 2006 accounts for 61% of total procurement dollars.

Given the growth of services, the expanded role of contractors and the government's reliance on them in the workplace, the Panel believes that addressing the "blended" workforce was essential though not specifically called out in its authorizing statute.

A. Focus On Effective, Efficient And Responsible Use Of Contractor Support

1. Findings

Several developments have led Federal agencies to rely increasingly on the use of contractors as service providers. Since the mid 1990s, the federal acquisition workforce has been reduced by 50 percent, and hiring virtually ceased, creating what has been termed the "bathtub effect," a severe shortage of procurement professionals with between 5 and 15 years of experience. The impact of this shortage is likely to be felt more acutely soon, as half of the current workforce is eligible to retire in the next four years. The impact of these events has left its mark on

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government operations, creating a shortage of certain capabilities and expertise in government ranks. In order to meet mission requirements and stay within hiring ceilings, some agencies have contracted for this capability and contractors are increasingly performing the functions previously done by civil servants. This has largely occurred outside of the discipline of OMB Circular A-76 procedures, meaning there is no clear and consistent governmentwide information on the numbers of and functions performed by this growing cadre of service providers.

The “blended” or “multi-sector” workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries. While the A-76 outsourcing process provides a certain rigor and discipline to distinguishing between “inherently governmental” and commercial functions, the application of these terms is less clear outside of this context. 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 questioned.

The growth in the use of contractors to perform acquisition functions that in the past were performed by Federal employees, coupled with the increased consolidation in many sectors of the contractor community, has increased the potential for organizational conflicts of interest (“OCI”). Based on the language in FAR 9.5, the case law has divided OCIs into three groups: (i) biased ground rules; (ii) unequal access to information; and (iii) impaired objectivity.¹⁸ And while the FAR instructs but provides little guidance to already strained contracting officers to identify, evaluate, and avoid or mitigate such conflicts, the GAO is sustaining more protests for the government’s failure to do so. With respect to protection of contractor confidential or proprietary data, the Panel recognizes the increased threat of improper disclosure as more and more contractor employees engage in support of the government’s acquisition function.

Government employees face civil and criminal penalties for not acting impartially in their official duties in exchange for personal gain, and some have suggested that similar civil and criminal statutes be applied to contractor employees performing acquisition functions. But the Panel found that many contractors have established extensive ethics and compliance programs. Further, the Sarbanes-Oxley Act of 2002 requires specific accountability and controls relating to fiduciary duties.

As the extent of service contracting has grown, the current ban on personal services contracts has created two unfortunate responses. Except as authorized by statute, the government is prohibited from entering into personal services contracts (“PSCs”). The FAR cautions that such relationships not only result from inappropriate contract terms, but also from the manner in which the contract is administered. In order to comply with the PSC prohibition, government managers may find themselves crafting cumbersome and inefficient processes to manage the work of contractor personnel to avoid an appearance that they are exercising continuous supervisory control. Some testimony before the Panel indicates that others simply ignore the ban.

¹⁸ See Daniel I. Gordon, *Organization Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 2005.

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2. Recommendations

The Panel recommends that OFPP update the principles for Agencies to apply in determining which functions must be performed by civil servants. These principles are needed so that those not specifically engaging in A-76 studies understand their applicability to the blended workforce.

With respect to conflicts of interest, the Panel concluded that it is not necessary to adopt any new Federal statutes to impose additional requirements upon contractors or their personnel. Rather, where appropriate, the obligations should be imposed through contract clauses, the goal of which should be ethical conduct, not technical compliance. Such clauses would not necessarily impose specific prohibitions upon contractors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct with general ethical guidelines and principles and/or by requiring appropriate disclosures. The Panel does not believe that the requirements imposed on contractors and their personnel – through the contract and solicitation clauses or otherwise – should incorporate the extensive and complex requirements imposed on Federal employees. The Panel is concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government.

Thus, the Panel recommends that the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs and personal conflicts of interest (“PCI”), and protection of contractor confidential and proprietary data, described in more detail in this report. The Panel recognized that numerous agencies have considered these issues, and in many cases identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council, as the developers of government-wide acquisition regulations, was the appropriate organization to perform this task. The FAR Council should work with DAU and FAI to develop and provide training and techniques to help procurement personnel identify and mitigate potential OCIs and PCIs, remedy conflicts when they occur, and appropriately applying tools for the protection of confidential data.

Finally, the Panel recommends replacing the ban on PSCs with guidance on the appropriate and effective use of such contracts. In implementing this recommendation, the government should be allowed to direct or supervise the contractor employee’s workforce concerning the substance of work or tasks performed. This new flexibility, however, should be accompanied by retention of the current prohibitions on government involvement in purely supervisory activities (e.g. hiring, leave approval, promotion, performance ratings, etc.). Because this recommendation represents a significant departure from the decades of prohibition on personal services, the Panel recommends that GAO review the new policy five years after implementation to identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

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**REPORT OF THE
ACQUISITION ADVISORY PANEL**

TO THE

OFFICE OF FEDERAL PROCUREMENT POLICY

AND THE

UNITED STATES CONGRESS

December 2006

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INTRODUCTION

The Panel Project

Background

The Federal government is the single largest buyer in the world. Each year Federal agencies spend nearly \$400 billion a year for a range of goods and services to meet their mission needs.¹ Some acquisitions are highly specialized – advanced fighter jets, precision munitions, nuclear submarines – for which there is no non-governmental or commercial demand. Other goods and services are readily available and purchased from the commercial marketplace. From laptop computers and off-the-shelf software to information technology (“IT”) consulting services, software development, and engineering services. Federal agencies rely upon common commercial goods and services to conduct their business. In addition, commercial products may be modified to meet government needs. In all of these circumstances government acquisition process intersects with the private sector and the Federal government can benefit from knowing how commercial buyers approach the acquisition process.

Importance Of The Commercial Market To Government Acquisition

Effective and efficient access to products and services available in the commercial market can help government agencies to achieve their various missions. The pace at which technology advances requires that government have access to commercial technology and technology based services. Agencies have a significant interest in acquiring such products and services at a reasonable price and without undue administrative burden. Of course, in light of the involvement of public funds, acquisition must be conducted in a manner that is fair and furthers the public interests in transparency and accountability.

Over the last two decades, significant study and effort has been dedicated to the acquisition of goods and services available in the commercial market by the federal government. For example, in 1986, the Blue Ribbon Commission on Defense Management highlighted the need for DOD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DOD contracts.²

Congress later chartered the “Section 800 Panel”³ to assess laws affecting defense procurement. In early 1993, the Section 800 Panel proposed a variety of reforms, including: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; and an expanded exemption for “adequate price competition” in the Truth in Negotiations Act.

¹ See <https://fpds.gov>; see also <http://www.whitehouse.gov/omb/procurement/index.html>.

² The President’s Blue Ribbon Commission on Defense Management (The Packard Commission), *A Quest for Excellence: Final Report to the President and Appendix* (Washington, D.C.: The Packard Commission, June 1986).

³ The Section 800 Panel was chartered by Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

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Following the efforts of the Section 800 Panel, Congress enacted a series of procurement reforms in the mid-1990s that were intended to enable the government to streamline the acquisition process and to obtain greater access to products and services available in the commercial market. These reforms primarily were introduced through the Federal Acquisition Streamlining Act of 1994 (“FASA”)⁴ and the Federal Acquisition Reform Act of 1996⁵ (“FARA”).

FASA and FARA required, and were followed by, various changes to the Federal Acquisition Regulation (“FAR”). For example, FASA introduced a strong preference for the acquisition of commercial items.⁶ The statutory definition of commercial items refers to categories of products and services.⁷ The same is true of the regulatory definition in the FAR.⁸

Since the FASA and FARA reforms, agencies have sought to purchase commercial items and otherwise rely on the techniques addressed in those statutes with varying degrees of success. Those efforts were the subject of considerable analysis, including by GAO in reports regarding use of the Multiple Award Schedule, task and delivery order contracts, and interagency contracting.

Congress enacted further reforms. For example, Congress passed the Services Acquisition Reform Act of 2003 (“SARA”), which introduced other reforms related to commercial items as well as to the acquisition workforce. SARA also chartered this Panel to study current laws, regulations, and government-wide acquisition policies with regard to commercial practices, and to recommend appropriate reforms.

Trends In Acquisition

Since the FASA and FARA reforms were enacted a decade or more ago, a number of events have affected government contracting. For example, the events of September 11, 2001, and subsequent conflicts in Afghanistan and Iraq, as well as the Katrina aftermath, have influenced what the government buys and how much it spends. From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75% from \$219 billion to more than \$380 billion.⁹

Over the last decade, a number of trends have affected government contracting. Services now comprise a greater percentage of the government’s acquisition budget. Between 1990 and

⁴ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁵ Pub. L. No. 104-106, 110 Stat 186 (1996). FARA was later renamed the “Clinger-Cohen Act.”

⁶ See 10 U.S.C. § 2577 (codifying preference).

⁷ See 41 U.S.C. § 403(12).

⁸ See FAR 2.101.

⁹ “Trending Analysis Report since Fiscal year 2000,”

http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

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1995 the government began spending more on services than goods.¹⁰ Currently, procurement spending on services accounts for more than 60% of total procurement dollars.¹¹ In FY 2005, DOD obligated more than \$141 billion on service contracts, a 72% increase since FY 1999.¹²

While procurement spending has increased, products and services often are purchased through relatively large orders under contracts with broad scopes of work. Contracting agencies often rely on indefinite delivery contracts, such as interagency contracts, under which orders are issued for products or services. Orders under the types of contracts discussed above often can be larger in amount than individual contracts. Orders under such contract vehicles can be significant in terms of size, and may exceed \$5 million. Purchases under the Multiple Award Schedules also have more than doubled in value over the last decade.¹³

There also are fewer acquisition professionals in the government to award and administer contracts as the government's contracting workforce has reduced in size over the last decade. The federal acquisition workforce has declined by nearly 50 percent since personnel reductions in the mid-1990s.¹⁴ Despite recent efforts to hire acquisition personnel, there is an acute shortage of federal procurement professionals with between five and 15 years of experience. This shortage will become more pronounced in the near term because roughly half of the current workforce is eligible to retire in the next four years.¹⁵

Over the last decade or so, consolidation has occurred in certain parts of industry that contract with the government, including but not limited to aerospace and defense. As a result, certain contractors are now performing work that previously was performed by other companies.

In sum, a variety of trends and factors have influenced government contracting and continue to do so. Effective and efficient access to the commercial market place, and will continue to play, a major role in helping to enable agencies to purchase the products and services they need.

¹⁰ Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995.

¹¹ Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

¹² See Government Accountability Office, *Defense Acquisitions: Tailored Approach Needed to Improve Service Acquisition Outcomes*, GAO-07-20 (Nov. 2006), at 1.

¹³ See General Accounting Office, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OCG-00-7 (Mar. 7, 2000), at 6-7.

¹⁴ Report on the Federal Acquisition Work Force: Fiscal Years 2003 and 2004 (Federal Acquisition Institute Report 2003-2004), Executive Summary, p. vii.

¹⁵ Testimony before the Acquisition Advisory Panel of S. Assad, Director, Defense Procurement and Acquisition Policy, June 13, 2006, p. 57-58 (testimony on file with the Panel).

Current Commercial Practices: What Are They?

Because Congress tasked the Panel¹⁶ to assess current laws, regulations, and government-wide acquisition policies with a view toward “ensuring effective and appropriate use of commercial practices and performance-based contracting,” the Panel considered it critical to identify current commercial practices.

Rather than make assumptions regarding current commercial practices, the Panel sought input. Specifically, over the course of its eighteen months of study, the Panel broadly solicited and received substantial testimony and other input from government, industry, and other members of the public regarding acquisition practices. As part of its study, the Panel also issued questionnaires to private sector buyers and government buying agencies to assess current practices and to identify potential areas for improvement in the way the government buys.

The Panel thus was able to conduct its assessment of current laws, regulations, and government-wide acquisition policies with the benefit of an understanding of current commercial practices, as described by industry. Industry input included private sector buyers with experience in large, complex acquisitions of services, such as information technology services. Such buyers described the competitions that they conducted, and their efforts to ensure that prices were fair and reasonable. It is clear from the many private sector buyers who testified before the Panel that the bedrock principle of current commercial practice is competition.

The Panel also benefited from the experience and insights provided by government acquisition personnel regarding the various practices that were introduced or encouraged by procurement reforms in the last decade. The Panel inquired about what agencies were doing, what worked, and what did not. The inputs described above provided critical information for the Panel’s work.

Commercial Purchases and Practices: The Special Challenge Of Government

Our Supreme Court has observed that when the government enters the commercial market, it generally subjects itself to the same contract rules as private parties.¹⁷ Although there are exceptions set forth in federal statutes regulations and the Constitution, this suggests that the Federal government take advantage of commercial practices where possible.

Due to its special status as the sovereign, and in light of the statutes and regulations that apply to government contracting, however, government agencies are not in a position to take full advantage of the practices of the private sector. For example, agencies generally may not award contracts based solely on consideration of a company’s prior performance or enter into long-term strategic agreements. Agencies are subject to appropriations laws, and may be limited to use of

¹⁶ See Pub. L. No. 108-136, sec. 1423(c)(1).

¹⁷ *Lynch v. United States*, 292 U.S. 571, 579 (1934). See also *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000).

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annual appropriations. As discussed above, agencies also are required to abide by competition statutes and regulations.

On the other hand, government can take advantage of many approaches used in the commercial market. Doing so can foster effective and efficient access to products and services.

The Panel has made an effort to achieve balance, recognizing the time pressures on the acquisition system, but also has tried to implement current commercial practices regarding competition, and to provide transparency and accountability necessary to expenditure of taxpayer funds.

Report Structure

This Report is divided into seven Chapters. Each chapter sets forth the background of the issues, followed by the Panel's findings and recommendations. We have provided a relatively detailed Executive Summary that explains the Panels findings and recommendations – as well as the Panel process. However, the Executive Summary is not the Report. The chapters are as follows:

Chapter 1 – Commercial Practices

Chapter 2 – Improving Implementation Of Performance-Based Service Acquisition (PBSA) In The Federal Government

Chapter 3 – Interagency Contracting

Chapter 4 – Small Business

Chapter 5 – The Federal Acquisition Workforce

Chapter 6 – Appropriate Role Of Contractors Supporting Government

Chapter 7 – Report On Federal Procurement Data

EXECUTIVE SUMMARY

As the Panel's Findings and Recommendations took root in its working groups and were presented to and debated and adopted by the full Panel during public meetings, certain themes began to emerge and intersect across the working groups. This executive summary does not list all of the findings and recommendations. Instead, it is intended to share those key themes that became apparent over the course of the Panel's deliberations. For clarity and consistency, this material is presented in accordance with the Panel's statutory charter.

I. Statutory Charter: Ensure Effective And Appropriate Use Of Commercial Practices

While nobody expects the government to ever be a truly commercial buyer given Constitutional constraints on funding, the need to be accountable for the expenditure of public funds, the statutory constraints aimed at providing full and open competition, and achievement of certain social and economic objectives, the Panel's many commercial sector witnesses echoed recurring themes that could be adopted by the government.

A. Enhance Competition

1. Findings

Requirements Definition is Key to Achieving Benefits of Competition. Commercial firms testifying before the Panel described a vigorous acquisition planning phase when buying service solutions. Acquisition process governance is considered of equal importance to selecting the right contractor. They obtain "buy in" of the business case from all organizational stakeholders. These organizations invest the time and resources necessary to clearly define requirements first, in order to achieve the benefits of competition in an efficient market: high quality, innovative solutions at the best prices. They apply multi-functional resources to perform ongoing rigorous market research and are thus able to provide well-defined performance-based requirements conducive to a best value solution at fixed prices.

Government Frequently Fails to Invest in Requirements Definition. Public sector officials and representatives of government contractors testified that the government frequently is unable to define its requirements sufficiently to allow for fixed price solutions. Ill-defined requirements also fail to produce meaningful competition for services solutions, relying instead on time and materials ("T&M") contracts based on fixed hourly rates. The causes for this failure to define requirements were described by many witnesses, including the Government Accountability Office ("GAO") and agency inspectors general ("IGs"). Major contributors to this problem are a culture focused on "getting to award" and budgetary time pressures combined with a strained workforce and lack of internal expertise in the market. Additional problems associated with unclear roles and responsibilities in the use of interagency or government-wide contracts, another area under this Panel's statutory purview, also contribute. The government's difficulties in defining requirements are well documented. Recently, the GAO and IGs have found that orders under interagency contracts frequently contain ill-defined requirements.

2. Recommendations

The Panel's recommendations seek to improve the environment for healthy competition using a 360 degree approach, providing tools to enhance transparency, requirements analysis and definition, requirements for greater use of competition, and positive pressures, in the form of protest authority and transparency that will result in agencies applying an appropriate level of discipline to the structure of their acquisitions.

The Panel could not make recommendations regarding competition without an aim toward nurturing a healthy environment conducive to achieving the benefits of competition. Therefore, the Panel recommends that agencies establish centers of expertise in requirements analysis and definition, and obtain express advance approval of the requirements from the key stakeholders (*e.g.*, program manager and contracting officer) to closely resemble the buy-in obtained in commercial practice. Additionally, the Panel recognizes a need for a centralized source of market research information to facilitate more robust but efficient acquisition planning. Therefore, the Panel recommends that the General Services Administration ("GSA") 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. In addressing the GAO and IGs concerns about ill-defined requirements in orders under interagency contracts, the Panel recommends criteria for upfront requirements planning by ordering agencies before access to vehicles is granted.

Specific to the Panel's charter to provide recommendations for the efficient and appropriate use of performance-based acquisition ("PBA"), the Panel made several recommendations to the Office of Federal Procurement Policy ("OFPP") to provide more guidance on the use of this technique in order to assist agencies with defining their requirements and establishing measurable performance standards and appropriate contract incentives. A recommendation for a formal PBA educational certification program for technical representatives and other acquisition team members will enhance the efficiency and effectiveness of analyzing and describing requirements.

B. Encourage Competition

1. Findings

Commercial Buyers of Services Rely Extensively on Competition. The numerous commercial organizations invited to address the Panel expressed their strong preference for head-to-head competition. They use rigorous market research and requests for information ("RFIs") to identify capabilities and suppliers. They provide significant opportunities for information exchange with potential suppliers and typically ensure that they retain at least two or three suppliers throughout negotiations. Sole source engagements are rare. Even after the contract is signed, competition remains a distinct possibility. These commercial buyers reserve the right to re-compete or bring the service in-house before the contract has run full term. Six Sigma-style continuous monitoring and evaluation is used to measure performance and suppliers face the prospect of losing business if performance doesn't meet targets or if technology or strategic

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direction changes. Finally, these buyers use relatively short-term contracts, especially for services that involve complex technology requirements.

Competition for Government Contracts as well as its Approaches to Acquiring Commercial Services Differs Significantly from Commercial Practice. The Extent to which Each of these Approaches Achieves Competition Varies. Even where the government attempts to adopt commercial approaches, competition for government contracts differs in significant respects from commercial practice. Contributing factors include fiscal constraints imposed by the annual appropriations process, the need to accomplish urgent missions with limited time and personnel, policies and statutory requirements requiring transparency and fairness in expenditure of public funds, use of the procurement system to accomplish a host of government social and economic objectives, and the audit and oversight process designed to protect taxpayers from fraud, waste, and abuse. But there is an unequivocal mandate for competition that runs through the statutes and regulations governing federal procurement. Yet, the Panel found government implementation of competition varies from very structured processes on the one hand, to ill-defined requirements and minimal, if any, head-to-head competition on the other.

Comparing the emphasis on competition in commercial practice with actual government-wide competition statistics, the Panel found that nearly one-third of the government's dollars obligated in fiscal year 2004 was awarded without competition accounting for \$108 billion. About one-fourth, or \$98 billion was awarded noncompetitively in fiscal year 2005. Even when competed, the percent of dollars awarded when only one offer was received has doubled from 2000 to 2005. Spending on services was \$216 billion in fiscal year 2004 and \$220 billion in fiscal year 2005, accounting for more than 60% of total obligations for each year. At least 20% to 24% of these services were awarded non-competitively in fiscal years 2004 and 2005. However, the Panel believes that the amount of non-competitive awards is underreported for orders under multiple award contracts available for interagency use. This lack of transparency is significant given that 40% or \$142 billion of all government obligations were spent under interagency contracts in 2004. But even without visibility into the level of competition on orders, there is significant evidence to give cause for concern. Both the GAO and the DoD IG have found that agencies continue to award a large proportion of orders for services noncompetitively. The GAO placed interagency contracts on their High Risk Series for 2005, finding, in part, that the orders under these contracts frequently fail to comply with competition requirements.

In addition to the concerns regarding the level of competition for orders under interagency contracts, the Panel also has significant concern regarding the level of meaningful competition achieved. Interagency contracts are generally indefinite delivery/indefinite quantity and, based on a statutory preference, generally result in multiple awards. Where services are sought, the initial competition for these contracts typically includes a loosely defined statement of the functional requirements in the solicitation, focusing on hourly rates for various labor categories, with the expectation that more clearly defined requirements will be provided at the order level where more meaningful competition will occur. However, the Panel heard testimony and reviewed GAO and IG reports describing ill-defined requirements at the order level. Costly

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and complex services are procured using orders under these contracts. Of the \$142 billion obligated under interagency contracts in fiscal year 2004, \$66.7 billion was awarded in single transactions exceeding \$5 million, with services accounting for 64% or \$42.6 billion. For fiscal year 2005, interagency contract obligations totaled \$132 billion with \$63.7 billion in single transactions over \$5 million, with services accounting for 66% or \$42 billion.

So what has happened to dampen the expectation for this more rigorous competitive process at the order level? There appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment. For instance, except recently for DoD, it is not required that all eligible contractors be informed of an order requirement. Also, there is little transparency, even into sole source orders, as there is no public notification or synopsis requirement. Even where competition is used at the order level, there is no protest option for contractors under multiple award contracts, reducing transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade offs based on these criteria. And, finally, there is no requirement for a detailed debriefing at the task order level, denying contractors the opportunity to become more competitive on future order requirements.

But the Panel does recognize that these multiple award contracts provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs. Multiple award contracts are an effective tool allowing a strained acquisition workforce to meet mission needs in a streamlined fashion. However, there was never an expectation that these streamlined vehicles would not produce meaningful competition. Therefore, the Panel sought to achieve a balance – one that would introduce more pressure to encourage competition but not unduly burden these contracts as tools for streamlining. While nearly half of the dollars spent under these contracts are awarded in single transactions over \$5M, the majority of the transactions fall under this threshold. Therefore, in addition to its other recommendations, the Panel recommends applying additional requirements at this threshold, thereby impacting a significant dollar volume but not the majority of transactions.

2. Recommendations

To emphasize the importance of competition to achieving the best outcomes, the Panel recommends expanding government-wide the current DoD requirements to notify all eligible contractors under multiple award contracts of order opportunities or to ensure the receipt of three offers. The Panel also felt that while a pre-award notification of sole source orders might unduly burden the streamlined purpose of these multiple award contracts, post-award notification would suffice in providing transparency and the positive pressures that transparency imparts while bolstering public confidence. And for single orders with an expected value in excess of \$5 million where a statement of work is required, the Panel recommends that agencies 1) provide a clear statement of the requirements; 2) disclose the significant evaluation factors and subfactors and their relative importance; 3) provide a reasonable response time for proposal submissions, and; 4) document the selection decision to include the trade off of price/cost to quality in best

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value awards. Additionally, the Panel recommends post-award debriefings for disappointed offerors for orders in excess of \$5 million where statements of work and evaluation criteria are used in the selection. The Panel found that contractors expend significant bid and proposal costs in competing for individual orders under multiple award contracts and that debriefings encourage meaningful competition by providing disappointed offerors information that assists them in becoming more competitive on future orders. Concerned that the government is purchasing costly and complex services without a commensurate level of deliberation, transparency and review to ensure an appropriate level of discipline, the Panel recommends limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at \$5 million or less.

With respect to the GSA Federal Supply Schedules Program, the Panel recommends a new services schedule for information technology that would reduce the burden on contractors normally resulting from a lengthy process of negotiating labor rates with GSA that produce little meaningful price competition because services of this type are requirement specific. 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. This new services schedule would *require* competition at the order level.

C. Adopt More Commercial Practices

1. Findings

Commercial Buyers Rely on Competition for the pricing of goods and services, using well-defined requirements that facilitate competitive, fixed price offers. Commercial practice strongly favors fixed-price contracts in the context of head-to-head competition in an efficient market. In the absence of competition, which is relatively rare, commercial buyers rely on their own market research, and benchmarking, and often seek data on similar commercial sales. In some cases, they may obtain certain cost-related data, such as wages or subcontract costs, from the seller to determine a price range.

While commercial buyers avoid time-and-materials (“T&M”) contracts, viewing them as too resource intensive to monitor, they do use them for specific types of work, for instance, repair, building capital equipment designed in-house, and engineering/development work. When T&M contracts are used, commercial buyers plan for and apply the necessary in-house resources to effectively monitor these contracts.

2. Recommendations

The Panel’s statutory charge requires it to make recommendations with a view toward protecting the best interests of the Federal government. These recommendations seek to improve the government’s ability to establish fair prices. The Panel recommends restoring the statutory definition of commercial services found in the Federal Acquisition Streamlining Act (“FASA”). FASA intended for services that were offered and sold in substantial quantities in the commercial marketplace to be defined as commercial, thereby allowing more streamlined purchasing per

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FAR Part 12. This would mirror how commercial buyers purchase in an efficient market using competition. However, the regulatory implementation of the definition of commercial services allowed services not sold in substantial quantities in the commercial marketplace, or those “of a type,” to nonetheless be classified as commercial and acquired using the streamlined purchasing procedures of FAR Part 12. This can leave the government at a significant disadvantage by restricting the available tools for determining fair and reasonable prices when limited or no competition exists. Restoring the statutory definition would not preclude purchasing services not sold in substantial quantities in the commercial marketplace, but would require that such services be purchased using FAR Part 15 procedures.

The Panel also recommends specific regulatory revisions that would provide a more commercial-like approach to determining price reasonableness when no or limited competition exists. The recommendation revises what “other cost or pricing data” the contracting officer can request when no or limited competition exists for a commercial item or service. To protect contractors from contracting officers who might be tempted to default immediately to seeking cost data from the contractor before attempting other means to establish price reasonableness, the Panel has provided an order of precedence, favoring market research first and limited information from the contractor last. In no event may the contracting officer require detailed cost breakdowns or profit, and shall rely instead on price analysis. The contracting officer may not require contractor certification of “other cost or pricing data,” nor may it be the subject of a post-award audit or price redetermination.

The Panel’s concerns regarding the use of T&M contracts are based largely on price and contract management. However, in considering a recommendation in this area, we had to balance our concerns for the risk these contracts place on the government, especially given GAO findings that the government does not provide sufficient surveillance, with our concern to protect the government’s ability to perform its mission uninterrupted. The Panel, therefore, recommends enforcing the current policies limiting the use of T&M contracts. This includes the recently enacted Section 1432 of SARA that allows the use of these contracts using FAR Part 12 procedures if they are competed. The Panel also recommends, whenever practicable, establishing procedures to convert work being done on a T&M basis to a performance-based effort. Finally, to limit the government’s risk under these contracts, the government should not award a contract or task order unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the T&M resources and to provide effective government oversight of the effort. While a written public statement from association representing contractors advised the Panel to recommend repealing the competition requirement for commercial item T&M contracts under SARA, the Panel could not ultimately support this given its findings regarding competition.

D. Equality Under Legal Presumptions

1. Findings

Government Contractors Not on a Level Playing Field. Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Current precedent provides that the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

2. Recommendation

In addition to protecting the best interests of the government, the Panel's statutory charter also called on it to make recommendations with a view toward ensuring fairness. The Panel recommends legislation to ensure that contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection 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. 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.

II. Statutory Charter: Review Laws And Regulations Regarding The Performance Of Acquisition Functions Across Agency Lines Of Responsibility, And The Use Of Government-Wide Contracts

A. Enhance Accountability And Transparency

1. Findings

Accountability and Transparency Lacking. Government-wide contracts are referred to in this report as interagency contracts and multi-agency contracts interchangeably. The performance of acquisition functions across agency lines is almost exclusively accomplished through the use of interagency contracts. The Panel finds that interagency contracts play a critical streamlining role, allowing agencies to achieve their missions with fewer resources devoted to procurement while affording the government the opportunity to leverage its buying power. But in 2005, GAO placed interagency contracts on its High Risk series due, in part, to ordering under these contracts that failed to adhere to laws, regulations, and sound contracting practices, and for a lack of oversight and accountability. GAO found that the causes of such deficiencies stem from the increasing demands on the acquisition workforce, insufficient training, and in some cases inadequate guidance. GAO also noted that the fee-for-service arrangement used for interagency contracts create incentives for the contracting agency to increase sales volume that results in too great a focus on meeting customer demands and not enough on complying with fiscal rules ordering procedures. GAO raised concerns that the lines

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of responsibility for key functions such as describing requirements, negotiating terms, and conducting oversight are not clear among: (i) the agency that manages the interagency contract, (ii) the ordering agency, and (iii) the end user.

The Comptroller General of the United States told the Panel that while it is known that these contracts are proliferating, outside of the GSA Schedules program and the Government-wide Acquisition Contracts (“GWACs”), there is no reliable data on how many such contracts exist, how much money is involved and the nature of the services acquired under them. As evidence of their popularity, interagency contract obligations in fiscal year 2004 totaled \$142 billion or 40% of the government’s obligations in that year.

With the proliferation has come extensive oversight by Congress, GAO, the IGs, outside organizations and the media of various federal agencies. Among the GAO and IG findings on ordering deficiencies is a significant failure to comply with competition requirements, use of ill-defined requirements and T&M pricing without sufficient government surveillance. Some GAO and IG findings identify “interagency assisting entities” that use interagency contracts. These interagency assisting entities provide fee-for-service acquisition support to other agencies. The Panel recommendations address these entities. The Panel also found a trend in agencies establishing enterprise-wide contract vehicles that operate much like an interagency contract, except their use is restricted to a single agency. While the Panel recognizes that some competition among agencies for these requirements is good, inefficient duplication threatens to dilute the overall value of interagency contracts to the government.

With the rapid growth in public funds spent under these interagency contracts and with the assisting entities that use them, the Panel believes it is critical to confront the lack of accountability and transparency to improve public confidence in these vehicles and ensure they fulfill their promise for reducing overall administrative costs to the government. It is notable that despite the significant dollars spent under these contracts, there is no consistent, Government-wide policy regarding their creation and reauthorization (or continuation).

2. Recommendations

Many of the issues identified by the GAO, agency IGs and Panel witnesses on the misuse of these vehicles are related to the internal controls, management and oversight, and division of roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of procedural requirements and transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, based on short term, transaction related benefits instead of on their ultimate value as a tool for effective government-wide strategic sourcing. The Panel recommends that under guidance issued by OMB, agencies formally authorize the creation or expansion of multi-agency contracts, enterprise-wide contracts, and assisting entities. The Panel’s recommendations maintain approval for the creation and expansion at the agency level (except for GWACs). The

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Panel provides a list of considerations to be included in this OMB guidance to address responsible management of these contracts and assisting entities.

The Panel also made recommendations to improve transparency regarding these contracts. First, the Panel recommends 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 includes the appropriate vehicles and data elements. The Panel believes that establishing a database identifying existing contracts and assisting entities as well as their characteristics is the most important near-term task. It is the view of the Panel the most expeditious means of assembling such information is in the form of a survey as currently drafted by OFPP in support of the OMB task force examining Interagency and Agency-Wide Contracting. The information gathered should allow for agency and public use. This survey is already underway.

From the outset of the Panel's work, we have been frustrated by the lack of data available to conduct a thorough analysis of interagency contracts and the orders placed under them. The Federal Procurement Data System ("FPDS") has traditionally been a transactions-based database, collecting information only on transactions that obligate funds. Therefore, while agencies input their order information, there was no efficient way to identify it as an order under an interagency contract, except for the GSA Schedules program.

In 2004, FPDS-Next Generation ("FPDS-NG"), a new technology solution, replaced FPDS. Twenty-seven years of collected contract data was migrated into the new system. But at the same time as the system migration, new reporting elements were added. For instance, FPDS-NG now collects information on interagency contracts. However, adding a new collection requirement on any ongoing contract or order creates a myriad of unavoidable migration issues. Moreover, information on the extent of competition at the order level is not reliable due to a number of issues including: (i) automatic DoD coding of all GSA schedule orders as full and open competition, (ii) coding of other orders as full and open based on the contract, and (iii) system migration rule failure.

The Panel also is concerned with the amount of incorrect data entered into the system by agencies, such as the ultimate value (base plus options) requiring the Panel to rely solely on the transaction value of an order, significantly less than the estimated value.

The data section of the report documents a long history of inaccurate data input by agencies. For example, the Panel's survey of PBA contracts and orders found that of the sample reviewed, 42% that were entered in FPDS-NG as performance based, clearly were not (with some agencies admitting to FPDS-NG coding errors). Among other recommendations for data improvement, the Panel has made several to focus attention on the importance of agencies inputting accurate data, including a statutory amendment assigning Agency Heads the accountability for accurate input. In those limited circumstances where the Panel and FPDS-NG staff were able to obtain data on interagency contracts, the Panel recommends providing public access to that data online.

III. Statutory Charter: Ensuring Effective And Appropriate Use Of Performance-Based Contracting

Performance-based Contracting, now called Performance-based Acquisition (“PBA”), is an approach to obtaining innovative solutions by focusing on mission outcomes rather than dictating the manner in which the contractor’s work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved.

During the Panel’s public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure. Despite the difficulty, it remains the preferred commercial technique seen as critical to obtaining transformational and innovative solutions. Ultimately, the Panel determined that in view of a lack of data supporting either that the technique is unworkable in the federal government sector or that PBA’s costs outweigh its benefits, the Panel’s statutory mandate was clear: improve the effectiveness and appropriate use of PBA. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBA. Rather the Panel aims are directed at improving current implementation and at providing a solid basis for a more thorough assessment of its value. Thus, the Panel agreed that the overall statement of the issue is “Why has PBA not been fully implemented in the federal government?”

A. Improve PBA Implementation

1. Findings

Uncertainty Remains on How and When to Apply PBA. Government officials testifying before the Panel related the challenges they face in applying PBA that included when and how to apply it and the time and resources required for the technique. They also spoke to the cultural emphasis of “getting to award” that shortchanges both the requirements definition process and effective post-award contract management. A 2002 GAO survey of 25 contracts reported as PBA found while most contained at least one PBA attribute, only 9 contained all of the required elements and may have used extremely restrictive work specifications. GAO concluded that the study raised concern about whether agencies have an understanding of PBA and how to maximize its benefits. A Rand Corporation study of the U.S. Air Force Air Logistics and Product Centers in 2002 found uncertainty over which services were suitable for PBA, confusion with the use of “Statement of Work” and “Statement of Objectives,” and about what constitutes a

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measurable performance standard. The Panel's own survey of randomly selected PBAs from the top ten contracting agencies reflect similar problems, including an inability to identify and align performance measures and contract incentives to ensure desired outcomes are achieved. A multi-association group representing government contractors told the Panel that many of the solicitations they receive that would be appropriate for PBA are still not described in terms of outcomes and those that are frequently do not identify measures to achieve those outcomes. This multi-association group provided the Panel with a sampling of such solicitations. As a result of these findings, the Panel concluded that PBA's potential for generating transformational solutions to agency challenges remains largely untapped.

FPDS-NG data are insufficient and perhaps misleading regarding use and success of PBA. At the suggestion of a written public statement, the Panel conducted its own survey of contracts and orders that were coded in FPDS-NG as performance-based. Of the 76 contracts and orders randomly selected from the top ten contracting agencies, the Panel received 55 that contained sufficient documentation to support the review. While 36% were determined to have the elements of a PBA, another 22% required significant improvement. And of the sample reviewed, 42% were clearly not PBA with some agencies admitting that the contracts were mistakenly coded as performance-based in FPDS-NG. Finally, it is important to note that FPDS-NG data is collected at the time of contract or order award and is not designed to collect information to assess cost savings or other similar measures of success.

2. Recommendations

Based on these findings, the Panel recommended more guidance to assist agencies in the efficient and appropriate application of PBA, including

- An Opportunity Assessment Tool that acknowledges the resource investment required by PBA and helps agencies identify those acquisitions likely to derive the most immediate benefit from such an investment;
- A Best Practices Guide on developing measurable performance standards; and
- Improved guidance on types of incentives appropriate for various contract vehicles

Other Panel recommendations seek to provide a framework for a discipline in defining outcomes and appropriate measures during acquisition planning, and with monitoring post-award. The recommendation for a Baseline Performance Case, prepared by the government, would assist agencies in developing and communicating appropriate outcomes, measures and expectations to prospective offerors. The Panel recommends a Performance Improvement Plan, prepared by the contractor, to serve as a tool to ensure that the contractor and agency are regularly assessing performance, expectations, and the need for continuous improvement to respond to shifting priorities

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As a signal of the cultural change PBA requires throughout the contract life cycle, the Panel recommends redesignating the traditional Contracting Officers Technical Representative (“COTR”) as a Contracting Officers Performance Representative (“COPR”). The COPR should receive training in PBA and be involved in the development of the Baseline Performance Case and key measures. The Panel recommends that the Federal Acquisition Institute and the Defense Acquisition University jointly develop a formal educational certification program for COPRs.

Finally, in recognition of the concerns raised by some regarding the appropriate use of and cost-benefits of this technique, the Panel makes two recommendations. First, the Panel recommends improved data on PBA usage and enhanced oversight by OFPP on proper implementation using an “Acquisition Performance Assessment Rating Tool” or “A-PART.” Currently, OMB uses a “Program Assessment Rating Tool” or “PART” as a systematic method for measuring program performance across the Federal government. It essentially includes a series of questions that help the evaluator determine whether a program is meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act (“GPRA”) as well as engaged OMB more aggressively in reviewing its implementation. The Panel recommends that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of a PBA to provide a more methodological and accountable approach to PBA implementation. While the Panel anticipates the need for such rigor until agencies are comfortable and competent in using the tool, we believe the requirement should sunset after three years unless its continued use is deemed useful by OMB and the agencies. Second, the Panel recommends that OFPP undertake a systematic study on the challenges, costs and benefits of using PBA techniques five years from the date of the Panel’s final report.

IV. Statutory Charter: Review All Federal Acquisition Laws And Regulations, And . . . Policies . . . Make Recommendations . . . Considered Necessary . . . To Protect The Best Interests Of The Federal Government [And] To Ensure The Continuing Financial And Ethical Integrity Of Acquisition

Because the state of, and the problems of, the federal acquisition workforce was not one of the topics specifically identified by Congress in the legislation establishing the Panel, some might wonder why the Panel addressed this topic. From the beginning, the Panel clearly understood that providing the insight and assistance that Congress sought could not be accomplished without addressing the federal acquisition workforce. Through the Panel’s review of numerous GAO and IG reports and extensive witness testimony, it is clear that the knowledge and skill base necessary to successfully operate the acquisition system and to secure good value for the government and taxpayers has outstripped the resources available to operate the system.

Without an analysis and recommendations on the state of this workforce, there is a risk that problems stemming from the shortcomings of the acquisition workforce would be misunderstood. And certainly, addressing the specifics of the Panel’s statutory charter, PBA, commercial practices, and interagency contracting, inevitably have an impact on the acquisition workforce, both in terms of identifying problems with these techniques and the recommendations

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to improve them. Finally, those readers who are familiar with the 1972 Commission on Government Procurement, and more recently, the National Performance Review, will recall that these initiatives recognized the importance of an effective workforce to the acquisition system.

A. Focus On The Acquisition Workforce

1. Findings

Even though there are now available a variety of simplified acquisition techniques, the demands on the workforce, both in terms of the complexity of the federal acquisition system as a whole as well as the volume and nature of what is bought, has markedly increased since the 1980s. A qualitatively and quantitatively adequate and adapted workforce is essential to the successful realization of the potential of the procurement reforms of the last decade. Without such a workforce, successful federal procurement is unachievable. But demands on the workforce have grown. Just since 9/11, the dollar volume of procurement has increased by 63 percent. And while acquisition reform made low dollar purchases less complex, high dollar purchasing became more complex with the emphasis on best value, past performance evaluations and PBA, placing greater demands on the workforce including requiring more sophisticated market expertise. The streamlined purchasing vehicles, such as purchase cards and interagency contracts, we now know are subject to management challenges associated with appropriate and effective use. Accompanying these trends is a structural change in what the government is purchasing, with an emphasis on high dollar complex services. In general, the demands placed on the acquisition workforce have outstripped its capacity. And while the current workforce has remained stable in the new millennium, there were substantial reductions in the 1990s accompanied with a lack of attention to providing the training necessary to those remaining to effectively operate the more complex buying climate. There are currently too few people in the pipeline, with between 5 and 15 years of experience to mitigate the eventual retirements of the most experienced acquisition workforce.

Lack of a Consistent Definition for and Accounting of the Workforce. Assessing workforce needs and proposing solutions for these challenges has been made difficult by the continued inconsistent definitions and accounting of the workforce. An accurate understanding of the key *trends* about the size and composition of the federal acquisition workforce cannot be had without using a consistent benchmark and none is currently available. The definitions for the DoD workforce and the civilian workforce are not consistent and have changed or been reported differently over time. The reports on the workforce, therefore, do not facilitate trend analysis.

The Panel recognized that these issues about the acquisition workforce have long roots. To assist the Panel in analyzing the available information about the size, composition, competencies and effectiveness of the acquisition workforce, and to help identify gaps and inconsistencies in the data, the Panel engaged a contractor, Beacon Associates, to collect and analyze the voluminous available data. Beacon created a report that has been used extensively by the Panel in developing its recommendations.

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Agencies have not Engaged in Systematic Human Capital Planning to Assess their Acquisition Workforce in the Present or for the Future. While the GAO has recognized improved progress in this area, there is a wide variance between agencies in terms of their progress. And while some agencies have undertaken an analysis of the competencies necessary for the workforce, they do not attempt to address the demands these competencies place on the workforce of the future nor the degree to which their existing workforce possess these competencies. In fact, GAO found that the civilian agencies generally lacked reliable, consistent and complete data on the composition of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.

Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce. Witness testimony before the Panel, a 2006 DoD IG Report, and the experience of members of the Panel makes clear that many agencies make substantial use of contractor resources to carry out their acquisition functions. But because there is no count of such contractor support, much of which is accomplished outside of the bounds of OMB Circular A-76, the government lacks information on which to make a determination of whether this reliance is cost effective.

While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments. Testimony before the Panel point to two reasons for this disparity. First, the most successful commercial organizations have built a procurement workforce on the understanding that smart buying is important to profitability. Second, the private sector pays better, has superior approaches to recruitment and retention, and considers procurement integral to business success.

2. Recommendations

Remedying what the Panel found as the structural barriers to assessing the acquisition workforce is an important first step to assessing how the acquisition workforce can better fulfill its mission. Therefore, the Panel provides a specific recommendation to OFPP to prescribe a single, consistent government-wide definition of the acquisition workforce using a combined methodology designed to address the broader understanding of the functions outside of procurement that must be addressed while preserving a count that does not overstate the resources available to conduct and manage procurement. The Panel's belief in the urgency of accurately assessing the acquisition workforce on a government-wide basis is reflected in its recommendation that using this combined methodology, OFPP should collect this data within a year of the issuance of Panel's final report. Consistent with this recommendation, OFPP should also be responsible for the creation, implementation and maintenance of a mandatory government-wide database for members of this acquisition workforce. The Panel notes that the Commission on Government Procurement recommended a similar system in 1971.

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Human capital planning requires prompt attention. Chief Acquisition Officers (“CAOs”) should be responsible for assessing the current and future needs of their agencies, including forthrightly identifying and acknowledging gaps, and taking immediate steps to address these gaps through hiring, allocation of resources, and training. The CAO should be responsible for developing a separate Acquisition Workforce Human Capital Strategic Plan as part of the overall Human Capital Management Plan. This plan should assess the effectiveness of contractor personnel supplementing the acquisition workforce. OFPP should be delegated the responsibility for reviewing and approving agency Human Capital Plans regarding the acquisition workforce and for identifying trends, good practices, and shortcomings.

The Panel recommends identifying and eliminating obstacles to the speedy hiring of new talent and a government-wide acquisition intern program to attract first-rate entry level personnel into the acquisition career fields. Concurrently, incentives to retain qualified, experienced personnel need to be created. To address the training needs of the acquisition workforce, the Panel recommends the statutory reauthorization of the SARA Training Fund and provision of direct funding/appropriations for it. Additionally, OMB should issue guidance directing agencies to assure that funds in agency budgets identified for acquisition workforce training are actually expended for that purpose and require Agency Head approval before such funds are diverted for other uses. OFPP should also conduct an annual review of whether agency acquisition workforce training funds are sufficient to meet agency needs per the agency’s human capital plan.

Because both DoD and the civilian agencies provide for waivers to the congressionally established training and education standards, such waivers should be guided by sufficient oversight. The Panel recommends that permanent waivers be granted by agencies only after an objective demonstration that the grantee possesses the competencies and skills necessary to perform the duties and that temporary waivers should only be granted to allow sufficient time to acquire any lacking education or training. And CAOs (or equivalent) should report annually to OFPP on the agency’s usage of waivers, justifying their usage and reporting on plans to overcome the need to rely excessively on waivers. Upon review of these reports, OFPP should provide an annual summary report on the use of waivers of congressionally established training and education standards. In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12-month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training. And finally, in light of OFPP’s unique government-wide focus, the Panel recommends establishing in OFPP a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.

V. Statutory Charter: Protect The Best Interests Of The Government...Amend Or Eliminate Any Provisions That Are Unnecessary For The Effective, Efficient, And Fair Award And Administration Of Contracts

The Panel recognized early in its deliberations that the Panel’s statutory charter would necessarily impact small business. In terms of ensuring the fair award of contracts, certainly

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with respect to government-wide contracts, the interests of small business must be represented. The statutory requirement that agencies afford the maximum practicable small business participation in federal acquisition reflects the critical role of small businesses in stimulating the Nation's economy, creating employment, and spurring technological innovation. The Panel identified findings and recommendations that impact efficient and effective acquisition planning and fairness in the competition of multiple award contracts.

A. Improve Small Business Participation

1. Findings

Inconsistent Statutory and Regulatory Framework Governing the Use of Various Small Business Preference Programs Hinders Efficient and Effective Use of the Programs. The Panel found potentially conflicting guidance between the statutory and regulatory provisions governing the priority of the various small business contracting programs. For example, the Small Business Act appears to mandate a priority for the HUBZone program by providing that contracting officers "shall" use the HUBZone contracting mechanism in certain circumstances "notwithstanding any other provision of law." At the same time, other provisions of law appear to suggest parity between the HUBZone and 8(a) programs. The potential inconsistency between the statutory framework and the regulatory guidance has created confusion among contracting officials and has hindered the proper application of these programs to ensure small business goal achievements.

But the Panel also found that there are no express guidelines governing a contracting officer's decision in selecting the appropriate small business contracting techniques. This lack of guidance not only deprives a contracting official of published standards against which to exercise discretion, but also obfuscates that decision-making process.

The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions. Continuing its focus on ensuring small businesses are afforded sufficient opportunities to participate in government contracting and that acquisition planning is efficient and effective, the Panel found that there continues to be confusion about what constitutes contract bundling and the procedures that apply for addressing it. Furthermore, the reporting and review provisions contain little in the way of clear procedures, instructions, or techniques for mitigating the effects of bundling once such acquisitions are identified and justified during the acquisition planning phase. This lack of guidance contributes to the workload pressures facing our acquisition workforce, undermining its ability to plan and award acquisitions efficiently.

Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses. The Panel found that because senior program managers play such an important role in shaping an acquisition during the planning stages, it is imperative that they understand the governing small business contracting requirements as well as the benefits of contracting with small business. Such an understanding would also serve to

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lessen the pressure on contracting officials to explain such requirements, thereby improving efficiency and the overall effectiveness of agencies in meeting small business goals.

Cascading procurements fail to balance the Government's interest in quick and efficient contracting with governing requirements for the maximum practicable small business contracting opportunities. Cascading procurements (sometimes called tiered procurements) are a costly substitute for government market research. Essentially, these procurements tier the evaluation of offers based on the socioeconomic status of the offeror. For example, an agency may establish a four-tiered evaluation, beginning with 8(a), HUBZone, small business, and finally large business offerors. The contracting officer's evaluation of offers will then cascade to each succeeding tier until a winning offeror is identified. If the winner is found in tier one, then the proposals of all other tiered offerors will never be considered for award. This controversial contracting technique, fails to balance the interests of the government and contractors. Proposal preparation is costly for government contractors, large and small alike. As a result, recent legislation limits their use in the Department of Defense. The new legislation requires the contracting officers to first conduct the required market research, and to document the contract file before engaging in cascading procurements. But the Panel has determined that the recent enhancements to the Central Contractor Registration database have improved the contracting officer's capability to conduct this type of market research, thereby obviating the need for such procurements. Cascading procurements place an undue financial burden on small and large contractors that is not outweighed by the administrative convenience of this technique.

There is No Explicit Statutory Authority For Small Business Reservations in Otherwise Full and Open Competitions for Multiple Award Contracts. While the Panel recognizes the great efficiencies offered by these contracts, especially those available for multi-agency use, the desire for efficiency must be balanced against the sometimes negative impact these contracts can have on small business opportunities. The Panel found that, often, these contracts have such broad coverage, either geographically, functionally, or both, that they effectively preclude small businesses from competing with large businesses under full and open competitions for the multiple awards. And if there are small businesses that receive awards under these contracts, there is no specific statutory or regulatory authority for agencies to reserve orders under these contracts for small business competition in order to achieve agency goals.

2. Recommendations

The Panel recommends a simple and specific amendment to the Small Business Act that would provide consistent statutory language enforcing the intended parity among the various small business programs and affording contracting officers the discretion and flexibility to develop acquisition strategies appropriate to agency small business goal achievements. The Panel also recommends specific statutory and regulatory revisions clarifying that contracting officers should exercise their discretion to select the appropriate small business contracting methods based on agency small business goal achievements and market research on the availability of small business vendors. With respect to the concerns over the implementation of contract bundling requirements, the Panel recommends additional training and the creation of an

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interagency group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.

Finding that acquisition planning and compliance with requirements would be better served if all stakeholders in the acquisition planning phase were better trained, the Panel recommends that OFPP coordinate the development of a government-wide small business contracting training module targeting program managers and acquisition team members. The training module should not only educate these officials on the requirements, but also the value and benefits of contracting with small businesses, including acquainting them with the substantial capabilities, sophistication and innovation of the Nation's small business concerns. The Panel also recommends a statutory prohibition on the use of the cascading procurement technique, finding that they place an undue financial burden on contractors, thereby limiting their participation in government procurement.

Finally, with respect to multiple award contracts, the Panel recommends specific statutory amendments that would allow contracting officers to reserve, for small business competition only, a portion of the multiple awards in a competition not suitable for a total small business set-aside. The Panel further recommends express authority to reserve certain orders under these multiple award contracts for competition by the small business multiple awardees only. These authorities will afford contracting officers who wish to take advantage of these streamlined acquisition vehicles greater opportunities in meeting agency small business goals as well.

VI. Statutory Charter: Ensure The Continuing Financial And Ethical Integrity Of Acquisitions

The government has realized for some time that it cannot achieve its mission without the support of contractors. A 1991 GAO report stated that contractors were "essential for carrying out functions of the government." Since this report, the government's spending on services has exceeded that spent on goods. Spending on services in 2006 accounts for 61% of total procurement dollars.

Given the growth of services, the expanded role of contractors and the government's reliance on them in the workplace, the Panel believes that addressing the "blended" workforce was essential though not specifically called out in its authorizing statute.

A. Focus On Effective, Efficient And Responsible Use Of Contractor Support

1. Findings

Several developments have led Federal agencies to rely increasingly on the use of contractors as service providers. Since the mid 1990s, the federal acquisition workforce has been reduced by 50 percent, and hiring virtually ceased, creating what has been termed the "bathtub effect," a severe shortage of procurement professionals with between 5 and 15 years of experience. The impact of this shortage is likely to be felt more acutely soon, as half of the

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current workforce is eligible to retire in the next four years. The impact of these events has left its mark on government operations, creating a shortage of certain capabilities and expertise in government ranks. In order to meet mission requirements and stay within hiring ceilings, some agencies have contracted for this capability and contractors are increasingly performing the functions previously done by civil servants. This has largely occurred outside of the discipline of OMB Circular A-76 procedures, meaning there is no clear and consistent governmentwide information on the numbers of and functions performed by this growing cadre of service providers.

The “blended” or “multi-sector” workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries. While the A-76 outsourcing process provides a certain rigor and discipline to distinguishing between “inherently governmental” and commercial functions, the application of these terms is less clear outside of this context. 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 questioned.

The growth in the use of contractors to perform acquisition functions that in the past were performed by Federal employees, coupled with the increased consolidation in many sectors of the contractor community, has increased the potential for organizational conflicts of interest (“OCI”). Based on the language in FAR 9.5, the case law has divided OCIs into three groups: (i) biased ground rules; (ii) unequal access to information; and (iii) impaired objectivity.¹ And while the FAR instructs but provides little guidance to already strained contracting officers to identify, evaluate, and avoid or mitigate such conflicts, the GAO is sustaining more protests for the government’s failure to do so. With respect to protection of contractor confidential or proprietary data, the Panel recognizes the increased threat of improper disclosure as more and more contractor employees engage in support of the government’s acquisition function.

Government employees face civil and criminal penalties for not acting impartially in their official duties in exchange for personal gain, and some have suggested that similar civil and criminal statutes be applied to contractor employees performing acquisition functions. But the Panel found that many contractors have established extensive ethics and compliance programs. Further, the Sarbanes-Oxley Act of 2002 requires specific accountability and controls relating to fiduciary duties.

As the extent of service contracting has grown, the current ban on personal services contacts has created two unfortunate responses. Except as authorized by statute, the government is prohibited from entering into personal services contracts (“PSCs”). The FAR cautions that such relationships not only result from inappropriate contract terms, but also from the manner in which the contract is administered. In order to comply with the PSC prohibition, government managers may find themselves crafting cumbersome and inefficient processes to manage the work of contractor personnel to avoid an appearance that they are exercising continuous

¹ See Daniel I. Gordon, *Organization Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 2005.

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supervisory control. Some testimony before the Panel indicates that others simply ignore the ban.

2. Recommendations

The Panel recommends that OFPP update the principles for Agencies to apply in determining which functions must be performed by civil servants. These principles are needed so that those not specifically engaging in A-76 studies understand their applicability to the blended workforce.

With respect to conflicts of interest, the Panel concluded that it is not necessary to adopt any new Federal statutes to impose additional requirements upon contractors or their personnel. Rather, where appropriate, the obligations should be imposed through contract clauses, the goal of which should be ethical conduct, not technical compliance. Such clauses would not necessarily impose specific prohibitions upon contractors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct with general ethical guidelines and principles and/or by requiring appropriate disclosures. The Panel does not believe that the requirements imposed on contractors and their personnel – through the contract and solicitation clauses or otherwise – should incorporate the extensive and complex requirements imposed on Federal employees. The Panel is concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government.

Thus, the Panel recommends that the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs and personal conflicts of interest (“PCI”), and protection of contractor confidential and proprietary data, described in more detail in this report. The Panel recognized that numerous agencies have considered these issues, and in many cases identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council, as the developers of government-wide acquisition regulations, was the appropriate organization to perform this task. The FAR Council should work with DAU and FAI to develop and provide training and techniques to help procurement personnel identify and mitigate potential OCIs and PCIs, remedy conflicts when they occur, and appropriately applying tools for the protection of confidential data.

Finally, the Panel recommends replacing the ban on PSCs with guidance on the appropriate and effective use of such contracts. In implementing this recommendation, the government should be allowed to direct or supervise the contractor employee’s workforce concerning the substance of work or tasks performed. This new flexibility, however, should be accompanied by retention of the current prohibitions on government involvement in purely

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supervisory activities (e.g. hiring, leave approval, promotion, performance ratings, etc.).

Because this recommendation represents a significant departure from the decades of prohibition on personal services, the Panel recommends that GAO review the new policy five years after implementation to identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

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CHAPTER 1

COMMERCIAL PRACTICES

REPORT OF THE ACQUISITION ADVISORY PANEL

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Commercial Practices Working Group Report

Part I – Background

Government Efforts to Use Commercial Practices

A. Introduction

Acquisition and process reform has been the subject of numerous studies and implementation efforts over the past four and a half decades.¹ A decade ago, following up on the Packard Commission Report, internal Department of Defense (DoD) initiatives and the work of the Section 800 Panel, and the National Performance Review (“NPR”) Report, the Federal Acquisition Streamlining Act of 1994 (“FASA”)² and the Federal Acquisition Reform Act (“FARA”)³ were enacted. The studies, FASA and FARA, were an effort to make the federal procurement process more commercial-like and to simplify the federal procurement process with the expectation that a simpler and more commercial-like process would increase government access to private sector technology and the growing private sector development of technology-related services. The reforms of the mid-90’s adopted some commercial practices in government procurement and encouraged the purchase of commercial products and services rather than acquisitions tailored to unique government specifications in the belief that this approach would give the Government access to commercial solutions, reduce the cost of major systems, improve the overall quality of contractor performance and shorten the time it takes to purchase goods and services that support agency missions. Those reforms have expanded the definition of commercial items to encompass not only goods but virtually all types of services.⁴

The most significant acquisition reform involving commercial items and services was FASA, which became law on October 13, 1994, following the 800 Panel Report and the NPR. This law was intended, among other purposes, to make it easier for the Government to acquire goods and services from the commercial marketplace. FASA made a wide range of changes in acquisition policy and procurement law by exempting purchases of commercial products from several statutes, while expanding the definition of a “commercial product.” FARA made additional statutory changes, such as exempting commercial items from certain cost disclosure and cost-accounting standards that, discouraged commercial companies from doing business with the Government. Building on more than 20 years of work by the Commission on Government Procurement,⁵ the Packard Commission,⁶ the Section 800 Panel,⁷ and the NPR,⁸

¹ See Def. Acquisition Performance Assessment Report, App. E (Jan. 2006). (Citing 128 acquisition-related studies that preceded it.)

² Pub. L. No. 103-355, 108 Stat. 3243 (1994); codified at 41 U.S.C. § 403.

³ Pub.L. No. 104-106, 110 Stat. 186 (1996).

⁴ Ashton B. Carter & John P. White, *Keeping the Edge, Managing Defense for the Future* 170-71 (MIT Press 2001).

⁵ Report of the Comm’n on Gov’t Procurement (Dec. 1972). For specific discussion of commercial products, see *id.* Vol. 3, Pt. D, *Acquisition of Commercial Products*.

⁶ The President’s Blue Ribbon Comm’n on Def. Mgmt, *A Quest for Excellence: Final Report to the President and Appendix* (June 1986) (hereinafter referred to as the “Packard Commission. Report”)

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FASA and FARA set the stage for simplifying the process for entering into contracts, and attempting to align government contracting more closely with commercial practices.⁹

In the late 1980's and early 1990's, senior government officials, including the Secretary of Defense and the Vice-President, were concerned that the Government was paying too much and not obtaining the latest technology because of regulatory impediments.¹⁰ Key concerns cited were military unique requirements and complex regulatory requirements associated with cost-based contracting such as the Truth in Negotiations Act ("TINA"), government specific Cost Accounting Standards ("CAS"), and associated reporting, auditing, and oversight mechanisms.¹¹ Other concerns cited in the NPR were burdensome rules for smaller purchases.¹² As discussed below, for acquisitions of commercial items the presumption in FASA and FARA is that a fair and reasonable price should be determined by reference to the market, rather than by examination of a seller's costs. FASA and FARA focused on obtaining the benefits of the commercial marketplace through competition, historical pricing, benchmark pricing, *etc.* However, in circumstances where market forces are not active, this presumption is questionable.¹³

In 1986, the Blue Ribbon Commission on Defense Management, chaired by former Deputy Secretary of Defense David Packard, highlighted the need for DoD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DoD contracts.¹⁴ The Packard Commission's recommendations clearly focused on the power of the commercial marketplace to produce more cheaply than the defense acquisition system.¹⁵ The report also contained a separate section on competition wherein the Commission noted that foremost among commercial practices is competition, "which should be used aggressively in the buying of systems, products and professional services."¹⁶

In January 1993, the Section 800 Panel, which specifically focused on laws affecting defense procurement, published its 1800-page report that made recommendations in the areas of procurement reform, electronic commerce, and military specifications, among others. The 800 Panel proposed a new approach to the acquisition of commercial items, both as end-items and as

⁷ The Advisory Panel on Streamlining and Codifying Acquisition Laws (known as the Section 800 Panel) was created in response to Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510.

⁸ Report of the Nat'l Performance Review, *Reinventing Procurement PROC 13*, Ch. 3 (Sept. 7, 1993).

⁹ Carter, *supra* note 4, at 170-71.

¹⁰ See National Performance Review Report: Foster Reliance on the Commercial Marketplace (Sept. 14, 1993).

¹¹ This concern is reflected in the Packard Commission Report, the Section 800 Panel, created by Congress, and the National Performance Review Report.

¹² Report of the Nat'l Performance Review, *PROC09: Lower Costs and Reduce Bureaucracy in Small Purchases through the Use of Purchase Cards* (1993).

¹³ See U.S. GAO, *DOD Contracting: Efforts Needed to Address Air Force Commercial Acquisition Risk*, GAO-06-995, 2-3 (Sept. 2006).

¹⁴ See Packard Comm'n Report.

¹⁵ Packard Comm'n Report at 60.

¹⁶ Packard Comm'n Report at 62.

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components in defense-unique products. The Panel specifically proposed: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; an expanded exemption for “adequate price competition” in the Truth in Negotiations Act, and relief from inappropriate requirements for cost or pricing data when a competitively awarded contract for commercial items or services is modified; new exemptions to technical data requirements in commercial item acquisitions; and relief from “Buy American” restrictions. The Panel also proposed creation of new subpart in Title 10 for commercial item acquisitions providing for exemptions from statutes that create barriers to the use of commercial items and including provisions on pricing, documentation, and audit rights tailored for commercial item acquisition.¹⁷

The Defense Science Board issued a report entitled “Defense Acquisition Reform” in July 1993. The report urged adoption of the recommendations of the Section 800 Panel. The Board also recommended: moving away from cost-based acquisition; using functional specifications to encourage commercial solutions; and adopting commercial practices for treatment of intellectual property.¹⁸

Later, on February 24, 1994, Defense Secretary William Perry set forth his vision for simplification of the way the Pentagon buys military systems in a report titled “Acquisition Reform: A Mandate for Change.”¹⁹ Dr. Perry was particularly concerned that the use of detailed military specifications limited competition, stifled innovation, increased costs, and delayed the fielding of new systems.²⁰ To correct that, Dr. Perry issued a memorandum entitled “Specifications and Standards—A New Way of Doing Business” on June 29, 1994. Also known as the “Perry Memo,” it reversed DoD policy by directing the military services to “use performance and commercial specifications and standards instead of military specifications and standards, unless no practical alternative exists to meet the user’s needs.” It also directed military acquisition programs to reduce their oversight, employing process controls in place of extensive testing and inspection.²¹

The Panel’s Commercial Practices Working Group was privileged to meet with Dr. Perry and to discuss his experience on the Packard Commission, his memorandum and his efforts to implement commercial practices. He explained that as a member of the Packard Commission he became concerned about the inability of the defense acquisition system to obtain current technology for semi-conductors. He said that when he became Secretary of Defense and issued his memorandum, his focus was on semi-conductors. He noted that when he was Secretary of Defense, DoD was behind in its use of semi-conductors. Dr. Perry was focused on how to buy

¹⁷ See *Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United States Congress* 18 (1993).

¹⁸ See *Report of the Defense Science Board Task Force on Defense Acquisition Reform* (July 1993).

¹⁹ Carter, *supra* note 4, at 171-72.

²⁰ William Perry, DoD, AAP Commercial Practices Working Group meeting (May 22, 2006).

²¹ Memorandum from Secretary of Defense William Perry to Secretaries of the Military Departments, et al., *Specifications & Standards – A New Way of Doing Business* (June 29, 1994).

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semi-conductors and related technology without paying exorbitant prices for them. He had observed that industry had already created semi-conductors that were adequately rugged. Therefore, he was particularly concerned about the impact of military specifications on the cost of technology – he saw potential savings of one to two billion dollars per year, just in semi-conductors.²²

Around the same time, the manner in which the DoD acquired information technology (IT) changed. The Information Technology Management Reform Act of 1996 (Division E of the Clinger-Cohen Act) sought to leverage commercial IT advances by calling for “modular contracting” in which acquisitions are “divided into smaller acquisition increments that (1) are easier to manage individually..., (2) enhance the likelihood of achieving workable solutions..., (3) [are] not dependent on any subsequent increment..., and (4) take advantage of any evolution in technology or needs.”²³

While FASA and FARA changed the federal acquisition landscape to improve access to commercial markets and to allow the Government to function more like a commercial buyer in some respects by reducing regulatory barriers, as discussed further below, the Government is nonetheless not a commercial buyer. The ways in which the Government differs from a commercial buyer are many, but to take some obvious examples:

- As discussed above, the Government’s source of funding is taxpayer – public funds. That source of funding is subject to Constitutional and legal restrictions that impose burdens on government managers to which the private sector is not subject. Annual appropriations, which frequently are not enacted into law after the fiscal year has already started, and fiscal procedures that distribute funds within an agency, often delay the availability of funds and shorten the time period that government managers have to conduct competitive procurements and obligate funds. Private sector buyers are not limited to annual appropriations for planning and implementing their acquisitions.
- The Government is not accountable from a profit and loss standpoint for its performance. Success in Government is measured by different standards; e.g., successful mission accomplishment, which features national security, defense, and homeland security missions. Market-based pressures that strongly influence commercial company performance are not present. Private companies can change and adapt their practices to reflect market trends as they evolve. The government changes its practices by statute and regulation.

²² Perry meeting.

²³ Pub. L. No. 104-106, §.5202, 110 Stat. 690 (1996).

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- Government is committed to a host of social and economic programs that are largely implemented through discretionary expenditures divided between grants and the procurement system, such as preference programs for small and disadvantaged businesses of various types; environmentally friendly products; handicap accessible products, services and buildings; and many others. This means the Government may purchase services or goods from a more costly provider in furtherance of broader social policy goals. And, compliance with some of these requirements is subject to an audit and compliance regime by a variety of Federal agencies.
- The Government has its own regulatory intellectual property (IP) regime that is significantly different from the private sector. The private sector focuses on development and protection of IP and has significant legal remedies for protecting the value of its IP. The Government, on the other hand, focuses on its rights to use IP without restriction for government purposes, which may involve giving a company's IP to a competitor, if necessary, for a government mission. The differing approaches often conflict when the Government acquires commercial items.
- The Government is subject to trade policy restrictions that limit the sources for its materials and products.
- The disputes mechanism for government contractors is limited to monetary remedies under the Contract Disputes Act. In the private sector, parties are free to bring claims in court, including seeking equitable remedies, or negotiate contract provisions for alternative resolution.
- Even in the "commercial" area, the Government has the right to audit, investigate, and bring civil or criminal fraud claims against a contractor.

It is in the context of the changes directed at making the Government's acquisition process more commercial that the Panel has done its analysis. The Panel began its efforts by reviewing relevant laws, regulations, and procurement policies relating to use of commercial practices by the Government. It further identified and reviewed reports and studies from the Government Accountability Office ("GAO"), the Inspectors General of DoD and General Services Administration. The Panel examined other studies and analyses such as the Defense Acquisition Performance Assessment and the study of Price-Based Acquisition performed by the Rand Corporation for the Air Force. The Panel also reviewed other literature and background studies on the topic of commercial practices in services acquisition. The Panel attempted to seek

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the views of all stakeholders; *i.e.*, the government users and buyers, the holders of government contracting vehicles, and the contractor community.

Significantly, the Panel attempted to ascertain *current* commercial practices, particularly for services acquisition by large commercial buyers of services and the professionals that support the procurement process for those companies. The Panel gained a heightened awareness that there exists in the private sector a large, vigorous, and rapidly-growing market for the acquisition of professional services, particularly information technology (“IT”), and IT-heavy business management and financial services. When large, private-sector companies acquire services, they may engage in an “outsourcing” transaction. For example, a company may seek a vendor to manage its IT resources, its human resources department, or support financial institutions transaction processes. In some outsourcing transactions, a company may acquire vendor services to support its own performance of such functions.

American corporations are hiring services vendors, both domestic and foreign, at a rapid pace to drive down costs and improve their profitability. These companies are supported, both internally and externally, in their procurement processes by highly trained and experienced executives and consultants. Indeed, there are services acquisition specialists who work only in the private sector. Moreover, major private-sector buyers are acquiring services from many of the same companies who sell services to the Government. The Commercial Practices Working Group and the Panel set out to learn as much as possible about the acquisition processes used by large private sector buyers. The Working Group met over 40 times in the past 17 months. The full Panel also has heard directly from a number of private sector buyers about their acquisition practices. At the same time, the Panel recognized that the Government has created its own set of practices that it identifies as “commercial,” characterized by FAR Part 12, use of interagency and indefinite delivery indefinite quantity (IDIQ) contracts, the GSA Multiple Award Schedule, and relief from submission of certified cost or pricing data.

The questions upon which the Panel has focused include: (1) how the Government can take advantage of commercial practices; (2) what is working and what is not in the current government “commercial” framework, and how that compares to what the commercial market is doing now; (3) how the Government’s commercial-like practices can be refined and improved by reference to current commercial best practices; and (4) how to strike the right balance to obtain access to commercial markets while achieving mission performance, honoring various social policy goals, and obtaining a reasonable level of oversight to protect the Government from fraud and abuse (recognizing that the Government will never be a truly commercial buyer). These are significant questions to have tackled, and the expectation is that this debate will continue for some time. However, it is very useful, a decade out from FASA and FARA, to benchmark current commercial best practices based on the huge volume of private sector services transactions and to compare the current Government “commercial” approach.

B. “Commercial Items” and Commercial Practices: Definition and Procurement Policies

The term “commercial items” has evolved as various acquisition reforms have attempted to simplify government procurement and to harness the efficiency of the commercial marketplace. As the Section 800 Acquisition Advisory Panel observed, “[T]he primary purpose of defining a commercial item [is] to be able to exempt items so defined from the reach of [statutes and regulations that] have created barriers to the acquisition of commercial items.”²⁴ Accordingly, this categorical approach to procurement consists of four components: (1) the gateway definition of “commercial items;” (2) the application of the definition to a particular item or service; (3) the determination of the appropriate pricing mechanism; and (4) the preferences and exemptions afforded to such items as qualified supplies or services.

1. Statutory Definition: “Commercial Items”

The current statutory definition for “commercial items” is set out in the Office of Federal Procurement Policy Act²⁵. It includes tangible items of the type traditionally used by the public, but it also includes items that have evolved from tangible commercial items and items that have been modified through processes traditionally available to the general public or in such a way that does not significantly alter the nongovernmental function of the item. Notwithstanding the use of the term “items,” the definition also embraces two forms of services: (1) services in support of tangible, commercial items and (2) standalone services, provided that such services are offered and sold competitively in substantial quantities based on established catalog or market prices. In full, the current statutory definition provides:

The term “commercial item” means any of the following:

- (A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—
 - (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.
- (B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

²⁴ 8 *Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United States Congress* 18 (Jan. 1993).

²⁵ 41 U.S.C. § 403(12).

(C) Any item that, but for—
(i) modifications of a type customarily available in the commercial marketplace, or
(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if—
(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and
(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.²⁶

2. Statutory Preferences and Exemptions for “Commercial Items”²⁷

In enacting FASA²⁸ in 1994 and FARA in 1996²⁹, Congress established a preference for the acquisition of “commercial items”³⁰ and provided exemptions from many of the cost-based

²⁶ 41 U.S.C. § 403 (12).

²⁷ See App. A for a redline tracing the evolution in the definition of “Commercial Items.”

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procurement requirements, including the Truth in Negotiation Act's ("TINA") cost or pricing data requirements³¹ and certain cost accounting standards ("CAS").³² In addition, Congress provided exemptions from many government-unique laws that were perceived as barriers to the procurement of "commercial items."³³

C. Legislative and Regulatory Origins

To fully understand the contemporary usage of the term "commercial items," it is necessary to consider its origins—as a component of the larger development of modern acquisition policy and as a reaction to perceived problems associated with those policies. Federal acquisition policy incorporates three core principals: (1) conducting procurements competitively whenever practicable so that the Government receives quality goods and services at a fair price and interested parties have a reasonable opportunity to compete; (2) maintaining the transparency of the acquisition process; and (3) ensuring that the Government's acquisition process has, and is seen as having, integrity.

1. The Origins of Current Government "Commercial" Practices

The start of the modern acquisition era is appropriately demarcated by the end of the Second World War.³⁴ In the immediate aftermath, Congress enacted the framework for modern acquisition procedures: the Armed Services Procurement Act of 1947³⁵ and its civilian counterpart, the Federal Property and Administrative Services Act of 1949.³⁶ For the most part, current federal acquisition policy developed from this framework—though it was shaped, to a great extent, by the unique concerns of the second half of the twentieth century, including the large peacetime military establishments associated with the Cold War, the Federal Government's expanding role in the domestic sphere, the rapid development of civilian and military technologies, and the equally rapid expansion of government spending.³⁷

²⁸ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

²⁹ Pub. L. No. 104-106, div. D, tit. XLII, 110 Stat. 649.

³⁰ 10 U.S.C. § 2377 (codifying preferences).

³¹ 10 U.S.C. § 2306a(b)(1)(B).

³² 41 U.S.C. § 422(f)(2)(B)(i).

³³ See Pub. L. No. 103-355, § 8105, 108 Stat. 3243, 3392. See also Pub. L. No. 104-106, div. D, tit. XLII, § 4203, 110 Stat. 642, 654-55 (rendering inapplicable certain procurement laws regarding commercially available off-the-shelf items). The Federal Acquisition Reform Act was renamed the "Clinger-Cohen Act" by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).

³⁴ It appears that the stresses of war are equally beneficial for the advancement of federal procurement policies as they are for medicine. As the 1972 Commission on Government Procurement explained, "The most significant developments in procurement procedures and policies have occurred during and soon after periods of large-scale military activity." Comm'n on Gov't Procurement Report VOL. 1 at 163 (1972).

³⁵ Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified as amended at 10 U.S.C. § 2301 *et seq.*).

³⁶ Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended at 40 U.S.C. § 471 *et seq.*).

³⁷ S. Rep. No. 103-259, at 1-2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2562.

While the Government sought to acquire more services and supplies—in particular, the newly emerging aerospace and electronic technologies of the 1950s and 1960s—the procurement system was becoming exponentially more complex.³⁸ These trends proved prohibitive to achieving all of the Government’s principal goals outlined above: the complexity discouraged competitive participants and there was concern that the volume of negotiated acquisitions made it increasingly difficult for the Government to safeguard itself against inflated cost estimates in negotiated contracts.³⁹

2. The Commercial Item Exemption from the Original Truth in Negotiations Act

In 1962, Congress enacted Public Law 87-653 to facilitate fair price terms in noncompetitive contracts.⁴⁰ The law amended the Armed Services Procurement Act to require “oral or written discussions” with all firms “within a competitive range” and promoted the use of advertising over single-party negotiated contracts—all in an effort to increase competition. The law also contained a provision requiring contractors to submit and certify detailed cost or pricing data to provide the Government with sufficient information to negotiate a fair price—now popularly referred to as the Truth in Negotiations Act (“TINA”).⁴¹

TINA exempted certain acquisitions from its requirements for certified cost or pricing data, including acquisitions that involved “commercial items sold in substantial quantities to the general public.” In full, the exemption clause stated:

*Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such a determination.*⁴²

³⁸ Comm’n on Gov’t Procurement Report VOL. 1 at 177-78 (1972).

³⁹ *Id.* at 178. See also S. Rep. No. 87-1884 (1962), reprinted in 1962 U.S.C.C.A.N. 2476. [Note: prior to 1984 enactment of the Competition In Contracting Act, the Armed Services Procurement Act and the Federal Property and Administrative Services Act relied on sealed bidding for competition. Negotiated procurement was permitted, but as an exception to formal advertising requiring a written justification. While competition for negotiated procurements was required, if practicable, negotiated contracts were frequently non-competitive.] See S. Rep. No. 98-50 (1983), reprinted in 1984 U.S.C.C.A.N. 2174-84.

⁴⁰ S. Rep. No. 87-1884 (1962), reprinted in 1962 U.S.C.C.A.N. 2476.

⁴¹ Public Law 87-653 may have actually discouraged increased participation and competition among vendors. The 1993 Report of the Acquisition Law Advisory Panel (“Section 800 Panel”) argued that TINA “greatly impedes commercial buying.” *Acquisition Law Advisory Panel Report* at 6.

⁴² Pub. L. No. 87-653, 76 Stat. 528 (1962) (emphasis in original).

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TINA was the first statute to use the term “commercial items.” To qualify under the “commercial item” exemption—and avoid TINA’s data submission requirements—a contractor had to proffer established catalog or market prices “sold in substantial quantities to the general public.” The definition did not encompass modification or development, and it did not apply to items not yet sold to the general public, even if those items were being developed for use by the general public.

3. The Commission on Government Procurement

During the 1960s and 1970s, the federal acquisition system was perceived as being plagued by cost overruns, inefficiencies, and burdensome government specifications. A 1970 General Accounting Office study of 57 major Department of Defense (“DoD”) systems found 38 systems with at least a 30 percent cost increase from the point of contract award.⁴³ Although this percentage was historically consistent with past cost overruns, the sheer volume of government contracting yielded staggering dollar amounts that proved unpalatable.⁴⁴ Government-unique specifications also proved a major impediment to the efficient procurement of otherwise suitable, commercially developed products and services. By way of a popular illustration, the military specifications for fruitcake once ran eighteen pages.⁴⁵

In 1969, Congress established the Commission on Government Procurement to study and recommend to Congress methods “to promote the economy, efficiency, and effectiveness” of procurement by the executive branch.⁴⁶ The Commission’s authority subsequently was extended,⁴⁷ and in 1972 it issued its report to Congress. Among its many recommendations, the Commission advocated for the creation of the Office of Federal Procurement Policy and the consolidation of federal acquisition regulations, leading to the passage of the Office of Federal Procurement Policy Act of 1974 and, ultimately, the promulgation of the Federal Acquisition Regulation (“FAR”).⁴⁸

The idea that the Federal Government could benefit from the broader use of commercial items did not go unnoticed by the Commission in its 1972 Report. In fact, the Commission urged Congress to promote the acquisition of commercial products over “Government-designed items to avoid the high cost of developing unique products.”⁴⁹ This recommendation, however, did not lead to appreciable statutory reforms—at least, not in the 1970s.

⁴³ U.S. GAO, *Status of the Acquisition of Selected Major Weapon Systems*, B-163058, Chapter 2 12 (1970); Comm’n on Gov’t Procurement Report VOL. 1 at 182.

⁴⁴ *Id.*

⁴⁵ Stephen Barr, ‘Reinvent’ Government Cautiously, Study Urges, Wash. Post, July 28, 1993, at A17, citing Brookings Institute Study. Of course, that should be understood in the context that the Government buys fruitcakes by the truckload (quite different from the “Joy of Cooking” recipe identified in the article).

⁴⁶ Pub. L. No. 91-129, 83 Stat. 263 (1969).

⁴⁷ Pub. L. No. 92-47, 85 Stat. 102 (1971).

⁴⁸ Pub. L. No. 93-400, 88 Stat. 796 (1974).

⁴⁹ Acquisition Law Advisory Panel Report at 3 (citing Comm’n on Gov’t Procurement Report, Pt. D).

4. DoD Directive 5000.37

In 1978, the DoD issued its Acquisition and Distribution of Commercial Products (“ADCOP”) directive, “which sought to facilitate the acquisition of commercial products by eliminating Government specifications and contract clauses that did not reflect commercial practices.”⁵⁰ During its implementation of ADCOP, DoD sought “to establish qualified commercial product lists,” but “[t]his aspect of ADCOP was blocked by Congress because it would have precluded small businesses that sold only to DoD from continuing to sell their products as commercial products.”⁵¹ At the same time, “various elements within DoD began assessing how commercial and foreign subsystems and components might be used in weapons systems.”⁵²

5. 1984 Congressional Reforms

In 1984, Congress passed the Competition in Contracting Act (“CICA”),⁵³ which was designed “to establish a statutory preference for the use of competitive procedures in awarding federal contracts for property or services, to impose restrictions on the awarding of noncompetitive contracts, and to permit federal agencies to use the competitive method most conducive to the conditions of the contract.”⁵⁴ In addition to representing the first major amendments to the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, CICA contained a specific provision requiring federal agencies to “promote the use of commercial products whenever practicable.”⁵⁵ Significantly, CICA also provided a statutory basis for multiple award schedule contracting, which became “a primary method for Government purchase of commercial products.”⁵⁶ CICA deemed the GSA Schedules to meet the definition of “competitive procedures” provided that (1) participation in the program is open to all responsible sources, and (2) orders and contracts under the schedules result in the lowest overall cost alternative to meet the Government’s needs.⁵⁷

Following the passage of CICA, Congress enacted the Defense Procurement Reform Act as a component of the National Defense Authorization Act for Fiscal Year 1985.⁵⁸ The act was designed to curb abuses, then brought to light, regarding the acquisition of military parts and supplies.⁵⁹ For example, during the course of congressional investigations, the House

⁵⁰ *Id.* (citing DoD Directive 5000.37 (Sept. 29, 1978)).

⁵¹ *Id.* at 3 n.6 (citing W.T. Kirby, *Expanding the Use of Commercial Products and “Commercial-Style” Acquisition Techniques in Defense Procurement: A Proposed Legal Framework*, Packard Comm’n Report). The small business restrictions from pre-qualification were lifted from the NDAA in 1986; however, qualified bidder lists remained impermissible pursuant to the passage of the Competition in Contracting Act in 1984.

⁵² *Id.* at 3.

⁵³ Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1175 (1984).

⁵⁴ S. Rep. No. 98-50, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2174.

⁵⁵ Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 1186 (1984).

⁵⁶ H. Rep. No. 98-861, at 1423, (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2110-11.

⁵⁷ 41 U.S.C. § 259.

⁵⁸ Pub. L. No. 98-525, tit. XII, 98 Stat. 2492, 2588 (1984).

⁵⁹ *See id.*

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Committee on Armed Services discovered an Air Force report that attempted to explain “how a diode which cost a contractor \$0.04 was billed to the Government at \$110.34.”⁶⁰ In an effort to reduce these excessive payments, Congress directed DoD to use “standard or commercial parts . . . whenever such use is technically acceptable and cost effective.”⁶¹

6. The President’s Blue Ribbon Commission on Defense Management

In 1986, President Reagan established the Packard Commission to make recommendations to improve defense management.⁶²

In a now familiar passage, the Packard Commission Report stated:

DOD should make greater use of components, systems, and services available “off-the-shelf.” It should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements.⁶³

No matter how DoD improves its organization or procedures, the defense acquisition system is unlikely to manufacture products as cheaply as the commercial marketplace. DoD cannot duplicate the economies of scale possible in products serving a mass market, nor the power of the free market system to select and perpetuate the most innovative and efficient producers. Products developed uniquely for military use and to military specifications generally cost substantially more than their commercial counterparts. . . .⁶⁴

A case in point is the integrated circuit or microchip. . . . This year DoD will buy almost \$2 billion worth of microchips, most of them manufactured to military specifications. The unit cost of a military microchip typically is three to ten times that of its commercial counterpart. This is a result of the extensive testing and documentation DoD requires and of smaller production runs (DoD buys less than ten percent of the microchips made in the U.S.) Moreover the process of procuring microchips made to military specifications involves substantial delay. As a consequence, military microchips typically lag a generation (three

⁶⁰ H.R. Rep. No. 98-690, at 10 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4237, 4241.

⁶¹ Pub. L. No. 98-525, tit. XII, § 1202, 98 Stat. 2492, 2588-89 (1984).

⁶² Packard Comm’n Report.

⁶³ Packard Comm’n Report, at 60 (emphasis removed).

⁶⁴ Packard Comm’n Report, at 60.

to five years) behind commercial microchips.”⁶⁵ The Packard Commission also noted that the same principle -- the expanded use of commercial items - could apply to a wide variety of products, but also to services, including professional services.⁶⁶

As set forth in the Introduction, the Packard Commission contained a discussion of competition as a “foremost” commercial practice that should be aggressively used in the acquisition of “systems, products and professional services.”⁶⁷

7. Congressional Directives of the Late 1980s and Early 1990s

Shortly after the Packard Commission issued its final report in 1986, Congress amended Title 10 of the United States Code to add a provision mandating that DoD use “nondevelopmental items” where those items would meet DoD’s needs.⁶⁸ The act defined “nondevelopmental items” to include “any item of supply that is available in the commercial marketplace.”⁶⁹ The provision also required DoD to define its requirements and undertake research to determine “whether nondevelopmental items are available or could be modified to meet agency needs” before creating unique military specifications.⁷⁰ According to a committee report that accompanied this legislation, it was Congress’s intent to break DoD’s “long-standing bias to use detailed military specifications.”⁷¹

Based on concerns over DoD’s “lack of progress in eliminating barriers to the procurement of [nondevelopmental items],”⁷² in 1989 Congress issued another set of directives—this time requiring DoD to issue streamlined regulations governing the acquisition of nondevelopmental and commercial items.⁷³ These mandates—part of the Defense Authorization Act for Fiscal Years 1990 and 1991—also required DoD to lessen TINA’s cost or pricing data submission requirements.⁷⁴ However, Congress failed to amend TINA’s statutorily defined exemptions, making it difficult for DoD to provide relief through regulatory changes.⁷⁵ Finally, in 1990, Congress again directed DoD to prioritize the use of nondevelopmental items.⁷⁶

⁶⁵ *Id.*

⁶⁶ *Id.* at 61.

⁶⁷ *Id.* at 62.

⁶⁸ National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 907, 100 Stat. 3816, 3917 (1986).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ S. Rep. No. 99-331, at 265 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6460.

⁷² H.R. Conf. Rep. No. 101-331, at 612 (1989), *reprinted in* 1989 U.S.C.C.A.N. 977, 1069.

⁷³ National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b), 103 Stat. 1352, 1504-05 (1989).

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 814, 104 Stat. 1485, 1595 (1990).

8. DFARS Parts 210 and 211

In response to these Congressional directives, DoD promulgated Parts 210 and 211 of the Defense Federal Acquisition Regulation Supplement (“DFARS”) in 1991.⁷⁷ Part 210 offered a definition and a preference for “nondevelopmental items,”⁷⁸ while Part 211 contained an early predecessor to the modern statutory definition of “commercial items.”⁷⁹ In pertinent part, the definition in Part 211 provided:

- (a) Commercial items means items regularly used in the course of normal business operations for other than Government purposes which:
- (1) Have been sold or licensed to the general public;
 - (2) Have not been sold or licensed; but have been offered for sale or license to the general public;
 - (3) Are not yet available in the commercial marketplace, but will be available for commercial delivery in a reasonable period of time;
 - (4) Are described in paragraph (1), (2), or (3) that would require only minor modification in order to meet the requirements of the procuring agency.⁸⁰

The DFARS definition represented a departure from TINA’s circumscribed conception of a commercial item. In contrast to TINA, which required that commercial items be based on established catalog or market prices “sold in substantial quantities to the general public,”⁸¹ Part 211 included items that were “*offered* for sale or license to the general public” and items that *eventually* would “be available for commercial delivery.”⁸² In addition, Part 211 contained a general provision, which permitted an item to still qualify as a “commercial item” even if it required “minor modification in order to meet the requirements of the procuring agency.”⁸³

9. The Section 800 Acquisition Advisory Panel

Sensing the need for significant acquisition reform, in 1990, Congress established the Advisory Panel on Streamlining and Codifying Acquisition Laws (“Section 800 Panel”).⁸⁴ The Section 800 Panel—popularly named after the section of the Act from which it derived authority—was to review existing defense acquisition laws, make recommendations for their

⁷⁷ 56 Fed. Reg. 36,315, 36,315-17 (July 31, 1991) (codified at 48 C.F.R. pts. 210, 211).

⁷⁸ *Id.* at 36,315 (defining “nondevelopmental items”).

⁷⁹ Compare 56 Fed. Reg. at 36,317 (defining “commercial items”), with 41 U.S.C. § 403(12) (2000) (defining “commercial items”), and 48 C.F.R. § 2.101 (2004) (also defining “commercial items”).

⁸⁰ 56 Fed. Reg. at 36,317.

⁸¹ Pub. L. No. 87-653, 76 Stat. 528 (1962).

⁸² 56 Fed. Reg. at 36,317 (emphasis added).

⁸³ *Id.*

⁸⁴ Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587.

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repeal or revision, and prepare an acquisition code “with a view towards streamlining the defense acquisition process.”⁸⁵

In January of 1993, the Panel issued its final report to Congress. Among its many recommendations, the Panel proposed “a comprehensive new approach to address the acquisition of commercial items.”⁸⁶ After explaining that the patch-work of congressional directives had failed to promote the broad use of commercial items in DoD systems, the Panel identified several reasons for this shortfall, including (1) the failure to enact a uniform definition for commercial items, (2) the burdens imposed by TINA’s cost or pricing data requirements, (3) the arduous standards associated with unique socioeconomic laws applicable only to government contractors, and (4) the ever-increasing burdens that flowed from the myriad of federal statutes and regulations governing procurement.⁸⁷

Drawing on Part 211 of the Defense Federal Acquisition Regulation Supplement,⁸⁸ the Panel proposed a uniform statutory definition for “commercial items”—

(5) The term “commercial item” means

(A) property, other than real property, which: (i) is sold or licensed to the general public for other than Government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than Government purposes; or (iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;

(B) The term “commercial item” also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the Government and commercial services are or will be provided by the same workforce, plant, or equipment;

(C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B) if unmodified will be deemed to be a commercial item when modified for sale to the

⁸⁵ *Id.*

⁸⁶ Acquisition Law Advisory Panel Report at 1.

⁸⁷ *Id.* at 5-6.

⁸⁸ *See id.* at 1, 17-18.

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Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than “commercial” merely because sales of such item to the general public for other than Governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.⁸⁹

“The Panel believed that the primary purpose of defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations that have created barriers to the acquisition of commercial items.”⁹⁰ To further this end and to eliminate many of the shortfalls identified above, the Panel expanded Part 211’s definition to include items that were modified in a way “customarily provided in the commercial marketplace” or in a manner that “would not significantly alter the inherent nongovernmental function or purpose of the item.”⁹¹ More fundamentally, the definition was expanded to include “services,” provided that those services were acquired in support of tangible commercial items.⁹² The Panel tied its definition of services to a requirement that they be offered contemporaneously to the general public under similar terms and conditions and that the commercial and government services be provided by the same workforce, plant, or equipment. The Panel thus wanted to be sure that the services had a solid anchor in the commercial marketplace. However, the Panel did not include standalone, or “pure,” services within the definition of a commercial item.⁹³

⁸⁹ *Id.* at 17-18.

⁹⁰ *Id.* at 18.

⁹¹ *Id.*

⁹² *Id.* at 17.

⁹³ *Id.* at 19. The Panel concluded that “it did not have sufficient information to recommend exempting ‘pure’ service contractors from additional Government-specific statutes and regulations.” *Id.* This would have been the natural effect of including “pure services” within the definition of a commercial item.

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10. The Federal Acquisition Streamlining Act of 1994

Over the course of the 103rd Congress, various legislative proposals were offered in an effort to implement the Section 800 Panel's recommendations.⁹⁴ Eventually, these efforts yielded the Federal Acquisition Streamlining Act ("FASA") of 1994⁹⁵—ushering in the largest federal procurement changes in almost a decade.

FASA included an expansive, uniform statutory definition for "commercial items," mostly tracking the Section 800 Panel's recommendations.⁹⁶ The definition did contain one significant revision, which was offered by the House of Representatives and acquiesced to by the Senate; it included standalone services within the meaning of "commercial items."⁹⁷ Accordingly, while the Section 800 Panel and the Senate would have included only "services that are procured for support of a commercial item,"⁹⁸ the House of Representatives prevailed in including within the meaning of "commercial items" any service that is "offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions."⁹⁹ The definition, which remains in the current statute, ties the definition of commercial services to the sale of services by competitive sales in the commercial marketplace. Thus, it links together the definition of commercial item for services with an explicit requirement for validation through competitive sales in the commercial market.

After defining "commercial items," Congress expressed a strong preference for their acquisition¹⁰⁰ and provided streamlined mechanisms to eliminate barriers to their procurement.¹⁰¹ Likewise, by expanding the definition of "commercial items," Congress seemingly expanded the applicability of the exemption from TINA's cost or pricing data requirements.¹⁰² Two years later, Congress eliminated the requirement for certified cost or pricing data for commercial item contracts.¹⁰³ However, FASA did provide that when certified cost or pricing data were not required to be submitted, the head of the procuring activity could require submission of "data

⁹⁴ See Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (as introduced); Federal Acquisition Improvement Act of 1993, H.R. 2238, 103rd Cong. (1993); Federal Acquisition Reform Act of 1994, H.R. 4328, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1994, S. 2206, 103rd Cong. (1994); Federal Acquisition Streamlining Reform Act of 1994, S. 2207, 103rd Cong. (1994); Federal Acquisition Streamlining Act of 1993, S. 1587, 103rd Cong. (1993) (enacted). Cf. Nondevelopmental Items Acquisition Act of 1991, S. 260, 102nd Cong. (1991); Federal Property and Administrative Services Authorization Act of 1991, H.R. 3161, 102nd Cong. (1991).

⁹⁵ Pub. L. No. 103-355.

⁹⁶ *Id.* § 8001(a), 108 Stat. at 3384.

⁹⁷ H.R. Conf. Rep. No. 103-712, at 228-29 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2607, 2658-59.

⁹⁸ *Id.* at 228, 1994 U.S.C.C.A.N. at 2658. Cf. Acquisition Law Advisory Panel Report at 19 (1993).

⁹⁹ Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (adding 41 U.S.C. § 403(12)).

¹⁰⁰ *Id.* tit. VIII, § 8104, 108 Stat. at 3390 (adding 10 U.S.C. § 2377).

¹⁰¹ *Id.* tit. VIII, § 8105, 108 Stat. at 3392 (eliminating various legal requirements imposed by Title 10 of the U.S. Code).

¹⁰² See *supra* text accompanying note 40.

¹⁰³ See Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).

other than certified cost of pricing data” to the extent necessary to determine price reasonableness.¹⁰⁴

11. The Regulatory and Practical Implementation of FASA

Following the passage of FASA, the Executive Branch began the difficult task of implementing its statutory requirements.¹⁰⁵ On September 18, 1995, DoD, GSA, and NASA issued a final rule, which included a regulatory definition for “commercial items.”¹⁰⁶ For the most part, this definition tracked the definition in FASA—though it did little to clarify some of its more archaic terms.¹⁰⁷ The definition did seek to clarify what would qualify as permissible “minor modifications” by providing specific factors that could be used to adjudge the nature of those modifications.¹⁰⁸ The regulatory definition also adjusted the scope of the definition of standalone services, permitting qualification based on established “market prices” in addition to catalog prices. (The statutory definition did not include the terms “market prices,” rather it only referred to “[s]ervices offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed. . . .”¹⁰⁹)

The final regulation slightly revised the definition of commercial services by adding the term “of a type.” The regulatory drafters were concerned that without this change, the Government would be limited to acquiring services based only on “established catalog prices.” They cited lawn-cutting and janitorial services as examples of commercial services that were priced based on the size of the task rather than existing catalog prices. The drafters also expressed concern that the intent of the law – providing for the acquisition of commercial services that are sold in substantial quantities in the commercial marketplace – could easily be circumvented by the creation of a catalog.¹¹⁰ Based on the record and testimony examined by the Panel, the drafters never intended for the “of a type” language to extend the definition of commercial services beyond those sold in substantial quantities in the commercial marketplace.¹¹¹

¹⁰⁴ Pub. L. No. 103-355, tit. I, § 1203, 108 Stat.3275 (1994).

¹⁰⁵ For an overview of FASA’s implementation, see U.S. GAO, *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, GAO/NSIAD 96-139 (June 1996).

¹⁰⁶ 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).

¹⁰⁷ Compare Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (1994) (defining “commercial items”), with 60 Fed. Reg. at 48,235 (also defining “commercial items”). Among the terms that the implementing agencies failed to clarify were “established catalog and market prices.” See 60 Fed. Reg. at 48,235.

¹⁰⁸ 60 Fed. Reg. at 48,235.

¹⁰⁹ Pub. L. No. 103-355, tit. VIII, § 8001, 108 Stat. 3385.

¹¹⁰ Memorandum from the Commercial Items Drafting Team to the FAR Council and the Project Manager, FASA Implementation Project, (Nov. 16, 1994) (on file with Commercial Items Drafting Team).

¹¹¹ Some of the comments received by the Panel from service industry associations have assumed that the “of a type” language expands the definition of commercial services far beyond what Congress of the FAR drafters ever intended.

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12. The Federal Acquisition Reform (“Clinger-Cohen”) Act of 1996

In 1996, Congress passed the Federal Acquisition Reform Act¹¹²—later renamed the Clinger-Cohen Act¹¹³—as part of the National Defense Authorization Act for Fiscal Year 1996. The Clinger-Cohen Act expanded upon FASA’s preference for commercial items by eliminating, for commercial items, TINA’s requirement for certified cost or pricing data¹¹⁴ and by relieving contractors supplying commercial items from complying with certain cost accounting standards (“CAS”).¹¹⁵ With respect to information “other than cost or pricing data,” FARA provided additional guidance and limitations on what types of information could be required.¹¹⁶ The act also provided simplified procedures for the acquisition of commercial items with a purchase value of \$5.5 million or less¹¹⁷ and set up an even more streamlined process for the acquisition of commercially available, off-the-shelf items (“COTS”).¹¹⁸ Finally, the act amended the definition of “commercial items” to include established “market prices” within the provision governing standalone services.¹¹⁹ This amendment adopted the language previously adopted in the FAR definition that implemented FASA.¹²⁰

13. Recent Congressional and Executive Changes

Even after the Clinger-Cohen Act, Congress and the Executive Branch have made subtle changes to the definition of “commercial items” and the process for their acquisition. First, in 1998, Congress directed the Executive Branch to modify the FAR’s definition of “commercial items” to clarify such terms as “established catalog prices” and “established market prices.”¹²¹ Then, in 1999, Congress amended the statutory definition of “commercial items” to define what constitutes services in support of commercial items.¹²² These legislative efforts helped to produce a revised regulatory definition for “commercial items,” which was codified in the FAR.¹²³ Finally, in 2003, Congress amended the definition of “commercial items” in order to accommodate explicit authorization for time-and-material commercial services contracts “to be

¹¹² Pub. L. No. 104-106, div. D, 110 Stat. 642 (1996).

¹¹³ Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).

¹¹⁴ Pub. L. No. 104-106, div. D, tit. XLII, § 4201, 110 Stat. 642, 649-52 (1996).

¹¹⁵ *Id.* § 4205, 110 Stat. at 656.

¹¹⁶ *Id.* § 4201, 110 Stat. at 650-51.

¹¹⁷ *Id.* § 4202, 110 Stat. at 652-53.

¹¹⁸ *Id.* § 4203, 110 Stat. at 654-55.

¹¹⁹ *Id.* § 4204, 110 Stat. at 655-56.

¹²⁰ 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).

¹²¹ Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 803(a), 112 Stat. 1920, 2082 (1998).

¹²² National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 805, 113 Stat. 512, 705 (1999).

¹²³ 66 Fed. Reg. 53,477 (Oct. 22, 2001).

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used for the acquisition of a commercial service commonly sold to the general public through such contracts.”¹²⁴

Section 814 of the National Defense Authorization Act for FY 2000 authorized the Secretary of Defense to initiate a 5-year pilot program treating procurement of some services “as” commercial items “if the source of the services provides similar services contemporaneously to the general public.”¹²⁵ Section 821 of the FY 2001 National Defense Authorization Act expands the authority to procure services as commercial items. It establishes a preference for performance-based contracting for services and allows DoD to award any applicable performance-based contract as a commercial item under Federal Acquisition Regulation (FAR) part 12, “Acquisition of Commercial Items,” if: the contract or task order is valued at \$5 million or less; the contract or task order sets forth specifically each task to be performed and (1) defines each task in measurable, mission-related terms, (2) identifies specific end products or output, and (3) has a firm fixed price; and the source of the services provides similar services contemporaneously to the general public under similar terms and conditions.¹²⁶ Lesser revisions also have been made in various Defense Authorization laws.¹²⁷

14. The Services Acquisition Reform Act of 2003

Congress has continued to revise the laws related to acquisition and commercial practices, including most notably the Services Acquisition Reform Act (“SARA”) of 2003.¹²⁸ Through SARA, Congress sought to improve the acquisition workforce¹²⁹ and make various reforms, including incentives for performance-based contracting¹³⁰ and special emergency procurement authority, that permit agencies to utilize emergency acquisition authority under the “commercial items” exemptions.¹³¹

With specific reference to services acquisition, SARA made three changes. First, it authorized performance-based contract or task orders for the procurement of services to be “deemed” a “commercial item” under specified circumstances: (1) if the value of the contract or

¹²⁴ Service Acquisition Reform Act of 2003 (“SARA”), Pub. L. No. 108-136, tit. XIV, § 1432, 117 Stat. 1663, 1672-73 (2003). *See also* 149 Cong. Rec. H. 10563 (2003). The Senate initially requested additional safeguards and limitations on the use of time-and-materials contracts for commercial services, but later withdrew this request because Section 824 of the National Defense Authorization Act for FY 2001 only permits the use of time-and-material contracts when “no other contract type is suitable.”

¹²⁵ National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 (2000).

¹²⁶ National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398 (2001).

¹²⁷ *See, e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 816, 118 Stat. 1811, 2015 (2004); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XIV, § 1431, 117 Stat. 1663, 1671-72 (2003) (containing SARA); Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 812, 116 Stat. 2458, 2609 (2002); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 823, 115 Stat. 1012, 1183 (2001).

¹²⁸ Pub. L. No. 108-136, tit. XIV, 117 Stat. 1663 (2003).

¹²⁹ *Id.* sub-tit. A, §§ 1411-14, 117 Stat. at 1663-66.

¹³⁰ *Id.* sub-tit. C, § 1431, 117 Stat. at 1671-72.

¹³¹ *Id.* sub-tit. D, § 1443, 117 Stat. at 1675-76.

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order is not expected to exceed \$ 25 million; and (2) if the contract or order specifically sets forth (i) each task to be performed, (ii) defines each task in measurable, mission-related terms, and (iii) identifies the specific result to be achieved. In addition, such performance-based commercial services contracts must contain firm fixed-prices, and further, the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Government.¹³²

Second, Section 1432 of the Act authorizes the limited use of a time-and-materials (“T&M”) or labor-hour contracts in the procurement of commercial services subject to certain restrictions, including that the services: (i) are commonly sold to the general public through such contracts; (ii) are purchased by the procuring agency on a competitive basis; (iii) the contracting officer executes a determination and finding that no other contract type is suitable; (iv) the contracting officer includes a ceiling price that the contractor exceeds at its own risk; and (v) the contracting officer authorizes any subsequent change in the ceiling price only upon a documented determination that it is in the best interest of the procuring agency to change the ceiling price.

Third, Congress looked at the definition of stand-alone services in FASA and maintained that definition with a revision to permit use of commercial items when the services are sold competitively in the commercial marketplace based on catalog or market prices for “specific outcomes” to be achieved as well as for specific tasks performed. Congress again remained focused on whether the services were sold competitively in the commercial marketplace.

In the SARA provisions, Congress also adopted a narrow exception to the prescribed market based approach to defining commercial items by allowing certain products or services to qualify for “commercial item” status, regardless of whether they actually were offered commercially. Section 1443(d)¹³³ provides authority to the head of an agency to treat certain procurements for defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack as commercial items, subject to the restriction that, if a contract greater than \$15 million in value is awarded on sole source basis, the provisions of TINA and CAS shall apply.

15. Restrictions on Use of Commercial Items

In the Defense Authorization Act of 2005, Congress restricted the relief from the requirement for cost or pricing data for commercial items. This change provides that cost or pricing data is required for noncommercial modifications to commercial items that are expected to cost, in the aggregate, more than \$500,000 or 5% of the total price of the contract, whichever is greater.¹³⁴ The provision took effect on June 1, 2005, and applies to offers submitted, and

¹³² Pub. L. No. 108-136, tit. XIV, § 1431, 117 Stat. 1663; codified at 41 U.S.C. § 403.

¹³³ *Id.* at § 1443.

¹³⁴ Pub. L. No. 108-375, § 818.

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modifications to contracts or subcontracts made, on or after that date. Interim Regulations implementing the provision became effective on June 8, 2005.¹³⁵

D. Time and Materials and Labor Hour Contracts

[The Panel notes that on December 12, 2006 the FAR Council issued its final rule implementing Section 1432 of the National Defense Authorization Act of 2004, which will be effective February 12, 2007. This section of the Panel's Report will be updated, as appropriate, to address the new rule.]

1. Definition and Description – The Current Rule

A time-and-materials contract provides for the acquisition of supplies or services on the basis of direct labor hours at specified fixed hourly rates and/or the cost of any materials used for the project. This contrasts with fixed-price contracts where the contractor is paid a firm fixed-price for completion of the contract, irrespective of the amount of time or materials expended on the project.

The use of T&M contracts is governed by FAR Part 16. FAR 16.601 provides a description of a T&M contract, lays out its appropriate application, and limits its use. T&M contracts are permitted when the contracting officer determines that "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."¹³⁶ In other words, when the buyer cannot determine its requirements sufficiently to use another contracting method. However, since T&M contracts provide "no positive profit incentive to the contractor for cost control or labor efficiency,"¹³⁷ the FAR makes T&M contracts the least preferred of all contract types. The most important limitation on the use of time and materials contracts is found in FAR 16.601(c)(1), which provides that T&M contracts may be used "only after the contracting officer executes a determination and findings that no other contract type is suitable..."¹³⁸

Under the current FAR rules, T&M contracts make a labor hour a unit of sale, but they do not make efficient or successful performance a condition of payment. Under FAR 52.232-7(a)(1), the contractor bills the Government by multiplying the appropriate hourly rates prescribed in the contract schedule¹³⁹ by the number of direct labor hours performed.¹⁴⁰ The rates are to include wages, indirect costs, general and administrative expense, and profit. Also, FAR 16.601(c)(2) requires that a T&M contract shall not be used unless the contract includes a "ceiling price that the contractor exceeds at its own risk." The total cost of the contract is not to exceed the ceiling price set forth in the schedule, and the contractor must agree to make its best

¹³⁵ 70 Fed. Reg. 33659 (June 8, 2005); See FAR 15.403-1(c)(3)(ii)(B), and (C).

¹³⁶ FAR 16.601 (b).

¹³⁷ FAR 16.601(b)(1).

¹³⁸ FAR 16.601(c)(1).

¹³⁹ FAR 15.204-1(b) identifies the uniform contract format including Part I, the Schedule.

¹⁴⁰ FAR 52.232-7(a)(1) (Payments under Time-and-Material and Labor-Hour Contracts).

efforts to perform the work within the ceiling price.¹⁴¹ However, the contractor is not obligated to continue performance if to do so would exceed the ceiling price, unless the contracting officer notifies the contractor that the ceiling price has been increased.¹⁴² In addition, the Government may be required to pay the contractor at the hourly rate, less profit, for correcting or replacing defective services.¹⁴³ Generally, if the contractor is terminated for default or defective performance, the Government, nonetheless, is obligated to pay the contractor at the hourly rate, less profit, for all hours of defective performance.¹⁴⁴

Under the current FAR provisions, therefore, the contractor does not have to complete the work successfully in order to obtain payment; rather the contractor is paid for the hours devoted to the task regardless of outcome. Therefore, substantial oversight is necessary for T&M contracts. Agencies are advised in FAR 16.601(b)(1) that “appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.”

2. Recent Legislative Developments

As noted above, section 1432 of the Services Acquisition Reform Act¹⁴⁵ amended section 8002(d) of the Federal Acquisition Streamlining Act to authorize the use of T&M contracts for the procurement of commercial services commonly sold to the general public through such contracts. As amended, section 8002(d) places certain conditions on the use of T&M contracts for purchases of commercial services under Federal Acquisition Regulation (FAR) Part 12: (1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories as prescribed in FASA section 8002(d); (3) the contracting officer must execute a determination and findings (D&F) that no other contracting type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency.¹⁴⁶

The House Conference Report for section 1432 noted that section 821 of the Floyd D. Spence National Defense Authorization Act for FY 2001¹⁴⁷ established a statutory preference for performance-based contracts and performance-based task orders that contain firm, fixed-prices for the specific tasks to be performed.¹⁴⁸ The Report stated that section 1432 should not be read to change that preference.¹⁴⁹ “A performance-based contract or task order that contains firm

¹⁴¹ FAR 52.232-7(c).

¹⁴² FAR 52.232-7(d).

¹⁴³ FAR 52.246-6.

¹⁴⁴ FAR 52.249-6, Alt. IV. This default condition can be incorporated by special contract provisions. However, such special provisions are seldom negotiated for routine T&M contracts.

¹⁴⁵ Pub. L. No. 108-136.

¹⁴⁶ SARA § 8002(d); FAR § 16.601.

¹⁴⁷ Pub. L. No. 106-398.

¹⁴⁸ H.R. Conf. Rep. No. 108-354 (2003).

¹⁴⁹ *Id.*

fixed prices for the specific tasks to be performed remains the preferred option for the acquisition of either commercial or non-commercial items.”¹⁵⁰

Despite the preference for any other contract type, the use of T&M contracts by the Government is widespread. The GSA Office of the Inspector General reported to the Panel in May 2005, that of recent studies of 523 Federal Technology Service contract awards, valued at over \$5.4 billion, the IG found (i) 58% of all awards were inadequately competed; (ii) of those solicitations open to competition, 1/3 of the orders representing 53% of the aggregate sales dollars received only one bid, and (iii) over 60% of all orders were awarded on a time and materials basis.¹⁵¹

3. OFPP’s Proposed Rule

It should be noted that the amendment section 1432 made to FASA section 8002(d) is not self-executing. Rather, implementation of section 8002(d) requires the Office of Federal Procurement Policy (OFPP) to revise FAR’s current commercial items policies and associated clauses. The OFPP, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a notice in the Federal Register soliciting comments regarding amendment to the FAR to account for T&M contracts.¹⁵² Subsequently, OFPP and the Councils issued a proposed rule,¹⁵³ which is yet to be finalized.

The proposed rule allows an agency to purchase any commercial service on a T&M basis if it uses competitive procedures and prepares a D&F containing sufficient facts and rationale to justify that a firm fixed-pricing arrangement is not suitable. With respect to the contents of the D&F, the rule provides that the rationale supporting use of a T&M contract for commercial services should establish that it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. If the need is of a recurring nature and is being acquired through a contract extension or renewal, the rule requires that the D&F reflect why knowledge gained from the previous acquisitions could not be used to further refine requirements and acquisition strategies in a manner that would enable purchase on a fixed-price basis. The stated goal of the proposed rule is to ensure that T&M contracts are used only when in the best interests of the Government.

E. Competition

1. A History of Difficulty in Achieving Competition

The long history of public contracting problems and the various legislative attempts at solutions was discussed and reported in the Report of the Commission on Government

¹⁵⁰ *Id.*

¹⁵¹ Test. of Eugene Waszily, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 198-99.

¹⁵² 69 Fed. Reg. 56316 (Sept. 20, 2004).

¹⁵³ 70 Fed. Reg. 56318 (Sept. 26, 2005).

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Procurement (“1972 Commission Report”).¹⁵⁴ Issues such as how to encourage competition and assure reasonable prices have been recurrent themes. The Government Procurement Commission Report discusses the various studies of these issues over the years, including the Dockery Commission (1893), the Keep Commission (1905), the two Hoover Commissions, and that of the Commission on Government Procurement itself. The Report traces the development of the “formal advertising” competition requirement in the two basic procurement statutes enacted after World War II; namely, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. Although these laws expressed a preference for competition, exceptions to competition requirements permitting “negotiated” contracts raised considerable concern whether or not the competition requirements were being met, particularly as the dollar value of government contracts increased. The Armed Services Procurement Act was amended in 1962 to enhance competition in negotiated procurements.¹⁵⁵

The legislative history of the Competition in Contracting Act demonstrates significant concerns about the lack of competition, particularly for large negotiated procurements. The Report of the Senate Committee on Government Affairs notes that a large volume of procurement dollars was being expended through non-competitive negotiated procurements due to the lack of an adequate competition standard for negotiated procurements and due to familiar sounding problems such as lack of appropriate market research, overuse of sole-source justifications, restrictive specifications, and the rush to expend appropriated funds in the final quarter of the fiscal year.¹⁵⁶

2. The Current Situation

As discussed below, currently, there are several different competition regimes in use today. The Competition in Contracting Act generally requires “full and open” competition (subject to certain exceptions for urgency, single source, *etc.*, that must be supported by a justification). However, today a large volume of federal procurement dollars are spent through processes that involve different types of procedures from the processes set forth in FAR Parts 15 (Contracting By Negotiation) and 14 (Sealed Bids).¹⁵⁷ Currently, the requirements of FAR Parts 15 and 14 do not apply to two parallel ordering regimes under which a huge volume of purchases is made.

First, the CICA statute provides that in addition to contracts entered into pursuant to full and open competition, the term “competitive procedures” also includes procedures established

¹⁵⁴ *Comm'n on Gov't Procurement Report* at 163-84.

¹⁵⁵ S. Rep. No. 98-50, at 5 (1984).

¹⁵⁶ *See, e.g., id.*

¹⁵⁷ The Panel is aware that sealed bid procurement is relatively unused in today’s environment, accounting for less than 1% of total actions and dollars in FY 2004 according to the Federal Procurement Report for FY 2004, and 1.3% of actions and 3.5% of dollars in FY 2005 according to the Federal Procurement Data Center. However, as noted below, the statute continues to define “full and open competition” with reference to sealed bids and competitive proposals.

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for the GSA schedules.¹⁵⁸ CICA provided a statutory basis for the schedule program as a means to meeting agency needs for a broad range of commercial products that would be provided to various using agencies in small quantities and at diverse locations.¹⁵⁹ As discussed below, the use of the GSA schedules for the acquisition of services has exploded since the late 90's. As this growth has occurred, GSA has developed approaches for obtaining competition among schedule contract holders that are different from the typical processes used under FAR Part 15 (and 14). Although prices on the schedules are deemed fair and reasonable, and orders can be placed directly in accordance with the applicable regulations, GSA also has developed additional tools, discussed further below, that allow buyers to enhance competition and seek further price reductions from schedule contract holders.

Second, also as discussed below, orders placed under multiple award contracts (such contracts usually awarded initially through Part 15 procedures) are subject to the requirement for a "fair opportunity to compete" among the contract holders if a waiver is not exercised. There is no requirement that these "mini-competitions" be synopsisized¹⁶⁰ or that unsuccessful offerors for an order receive a debriefing. Data requested by the Panel indicates that significant numbers of large orders, in excess of \$5 million, have been placed under these vehicles.

3. The Competition in Contracting Act¹⁶¹

a. Background

In 1982, contracting officers of various agencies testified before Congress to the effect that, while competition in government contracting was the requirement, it was not the practice. Congress attempted to reform the procurement process in 1984 by passing the Competition in Contracting Act (CICA). CICA provided that competition, rather than the common practice of "formal advertising" (sealed bidding) should be the norm. At the time, negotiated procurement was not required to be competitive, so Congress was concerned about the increasing use of non-competitive negotiations.

Although drafts of CICA used the term "effective competition," the conferees ultimately adopted "full and open competition" as the standard for federal procurement. The Report of the House Government Operations Committee on CICA explained the benefits of competition:

The Committee has long held the belief that any effort to reform Government procurement practices must start with a firm commitment to increase the use of competition in the Federal marketplace. Competition not only provides substantially reduced

¹⁵⁸ 41 U.S.C. § 259(b)(3). The term "full and open competition" is defined in 42 U.S.C. § 403 (6) to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."

¹⁵⁹ H. Conf. Rep. No. 98-861 (1984), as *reprinted in* 1984 U.S.C.C.A.A.N. ____ page .

¹⁶⁰ FAR 16.505(a)(1).

¹⁶¹ Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of the U.S.C.)

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costs, but also ensures that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to compete.¹⁶²

The premise that underlies this strong preference for “full and open competition” is the economic premise that has long been recognized by the courts as the basis for a free market economic system—that competition brings consumers the widest variety of choices and the lowest possible prices.¹⁶³

The Senate Committee specifically provided a definition of competition for federal procurement in its report. “In government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government’s business.”¹⁶⁴

CICA defined “full and open competition” to mean “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.”¹⁶⁵ In addition, to ensure that agencies did not lightly sidestep the competition requirement, Congress established requirements to justify departures from full and open competition. For example, CICA provided that full and open competition could be avoided only through one of seven limited exceptions,¹⁶⁶ and it required a written justification & approval (“J&A”) document to be filed if one of the exceptions was invoked.¹⁶⁷ In addition, Congress mandated that the head of each agency designate a Competition Advocate and required that all J&A’s for procurements of \$500,000 or more be approved by the Competition Advocate for each agency.¹⁶⁸

CICA expressly recognized and permitted the use of competitive negotiations, rather than sealed bids, required that the Government’s requirements and evaluation factors be clearly expressed so that offerors could understand the ground rules, and mandated that the Government follow its stated requirements and evaluation factors in the source selection process. CICA expressly recognized and permitted best value selections based on technical, cost, and other factors, rather than just cost. In a best value source selection, the Government can choose the overall best value for the particular requirement; however, cost must be a consideration under CICA – it cannot be ignored. To support a best value selection, the source selection official must justify the trade off between the cost and technical merit of the offers in the competitive range. Thus, for each best value procurement, the government buyer has a record of the basis for the selection.

¹⁶² H.R. Rep. No. 98-1157, at 11 (1984).

¹⁶³ *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 500 (1997) (citing Adam Smith, *Wealth of Nations* 112 (1776)).

¹⁶⁴ S. Rep. No. 97-665, at 2.

¹⁶⁵ 41 U.S.C. § 403(6).

¹⁶⁶ 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).

¹⁶⁷ 10 U.S.C. § 2304(f)(1)(A); 41 U.S.C. § 253(f)(1)(A).

¹⁶⁸ FAR 6.501.

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b. Competition Under CICA Procedures

Acquisition Planning. The statute and the FAR require agencies to use advance procurement planning and develop specifications using appropriate market research that meets the agency's needs. Specifications may be stated in functional, performance or design terms as the agency requires. However, unless an exception applies, requirements must be stated in a manner designed to achieve full and open competition.¹⁶⁹

Synopsis. Current procedures require contracting officers to synopsise contract actions expected to exceed \$25,000 via the Internet to the single government point-of-entry (GPE) known as Federal Business Opportunities (FedBizOpps).¹⁷⁰ Publication is to insure that all responsible sources are permitted to submit offers consistent with the definition of "full and open competition" at 41 U.S.C. § 403(6) which provides:

(6) The term "full and open competition," when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."

Typically, for a procurement expected to exceed the simplified acquisition threshold, the FAR requires a synopsis to be published at least 15 days prior to the issuance of the solicitation. Once the solicitation is issued, agencies must allow at least 30 days response time for receipt of offers, making the minimum period between the publication of synopsis and the receipt of offers 45 days.¹⁷¹

For commercial items, agencies may establish a shorter period for issuance of the solicitation or use the combined synopsis/solicitation procedures set out in FAR 12.603. In such case the solicitation response time may be determined so as to "afford potential offerors a reasonable opportunity to respond" considering "the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency."¹⁷² The time required for synopsis may be affected, even in the case of commercial items, by the requirements of certain trade agreements. Under the WTO Government Procurement Agreement or a Free Trade Agreement,¹⁷³ the time between publication of the notice and receipt of offers must be no less than 40 days.

Solicitation. Once a solicitation is issued in the form of a Request for Proposals (RFP) or Invitation for Bids (IFB), interested vendors submit their offers and the selection process begins.

¹⁶⁹ 41 U.S.C. § 253a; FAR 11.002, 15.2.

¹⁷⁰ The synopsis is required by the OFPP Act (41 U.S.C. § 416), and the Small Business Act (15 U.S.C. § 637(e). FAR 5.003 and 5.102(a)(1) requires the Government to use the GPE known as FedBizOpps at <http://www.fedbizopps.gov>.

¹⁷¹ FAR 5.203.

¹⁷² FAR 5.203 (b).

¹⁷³ FAR subpart 25.4.

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While sealed bids are evaluated without discussion (FAR 14.101(d)) and award is made on the basis of price,¹⁷⁴ evaluation of competitive proposals typically involves a negotiation with the offerors. The objective of competitive negotiations under the statute and FAR Part 15 is to give the government the ability to negotiate for the proposal that represents the best value, considering the factors specified in the solicitation and price.¹⁷⁵ For competitive negotiated procurements, CICA requires that the solicitation state all significant factors and subfactors, both non-price (e.g., technical capability, management capability, prior experience, and past performance) and price, that the agency expects to consider in evaluating proposals and the relative importance assigned to each of those factors and subfactors.¹⁷⁶ The statute explicitly requires that the agency evaluate proposals "based solely on the factors specified in the solicitation."¹⁷⁷

Negotiations. The process of competitive negotiations allows the buying agency to negotiate with the offerors to obtain the best value. Where discussions are held,¹⁷⁸ the contracting officer must establish a competitive range comprised of "all of the most highly rated proposals."¹⁷⁹ The CO may, pursuant to specific statutory authority, further "limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals."¹⁸⁰ This provision allows narrowing of the competitive range to the proposals most likely to be successful. Note, however, that the standard RFP instructions to offerors for commercial items in FAR 52.212-1 for some reason does not include such language while its FAR 15 counterpart does include the language. (See FAR 52.215-1(f)(4).)

Negotiations with offerors in the competitive range, if determined to be in the government's interest, may occur. If the CO holds discussions, the CO must "indicate to, or discuss with" each offeror, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. While the CO is not required to discuss every area where the proposal could be improved, the FAR encourages the CO to discuss aspects of the offeror's proposal that could, in the opinion of the CO, be altered or explained to enhance materially the proposal's potential for award (FAR 15.306(d)(3)). Following close of discussions, the CO is required to permit final proposal revisions at a common cut-off date.¹⁸¹ Government personnel participating in discussions must observe certain requirements for fairness such as: (1) not favoring one offeror over another; (2) not revealing an

¹⁷⁴ FAR 14.101(e).

¹⁷⁵ 41 U.S.C. § 253 (b); FAR 15.302

¹⁷⁶ 41 U.S.C. § 253a(b), (c); FAR 15.305.

¹⁷⁷ 41 U.S.C. § 253b(a).

¹⁷⁸ Award may be made without discussions pursuant to FAR 52.212-1 and 52.215-1. In this case, no competitive range is established and the most competitive proposal as evaluated in accordance with the evaluation criteria will be awarded a contract. Here, only limited exchanges in the form of clarifications are allowed to ensure fair treatment of all offerors (FAR 15.306).

¹⁷⁹ 41 U.S.C. § 253b(d); FAR 15.306.

¹⁸⁰ 10 U.S.C. § 2305(b)(4); 41 U.S.C. § 253b(d); FAR 15.306.

¹⁸¹ FAR 15.307.

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offeror's unique technical solution or intellectual property; 93) not revealing an offeror's specific price; (4) not disclosing past performance references, and (5) not violating the Procurement Integrity Act by revealing source selection information.

Award. Awards are made on the basis of the solicitation factors and subfactors by a Source Selection Official who, using his or her discretion and independent judgment, makes a comparative assessment of the competing proposals, trading off relative benefits and costs. The Source Selection decision must be reflected in a written statement that explains the rationale for award.¹⁸²

Post-Award. Unsuccessful offerors are entitled to a debriefing, if timely requested, regarding the conduct of the procurement and the evaluation of their proposals. The debriefing must disclose at least: (1) the government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal; (2) the overall evaluated cost or price and technical rating of the awardee and the debriefed offeror, and past performance information on the debriefed offeror; (3) the overall ranking of all offerors, if one exists; (4) a summary of the rationale for award; (5) for commercial items, the make and model of the item to be delivered by the awardee; (6) reasonable responses to questions about whether the solicitation procedures were followed.¹⁸³

An offeror who believes that the solicitation or the source selection process was unfair may protest and obtain an independent outside review of the award decision under an Administrative Procedure Act standard of review which provides that the decision may be overturned only upon a showing that the decision was arbitrary and capricious (which includes within its definition that the decision violated law or regulation).¹⁸⁴

4. The Use of Interagency Vehicles

In 1993, the Section 800 Panel Report¹⁸⁵ again discussed the fundamental role of competition in public procurement. Agencies complained about the time and delays involved in considering multiple proposals and their perceived inability to eliminate proposals that did not have an opportunity for success from consideration.¹⁸⁶ The Section 800 Panel gave serious consideration to amending the competition statute to provide for "adequate and effective

¹⁸² FAR 15.308.

¹⁸³ FAR 15.506.

¹⁸⁴ 31 U.S.C. §§ 3351-3666; 28 U.S.C. §1491(b)

¹⁸⁵ Acquisition Law Advisory Panel Report, Ch. 1.,

¹⁸⁶ The complaint of difficulty in winnowing down the offers to those with the best chance of success was not a new one. Congress had addressed this very issue in considering the potential definition of "effective competition" in enactment of CICA. The CICA conferees expressed their view that the procurement process "should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received." H.R. Rep. No. 861, 98-1422 (1984).

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competition” but, after extensive consideration,¹⁸⁷ decided to retain the definition of full and open competition. Among other things, the Section 800 Panel was concerned both with the strongly expressed views of Congress and the difficulties involved in defining “adequate and effective competition.”¹⁸⁸

Following submission of the Section 800 Panel report, Congress considered substituting the term “efficient competition” for “full and open competition.” However, Congress retained the term “full and open competition.” In 1996, during consideration of the Federal Acquisition Reform Act, Congress provided guidance in use of the “full and open” standard by the following addition to 10 U.S.C. § 2304(j) and 41 U.S.C. § 253(h): “[t]he Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government’s requirements.” Although the basic standard was not changed, in response to agencies expressed concerns, Congress tried to convey to agencies that they had flexibility in establishing the competitive range and in using competition to obtain the best result for the Government.

Two other issues entered into the practical application of competition at the time of FASA and FARA. First, was the increased use of indefinite delivery indefinite quantity (IDIQ) contracts. Second, was the use of the GSA schedules to include the acquisition of services. These developments are discussed below.

5. Indefinite Delivery Indefinite Quantity (IDIQ) Contracts

a. Background

At the time of its deliberations, the Section 800 Panel reviewed the use of indefinite delivery indefinite quantity (IDIQ) contracts, also known as delivery order contracts or task order contracts.¹⁸⁹ The Section 800 Panel noted concerns regarding the abuse of sole source IDIQ contracts for supplies and services, and the existing of Inspector General and audit reports criticizing the award and administration of such contracts.¹⁹⁰ The 800 Panel was concerned about the growing practice of awarding IDIQ contracts on a sole source basis. Recognizing these concerns and the inadequacy of the then existing statutory provision for master agreements for

¹⁸⁷ The 800 Panel understood there could be situations in which the circumstances did not warrant the expense of proceeding with a full and open competition. Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel, Ch. 1 at 1-24.

¹⁸⁸ *Id.* at 1-25.

¹⁸⁹ Under FAR 16.501-2(a), indefinite delivery indefinite quantity (IDIQ) contracts are a subset of indefinite delivery contracts. IDIQ contracts may be delivery order contracts or task order contracts. Under FAR 16.501-1, a “delivery order contract” is defined as a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract. A “task order contract” is defined as a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

¹⁹⁰ Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel, Ch. 1 at 1-32.

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advisory and assistance services, the Section 800 Panel recommended a revision of the authority for IDIQ vehicles. While noting the issue of agencies expanding the scope of such vehicles as a problem, the Section 800 Panel believed that flexibility was necessary to permit award of contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value could not be determined at the time the basic contract was awarded.¹⁹¹ Without this ability, the Section 800 Panel expressed concern that legitimate requirements and tasks would be unnecessarily delayed or result in improper sole source justifications or inappropriate undefinitized contract actions.

The Section 800 Panel then recommended a new statute that would provide some structure around the use of IDIQ contracts. First, the basic contract had to be awarded pursuant to full and open competition (or a permissible properly approved exception). The competition for the basic contract was required to have provided: (i) “a reasonable description of the general scope, nature, complexity, and purposes of the supplies or services;” (ii) meaningful evaluation criteria, properly applied; and (iii) if multiple awards were made, a clear method of competing or allocating delivery or task orders among contracts.¹⁹² If properly awarded, then with respect to delivery orders or task orders issued under that contract, no notice (synopsis) or separate competition (or justification) was required.¹⁹³ At the time, the Section 800 Panel believed that the potential for abuse of these vehicles was the expansion of the contract scope or period by a delivery or task order. Thus, the Panel recommendation prohibited any such expansion without use of full and open competition.¹⁹⁴

In enactment of FASA,¹⁹⁵ Congress largely accepted the Section 800 Panel approach. FASA required that award of IDIQ contracts be subject to full and open competition and include specific requirements for solicitations for such contracts, including specification of the contract period and the maximum quantity or dollar value to be procured. In addition, Congress stated that the solicitation should contain:

A statement of work, specifications or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.¹⁹⁶

¹⁹¹ *Id.* at 1-32, 33.

¹⁹² *Id.* at 1-52-53.

¹⁹³ *Id.* at 1-53.

¹⁹⁴ *Id.* “The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsibly provide supplies or perform services when the quantities, timing and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not.” *Id.*

¹⁹⁵ 41 U.S.C.A. § 253j; 10 U.S.C.A. § 2304a-d

¹⁹⁶ 41 U.S.C.A. § 253h; 10 U.S.C.A. § 2304a.

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Congress also included a preference for multiple awards to improve competition, stating it was establishing a “requirement that solicitations for such contracts shall ordinarily provide for multiple awards and for fair consideration of each awardee for task orders issues under the contracts....”¹⁹⁷ The Report of the Senate Government Affairs Committee, which originated the provisions regarding IDIQ and task order contracts, stated its reasons for their enactment as follows:

The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed without significantly burdening the procurement system, by awarding multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, whenever it is practical to do so.¹⁹⁸

b. “Fair Opportunity”

FASA mandated that agencies award orders through a limited competitive process. Specifically, the statute required that all contractors to multiple award contracts be provided a “fair opportunity to be considered” for each task or delivery order in excess of \$2,500,¹⁹⁹ subject to four exceptions: (1) circumstances of unusual urgency that will not permit fair opportunity; (2) only one contractor has the capability to provide the highly unique or specialized services necessary; (3) a sole source order is necessary as a logical follow-on to an existing order already issued on a competitive basis; or (4) the non-competitive order is necessary to satisfy a minimum guarantee.²⁰⁰

The fair opportunity process for IDIQ contracts was implemented in FAR Subpart 16.5.²⁰¹ Although FASA called for a “fair opportunity to be considered,” studies conducted by GAO and agencies’ Inspectors General after the Act was implemented indicated that agencies did not consistently promote competition or justify exceptions to competition.²⁰² To address

¹⁹⁷ S. Rep. No. 103-258, at 15 (1994); *See also* 41 U.S.C.A. § 253h(d)(3); 10 U.S.C.A. § 2304a(d)(3).

¹⁹⁸ S. Rep. No. 103-258, at 15.

¹⁹⁹ 41 U.S.C.A. § 253j; 10 U.S.C.A. 2304c(b).

²⁰⁰ 41 U.S.C.A. § 253j; 10 U.S.C.A. 2304c(b).

²⁰¹ FAR 16.5(c) provides that with respect to GSA, nothing in 16.5 restricts GSA’s authority to enter into schedule, multiple award or task or delivery order contracts under any other provision of law. GSA’s regulations at FAR 8.4 take precedence for GSA’s contracts.

²⁰² *See* U.S. DOD IG, *DOD Use of Multiple Award Task Order Contracts*, (1999) at 4-7; U.S. General Accounting Office, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, Audit Rep. No. 99-116, GAO/NSIAD-0056, 12-13 (2000).

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these concerns, Congress enacted section 804 of the National Defense Authorization Act for Fiscal Year 2000.²⁰³ This provision directed that the FAR be revised to provide guidance regarding the appropriate use of multiple award IDIQ contracts. The guidance, at a minimum, was to identify specific steps that agencies should take to ensure that: (1) all contractors are afforded a fair opportunity to be considered for the award of task and delivery orders and (2) the statement of work for each order clearly specifies all tasks to be performed or property to be delivered. In April 2000, the FAR was revised to address these topics.

Under the FAR revisions, fair opportunity requires, with limited exceptions, that all awardees are afforded a fair opportunity to be considered for each order exceeding \$2,500. The current FAR gives contracting officers significant discretion in applying the fair opportunity standard. For example, FAR 16.505(b)(1)(ii) provides that contracting officers “need not contact each of the multiple awardees . . . if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order.”

Protests of task order awards are not authorized, except for cases where the order increases the scope, period, or maximum value of the contract under which the order is issued.²⁰⁴ FASA did require that each agency issuing task or delivery order contracts appoint an ombudsman to review complaints regarding the fair opportunity process.²⁰⁵

c. Section 803 Revisions to “Fair Opportunity”

Notwithstanding the measures to further define the fair opportunity standard and the discretion afforded by the FAR, Congress continued to have concern regarding the adequacy of competition under multiple award contracts, particularly for services. For example, Section 803 of the National Defense Authorization Act for Fiscal Year 2002 required DoD to promulgate regulations requiring competition in the purchase of services by DoD under multiple award contracts. It required that DoD’s regulations must provide for DoD the award of orders “on a competitive basis,” absent a waiver.²⁰⁶ The statute provided that the purchase of services would be made on a “competitive basis” only if it was made pursuant to procedures that required “fair notice” of the intent to make a purchase to be given to “all contractors offering such services under the multiple award contract” and afforded all contractors that respond “a fair opportunity to make an offer and have that offer fairly considered” by the official making the purchase.²⁰⁷ Thus, Section 803 went beyond the FAR in that, when implemented, it would require agencies to solicit offers from all contract holders to meet the “fair opportunity” test.

²⁰³ Pub. L. No. 106-65 (Oct. 5, 1999).

²⁰⁴ 10 U.S.C. § 2304c(d).

²⁰⁵ 10 U.S.C. § 2304c(e).

²⁰⁶ See Pub. L. No. 107-107, § 803(b)(1).

²⁰⁷ *Id.* § 803(b)(2).

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DoD's implementing regulations, which became effective in October 2002, require that each order of services exceeding \$100,000 shall be placed on a "competitive basis." The regulations provide that an order is made on such a basis only if the contracting officer:

- (1) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the service under the multiple award contract; and
- (2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.²⁰⁸

The regulations also permit the contracting officer to waive the competition requirement under certain circumstances.²⁰⁹ As discussed below, the DoD regulations also cover ordering procedures for services under schedule contracts.

GAO continued to express concern in 2003 regarding the level of competition under fair opportunity.²¹⁰ In July 2004, GAO issued another report regarding DoD's implementation of Section 803.²¹¹ GAO found that competition requirements were waived for nearly half of the task orders surveyed. GAO noted that, as a "result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value for the taxpayer."²¹² GAO found that, in the majority of cases where waivers were invoked, it was done at the request of the government program office "to retain the services of contractors currently performing the work."²¹³ The report further found that roughly two-thirds of the cases in which waivers were invoked were in federal supply schedule orders.²¹⁴ For orders that were available for competition, buying organizations awarded more than one-third after receiving only one offer.²¹⁵

In its July 2004 report regarding Section 803, GAO recommended that DoD:

- develop additional guidance on the circumstances under which the logical follow-on and unique services waivers may be used;

²⁰⁸ See DFARS 216.505(c).

²⁰⁹ See DFARS 216.505(b).

²¹⁰ U.S. GAO, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-393, 7 (2003).

²¹¹ U.S. GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (2004).

²¹² *Id.* at 6.

²¹³ *Id.* at 3.

²¹⁴ *Id.* at 6.

²¹⁵ *Id.* at 3.

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- require that all waiver determinations be supported by documentation describing in detail the circumstances that warrant the use of a waiver; and
- establish approval levels for waivers under multiple award contracts that are comparable to the approval levels for sole-source federal supply schedule orders under subpart 8.4 of the FAR.²¹⁶

In testimony before the Panel, representatives of the DoD Inspector General discussed an additional investigative report that would show (report released in October 2006) a significant number of orders still are not being subjected to fair opportunity requirements.²¹⁷ The report states that on 6 of 14 sole-source purchases reviewed, adequate justification was not provided for sole-source procurements.²¹⁸ In the FY 2007 DOD Authorization Act, Congress tasked with IG with a further review of fair opportunity.²¹⁹ The agency implementation of the “fair opportunity” required by FASA thus has been uneven and subject to Congressional prodding to encourage competition.

The Defense FAR Supplement was amended further in March 2006 to add increased specificity to the requirements for competition in placement of orders under multiple award contracts.²²⁰ The March 2006 amendments made clear that DoD’s requirements pursuant to Section 803 apply to orders for both supplies and services, including orders placed by non-DoD agencies on behalf of DoD. In addition, DoD clarified that any justification for a waiver of fair opportunity was required to be consistent with the requirements of FAR 8.405-6,²²¹ including senior level approvals for waivers involving large orders.

d. Competition under Multiple Award IDIQ Contracts

As described above, the award of work under multiple award IDIQ contracts is a two-step process. The award of the basic multiple award IDIQ contract is made using FAR Part 15 procedures. Agency requirements are broadly stated in these contracts, since the actual requirements to be filled have not yet been determined.

²¹⁶ *Id.* at 17.

²¹⁷ Test. of Henry Kleinknecht & Terry McKinney, DoD, AAP Pub. Meeting (June 29, 2006) Tr. at 54-56, 111-12;

²¹⁸ U.S. DoD IG, *Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration*, D-2007-007, 5 (2006).

²¹⁹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 817, 120 Stat. 2083 (2006).

²²⁰ 71 Fed. Reg. 14106 (Mar. 21, 2006).

²²¹ FAR 8.405-6, as amended by GSA in June 2004, sets forth detailed requirements for a waiver justification including, among other things, (i) demonstration of the proposed contractor’s unique qualifications; (ii) the ordering activity CO’s determination that the order represents the best value to the Government, (iii) the market research performed; (iv) steps the ordering agency may take in the future to overcome the need for a non-competitive order; and (v) evidence that supporting data have been certified as accurate and complete by technical or requirements personnel.

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In the case of supplies, an agency may know what it needs, but not the quantity or timing. For services, the government's ability to state its requirements in a manner that allows an evaluation against those requirements may be difficult. For routine services such as grounds keeping or equipment maintenance, the work is identifiable and the unknowns are quantity and timing. However, for complex IT and management services, the statement of requirements may be extremely general since the agency does not include the mix of labor or the expected nature and duration of the individual projects in the solicitation. For complex services, the evaluation thus typically is based on sample tasks rather than the agency's actual requirements. Because of the multiple award preference stated in FAR 16.504(c), awards usually are made to multiple offerors, including one or more mandatory awards to small businesses – if a partial reservation has been made. Large programs such as the authorized GWACs typically have a set number of awardees and involve more offerors. Some multiple award vehicles, such as SeaPort-e may not involve any initial competition, *i.e.*, according to testimony, SeaPort-e initially awarded 654 contracts.²²²

Once the base contract awards are made under a multiple award IDIQ solicitation, the government's specific requirements are identified in task orders. The DFARS order procedures at 216.505 contain relatively little guidance for the conduct of order competitions over \$100,000. The CO is required to consider cost or price and is encouraged to use streamlined procedures, as well as take into account past performance on earlier orders under the contract.²²³ However, for the more complex and higher value task orders involving services, agencies often will conduct competitive negotiations that apply some of the competitive source selection procedures from FAR Part 15. For example, agencies will issue a solicitation type document that contains a statement of work, proposal instructions, evaluation criteria, and a statement of intent to make a best value selection. Agencies often hold discussions, request final proposals, and make an award based on trade offs involving price and non-price factors. [Note that GSA's regulations for FSS order provide more detailed guidance for large orders involving statements of work, as discussed further below.] However, agencies making awards under multiple award IDIQ contracts are not required to debrief offerors, and, regardless of the size of the award, no protest involving the procurement process is permitted. Protests are permitted only under limited circumstances involving orders out of scope.

6. GSA Federal Supply Schedule

a. Background

With enactment of the provisions for commercial items, the acquisition of services on the GSA Federal Supply Schedule increased dramatically. Sales under the Federal Supply Schedules grew from \$4.5 billion in 1993 to \$10.5 billion in 1999²²⁴ and reached \$35.1 billion in fiscal year ("FY") 2006 (in addition, sales under the Veterans Administration Federal Supply

²²² Test. of Jerome Punderson, NAVSEA, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 285-86.

²²³ DFARS 216.505-70(c).

²²⁴ See U.S. GAO, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OCG-00-7, 6-7 (2000).

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Schedule in FY 2005 was \$7.9 billion).²²⁵ The effect on the acquisition of services was particularly profound. FASA led to a “significant increase” in the type of services available on GSA’s schedules,²²⁶ and by 2001, the Federal Government spent \$109 billion on services, constituting 51 percent of all acquisition spending for that year.²²⁷ In FY 2005, total GSA schedule sales had increased to \$33.9 billion with services constituting 61.9% of schedule sales or \$20.9 billion. In FY 2006, GSA schedule sales increased again to a total of \$35.1 billion with services constituting 64.4% or \$22.6 billion. During the past nine years, GSA-managed schedule sales have grown on average 22.7% annually. (Note that for FY 2006 GSA-managed Schedule sales grew by only 3.5 percent from FY 2005 – a decrease from the 21.5 percent growth in FY 2004 and 9.0 percent growth in FY 2005.)²²⁸ Today, services account for about two-thirds of all schedule sales.

GSA offers professional services through the schedule in a variety of areas, including: general purpose commercial Information Technology Equipment, software and services (known as the “IT 70” Schedule); Financial and Business Solutions (“FABS”); Mission Oriented Business Integrated Services (“MOBIS”); Professional Engineering Services (“PES”), and Environmental Services. Companies offering these services agree to perform the identified services for hourly rates identified on the Schedule.

Within the schedules program, the Services Acquisition Center offering the PES, FABS, and Advertising and Integrated Marketing (AIMS) Schedules has grown remarkably. The Services Acquisition Centers FY 2005 sales were \$3.5 billion. During the previous three years, its sales have grown by 164 percent, showing a substantial demand for professional services. Although services under the IT 70 schedule grew less dramatically (less than one percent in FY 2005), IT 70 schedule sales totaled \$16.9 billion in FY 2005, accounting for approximately 50.8 percent of total Schedule sales. This number grew only slightly in FY 2006, to \$17 billion, of which services accounted for approximately 64 percent or \$10.8 billion.

Federal Supply Schedule (“FSS”) contracts are awarded pursuant to GSA’s separate authorizing statute. CICA defined “competitive procedures” to include the GSA schedules so long as: (1) participation in the program is open to all responsible sources, and (2) orders and contracts under such procedures result in the lowest overall cost alternative to meet the Government’s needs.²²⁹ Thus, orders placed under the schedules are deemed to be the product of full and open competition, because they are items and services that are routinely sold in substantial quantities in the commercial marketplace. GSA’s regulations implementing the FSS program are set forth in FAR Subpart 8.4. For the FSS program, GSA maintains an open solicitation under which any contractor may submit an offer of a commercial item or service for

²²⁵ GSA Data, *Contractors Report of Sales - Schedule Sales FY 2006 Final*, (Oct. 24, 2006).

²²⁶ See Commercial Activities Panel, *Final Report: Improving the Sourcing Decision of the Federal Government* 29 (Apr. 2002), <http://www.gao.gov/a76panel/dcap0201.pdf>.

²²⁷ *Id.* at 27.

²²⁸ GSA Data at _.

²²⁹ 41 U.S.C.A. § 259.

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award of an FSS contract.²³⁰ Offerors under an FSS solicitation do not compete against other offerors; rather, prices are assessed against the standard of a “fair and reasonable price.” For services, the FAR states:

GSA has already determined that the prices of fixed-price services and rates for services offered at hourly rates under schedule contracts to be fair and reasonable. [B]y placing an order against a schedule contract..., the ordering activity has concluded that the order represents the best value...and results in the lowest overall cost alternative (considering price, special features, administrative costs, *etc.*) to meet the Government’s needs.²³¹

To be awarded a base schedule contract, a vendor has to provide GSA with information about its commercial sales practices and identify categories of customers who then become the basis of negotiation. Utilizing a most favored customer approach, GSA negotiates with its vendors to obtain the best prices afforded their preferred customers for like requirements of similar scale. The essence of GSA Schedule contract price analysis is a comparison of the prices offered to the Government with the prices paid by others in the commercial marketplace for the same or similar items, including services, under similar conditions. This pricing approach, combined with GSA’s Price Reductions clause (GSAM 552.238-75), is designed to maintain a specific, commercially-competitive pricing relationship throughout the duration of the contract. The focus of this threshold negotiation is to leverage the government’s volume buying to achieve a position similar to that of the most competitive commercial customer from the particular vendor.²³² The resulting price is, thus, deemed “fair and reasonable.”²³³

b. Market Prices

As discussed above, orders placed under the schedules are deemed to be the product of a competitive procedure because the items and services are routinely sold in substantial quantities in the commercial marketplace. GSA attempts to ensure that the prices and labor rates of an FSS contract are reasonable through analysis of commercial pricing policies and practices and use of pre-award audits by the GSA IG of those commercial prices. In recent years GSA has increased the surveillance of commercial prices. The number of pre-award audits is increasing. During fiscal year 2003 to 2005, the number of pre-award audits performed increased from 18 to 40 to 70.²³⁴ According to GSA, the goal is set at 100 in fiscal year 2006.²³⁵ In FY 1995, GSA

²³⁰ As of the date of this report, more than 17,000 companies have Schedule contracts.

²³¹ FAR 8.404(d).

²³² FSS Procurement Information Bulletin 04-2.

²³³ FAR 8.404(d).

²³⁴ GAO-05-229 at 14-15.

²³⁵ *Id* at 17.

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conducted 154 pre-award audits. GSA MAS contracts contain over 10 million products from more than 17,000 commercial vendors.²³⁶

c. Streamlined Ordering Process

The use of GSA schedules provides for a simplified ordering process. For instance, as long as ordering activities (*i.e.*, buyers) comply with the regulatory ordering policies and procedures established by GSA and set forth in FAR 8.405, the order is not subject to the requirements of FAR Part 13 (Blanket Purchase Agreements), FAR Part 14 (Sealed Bidding), FAR Part 15 (Contracting By Negotiation), or FAR Part 19 (Small Business Programs)(except for the requirement at FAR 19.202-1(e)(1)(iii) dealing with bundling in small business procurements). Buyers still must comply with all FAR requirements regarding bundled contracts, if the order meets the definition for a bundled contract at FAR 2.101(b). The GSA schedules also may be used to meet agency small business goals.

Once a contractor's products or services are placed on the GSA schedules, any agency may order pursuant to the ordering procedures set forth in FAR 8.4.

Although GAO generally lacks jurisdiction to hear protests involving the issuance of delivery and task orders,²³⁷ GAO has determined that its bid protest jurisdiction under the Competition in Contracting Act²³⁸ does extend to competitions conducted under FSS contracts.²³⁹

Orders under the schedules may be protested, regardless of the size of the order.

Policies and Procedures for Ordering Services. While there are no dollar limits for orders placed under GSA Schedule contracts, the ordering procedures specified in the FAR differ depending on a number of factors, including dollar thresholds. More specifically, the ordering procedures vary depending on (1) whether the acquisition is for supplies or services, (2) if services, whether they are of a type requiring a statement of work, *i.e.*, statement of the buyer's requirements, (3) the dollar value of the purchase (*i.e.*, below the micro-purchase threshold, currently set at \$3,000, or above the micro purchase threshold established by category of supply or service), and (4) whether a Blanket Purchase Agreement ("BPA") is being established under the schedule contract for the fulfillment of repetitive needs for supplies or services. For any

²³⁶ GSA Data at ____.

²³⁷ 41 U.S.C.A. § 253j(d); 10 U.S.C.A. § 2304c(d).

²³⁸ See 31 U.S.C.A. § 3551 *et seq.*

²³⁹ E.g., *Savantage Fin. Servs., Inc.*, B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113; See *Sys. Plus, Inc. v. United States*, 68 Fed. Cl. 206 (2005), where the extent of the authority for review of FSS competitions has been called into question. In recently rejecting a challenge to an agency decision not to implement a stay of performance in regard to the award of an order under a schedule contract, the U.S. Court of Federal Claims distinguished FAR Part 15 procurements from the competitions conducted under FAR subpart 8.4 for purposes of the statutory stay outlined in the statute that sets forth GAO's bid protest jurisdiction.

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orders of services at or below the micro purchase threshold, the buyer may place orders directly with any FSS contractor that can meet the agency's needs, without regard to whether an SOW was used.²⁴⁰

For orders of services under the maximum order threshold, if a SOW is not used (*e.g.*, for commoditized services such as installation, maintenance or repair services), the ordering activity must review at least three schedule contractors pricelists.²⁴¹ Such a survey of prospective suppliers on the schedules may be accomplished through a review of the "GSA Advantage!²⁴² On-line" shopping service or by review of catalogs or pricelists from three contractors.²⁴³ The FAR does not define survey requirements or how the three schedule contractors are to be chosen. The FAR does include a list of factors that may be considered in determining best value for purposes of selecting a contractor for an order.²⁴⁴ For orders in excess of the maximum order threshold, the policy is that buyers should seek a price reduction.²⁴⁵ However, an order may be placed even though no reduction is offered.²⁴⁶

In cases where services priced at hourly rates are being acquired from schedule contractors, GSA policy calls for an SOW stating the buyer's requirements (*e.g.*, the work to be performed, location, period of performance, schedule, performance standards, etc.) to be provided along with evaluation criteria in an RFQ.²⁴⁷ In circumstances involving orders over the micro-purchase threshold, but less than the maximum order threshold where a SOW is called for, the policy is that the buyer provide such an RFQ "to at least three schedule contractors that offer services that will meet the agency's needs."²⁴⁸ RFQs may be posted on e-Buy. Buyers are encouraged to request firm fixed-prices for the work scope.²⁴⁹ The policy makes it clear that although the hourly rates are already on the schedule and deemed fair and reasonable (through deemed competition) the responsibility for obtaining a fair and reasonable price for the buyer's specific requirement considering the level of effort and mix of labor proposed, is the responsibility of the buyer.²⁵⁰ Buyers are encouraged to seek price reductions regardless of the size of individual orders.²⁵¹

In purchases where the dollar value of the buy exceeds the maximum order threshold or if establishing a BPA under a schedule, the FAR instructs ordering activities whose order *does not*

²⁴⁰ FAR 8.405-1(b) and 8.405-2(c)(1)

²⁴¹ FAR 8.405-1(c)

²⁴² As of January 2006, GSA Advantage! provides more than 11.2 million different commercial services and products through its 17,495 contracts in 43 different Schedules. It features advanced search capability and has traffic of approximately 45,000 hits a day.

²⁴³ See *id.*

²⁴⁴ FAR 8.405-1(c)(3).

²⁴⁵ FAR 8.405-1(d).

²⁴⁶ FAR 8.405-1(d)(3).

²⁴⁷ FAR 8.405-2(c).

²⁴⁸ FAR 8.405-2(c).

²⁴⁹ FAR 8.405-2(c)(2)(iii).

²⁵⁰ FAR 8.405-2(d).

²⁵¹ FAR 8.405-4.

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require a SOW to review the pricelists of additional schedule contractors, seek price reductions, and place the order or BPA with the schedule contractor that provides the best value.²⁵² However, as noted above, the order may be placed even if no price reductions are forthcoming.²⁵³

For those orders exceeding the maximum order threshold or for establishing a BPA for services that require a SOW, the policy is that buyers provide the RFQ to additional schedule contractors, or to any schedule contractor who requests the RFQ. The SOW is required to identify the work performed, location period of performance deliverable schedule, and performance standards.²⁵⁴ In order to determine the appropriate number of additional contractors, buyers should consider, among other factors, the complexity, scope, estimated value of the requirement and market research. GSA places the responsibility on the buyer whose requirement is being filled, to evaluate the responses and make an award to the schedule contractor determined to offer best value based on a consideration of the level of effort and the proposed labor mix for the task defined in the SOW.²⁵⁵ In such circumstances and depending on the complexity and size of the order, the buying agency CO may use his or her discretion to use the minimum required evaluation procedures in FAR 8.405-2 to conduct an evaluation that is similar to a best value selection under FAR part 15 and produces a result deemed to be the best value.

The Internet-based tool e-Buy often is used for order competitions under the GSA schedules. This tool is designed to facilitate the request for and submission of quotes or proposals for products and services offered through FSS contracts and GSA GWACs.²⁵⁶ Agencies can use e-Buy to prepare and post a request for quotations for specific products and services for a specified period of time, and contractors may review the request and post a response. Under the e-Buy tool, the buying agency, not GSA, defines the requirements and writes the statement of work – GSA does not review them. The buying agency selects the contractors who will be solicited for a quotation. However, the system is set up so that all vendors within the selected product/service categories or SINs can view the RFQ under the bulletin board and submit quotations. It is up to the vendor whether to make the effort to submit a quotation if that vendor did not receive a solicitation. Using e-Buy satisfies the additional requirements of DFARS 208.405-70. DoD's implementation was addressed in the GAO report discussed above.²⁵⁷

For example, an ordering agency with a requirement for an IT business improvement task may choose SIN 132-51, IT Services, under the Schedule 70-Information Technology and SIN

²⁵² FAR 8.405-1(d)(1)-(3).

²⁵³ FAR 8.405-1(d)(3).

²⁵⁴ FAR 8.405-2 (b) and (c)(3).

²⁵⁵ FAR 8.405-2(c)(3)-(4) and 8.405-2(d).

²⁵⁶ <http://www.gsaadvantage.gov>.

²⁵⁷ See U.S. GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (2004).

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874-1, Consulting Services, under the Schedule 874- Mission Oriented Business Integrated Services (MOBIS). The e-Buy system will show the list of 3,995 vendors available under SIN 132-51 and 1,741 vendors under SIN 874-1 (as of 6/8/2006). The agency will then select the vendors to whom to send e-mail notifications about the RFQ (“select all vendors” is also available). However, the rest of the vendors within the two SINs may still view the RFQ in the bulletin board and submit quotes. Under, FAR 8.405-2(c)(4) and (d), the ordering agencies must provide the RFQ including the statement of work and the evaluation criteria to any Schedule contractor who requests it and they must also evaluate all responses received. The agency can decide reasonable response time.

Postings on e-Buy have been continually increasing since its inception in August 2002. In fiscal year (“FY”) 2003, 13,282 solicitations were posted. Postings increased to 25,582 in FY 2004 and 41,179 in FY 2005. Finally, in FY 2006, there have been 48,423 postings representing an approximately 18 percent increase over the last year. On average, three quotes have been received per closed RFQ during FY 2005 and FY 2006.

Regardless of whether ordering activities use e-Buy, the ordering activity, not GSA, is responsible for establishing the dollar thresholds for BPAs and orders, developing a quality SOW when required, conducting the competition including selecting appropriate vendors to receive an RFQ when e-Buy is not used, and evaluating and selecting the schedule contractor to fulfill their requirements.

As with task orders under multiple award contracts, Section 803 also applies to orders under FSS contracts. DoD regulations impose the requirements of Section 803 for services orders over \$100,000 under GSA schedule contracts.²⁵⁸ As implemented in DFARS 208.405-70, DoD’s regulations require that a DoD order for supplies or services exceeding \$100,000 must provide fair notice either to all applicable Schedule holders or to as many Schedule contractors as practicable to reasonably ensure receipt of at least three offers. The Procedures, Guidance and Information (PGI) for DFARS 208.405-70 specifically mentions “e-Buy” as one medium that provides fair notice to all the GSA schedule contractors. At the time of this report, GSA has under consideration, a proposed rule that will make Section 803 applicable government-wide.

Schedule BPAs. Blanket Purchase Agreements under GSA schedules also are used as a tool to streamline the ordering process. BPAs originally were designed to provide a simplified method for government agencies to meet their repetitive needs for unpredictable quantities of commodities.²⁵⁹ With the addition of services priced at hourly rates to the Federal Supply Schedules, schedule BPAs for these services in some ways more closely resemble indefinite-delivery, indefinite-quantity (IDIQ) services contracts in their application and use than traditional FAR Part 13 BPAs with their individual purchase limitations.²⁶⁰ BPAs under GSA schedules may be single BPAs or multiple BPAs. Schedule BPAs also may be established for the use of a

²⁵⁸ See DFARS 208.405-70.

²⁵⁹ FAR 8.405-3(a)(1).

²⁶⁰ FAR Subsection 13.303-5(b).

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single agency, or may be established for multi-agency use if the BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

While fair opportunity requirements that apply to umbrella IDIQ contracts do not apply to multiple BPAs, the establishing agency must specify the ordering procedures to be used by the ordering activities and the ordering activities must forward their requirement, including any statement of work and evaluation criteria, if required, to an appropriate number of BPA holders, as established by the BPA's ordering procedures.

Unlike traditional FAR Part 13 BPAs, with their dollar threshold limitations, BPAs under GSA schedules have been used for streamlining large buying programs for various types of services and supplies. While dollar thresholds invoke varying ordering procedures under GSA schedules (as discussed above), there are no dollar limits for an order or a BPA. After complying with the ordering policies discussed above under FAR Subsection 8.405-1 or -2 as applicable for establishing the BPA, and estimating the quantities or work to be performed,²⁶¹ the ordering activity may place orders as the need arises for the duration of the BPA (usually 5 years),²⁶² without notice requirements or competition beyond that required under the BPA's ordering procedures. As discussed above, FAR Subsection 8.405-3(b)(3) requires that those placing orders under a BPA for hourly rate services develop a SOW for the order and ensure that the order specifies a price for the performance of the tasks identified in the SOW. So, while the hourly rates are themselves already deemed fair and reasonable, FAR Subsection 8.405-2(d) places the responsibility for considering the level of effort and the mix of labor proposed to perform a specific task on the ordering activity in determining the total price reasonable.

While an established BPA can remain in effect for up to five years (may exceed 5 years to meet program requirements),²⁶³ the contracting officer must review the BPA annually.²⁶⁴ The review process must determine: whether the vendor is still under the GSA schedule contract; whether the BPA is still the best value for the Government; and whether additional price reductions could be obtained due to an increase in the amounts of services purchased.²⁶⁵ In addition, the contracting officer must document the results of the annual review.²⁶⁶

Brand Name Specifications. On April 11, 2005, OMB issued a memorandum addressing the use of brand name specifications to reinforce the need to maintain vendor and technology neutral contract specifications. OMB's twin goals in issuing the memorandum were to increase competition and transparency regarding the use of brand name requirements. OMB encouraged agencies to limit the use of brand name specifications and requested that agencies publicize any justification for use of a brand name with the contract solicitation. The Civilian Agency

²⁶¹ FAR 8.405-3(a)(2).

²⁶² FAR 8-405.3(c).

²⁶³ *Id.* at 8.405-3(c).

²⁶⁴ *Id.* at 8.405-3(d).

²⁶⁵ *Id.* at 8.405-3(d)(1).

²⁶⁶ *Id.* at 8.405-3(d)(2).

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Acquisition Council and the Defense Acquisition Regulations Council (“Councils”) followed suit and, on September 28, 2006, the Councils issued an interim rule amending the FAR to require agencies to publish on the Government-wide Point of Entry (“GPE”) or e-Buy, the justification to support the use of brand name specifications.

The interim rule stated that, as a general rule, contract specifications should emphasize the necessary physical, functional, and performance characteristics of a product – not brand names. In addition, the interim rule requires that brand name orders exceeding \$25,000 to be placed against the FSS program must be posted on e-Buy. As part of the posting, the ordering agency is required to include the documentation or justification supporting the brand name requirement. For non-FSS acquisitions, including simplified acquisitions, the interim rule requires posting of the justification or documentation supporting the brand name requirement to the FedBizOpps website.

F. Pricing – The Current Regulatory and Oversight Scheme

1. Overview

Under current law, contracts that are priced or performed on the basis of cost are subject to the requirement for submission of certified cost or pricing data if they are above the \$650,000 threshold.²⁶⁷ There are exceptions to this requirement, as discussed further below, for competitively awarded contracts (although non-competitive modifications to such contracts may be covered) and for contracts for commercial items (the exception also covers modifications to commercial item contracts).

For commercial item contracts under FAR Part 12, the Government still must determine whether the price is fair and reasonable. Where commercial item contracts are competitively awarded, price reasonableness is easily established. Where commercial item contracts are acquired non-competitively, an issue arises as to what data should reasonably be required to support the contractor’s proposed pricing. For price-based acquisitions of commercial items, FAR 15.403-3(c) describes the process the contracting officer must utilize. The contracting officer is directed, “at a minimum” to use price analysis to determine fair and reasonable prices whenever a commercial item is acquired. If price analysis is not sufficient, the contracting officer is directed to use other sources (*e.g.*, market information), and if that is insufficient, authority exists to obtain information other than cost or pricing data.

In the grey area, where there is little or no competition, where exceptions to fair opportunity are used, or where there is an inadequate response to the competition, questions arise as to what types of data the contracting officer can and should obtain in connection with commercial items, whether pressures to get to award discourage asking for information other than cost or pricing data, and what the government audit community does with such data; *i.e.*, is the mindset to treat it no differently than cost or pricing data?

²⁶⁷ FAR 16.403-4(a).

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For defense articles, considerable controversy has arisen since this Panel was appointed regarding whether such articles should be considered “commercial items” and whether price-based acquisition of such items should be permitted.

2. The Current Truth in Negotiations Act

The Truth in Negotiations Act (“TINA”)²⁶⁸ requires a contractor to submit certain factual information to the Government for purposes of contract negotiations. The contractor must submit this “cost or pricing data” to the Government and certify that the data are “accurate, complete, and current.”²⁶⁹

Specifically, unless an exception applies, TINA requires submission of cost or pricing data before the award of any negotiated prime contract, subcontract, or modification to any contract that is expected to exceed \$650,000. Unless an exception applies, cost or pricing data also may be required for contract actions over the simplified acquisition threshold if the data are necessary to determine whether the offered contract or modification price is fair and reasonable.²⁷⁰ The FAR encourages²⁷¹ contracting officers to “use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data.”

There are several exceptions to the requirement that a contractor submit cost or pricing data.²⁷² A contractor does not have to provide cost or pricing data if the agreed upon price was based on “adequate price competition”²⁷³ or “prices set by law or regulation.”²⁷⁴ Finally, submission of cost or pricing data is not required for contracts for “commercial items” or modifications to such contracts (provided that such modifications would not change the contract from one for a commercial item to one other than for a commercial item).²⁷⁵ Notwithstanding, the contracting officer may require information other than cost or pricing data to support a determination of price reasonableness or cost realism.²⁷⁶ The Government may not require submission of cost or pricing data if an exception applies.²⁷⁷

Cost or Pricing Data. Cost or pricing data is broadly defined as:

all facts that, as of the date of agreement on the price of a contract
(or the price of a contract modification), or, if applicable consistent

²⁶⁸ 10 U.S.C. § 2306a; 41 U.S.C. § 254b.

²⁶⁹ See 10 U.S.C. § 2306a(a)(2), 41 U.S.C. § 254b(a)(2).

²⁷⁰ See FAR 15.403-4(a)(2).

²⁷¹ FAR 15.402(a)(3).

²⁷² See 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b); FAR 15.403-1.

²⁷³ See FAR 15.403-1(b)(1).

²⁷⁴ FAR 15.403-1(b)(2).

²⁷⁵ See FAR 15.403-1(b)(3).

²⁷⁶ See FAR 15.403-1(b).

²⁷⁷ See 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b).

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with [TINA], another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.²⁷⁸

The FAR further states:

Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.²⁷⁹

Thus, cost or pricing data includes a variety of information including, but not limited to, cost information on which the contractor based its price.

The FAR provides some specific guidance in identifying broad categories of information that qualify as cost or pricing data. It states that cost or pricing data includes "such factors as –

- (1) Vendor quotations;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit-cost trends such as those associated with labor efficiency;
- (6) Make-or-buy decisions;
- (7) Estimated resources to attain business goals; and
- (8) Information on management decisions that could have a significant bearing on costs.²⁸⁰

Information Other Than Cost or Pricing Data. When one of the exceptions discussed above applies, the contracting officer "shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications)."²⁸¹ Therefore, the prohibition on obtaining such data is explicit. The FAR also states, however, that the contracting officer "may

²⁷⁸ 10 U.S.C. § 2306a(h)(1); 41 U.S.C. § 254b(h)(1). *See also* FAR 2.101.

²⁷⁹ FAR 2.101.

²⁸⁰ *Id.*

²⁸¹ *See* FAR 15.403-1(b).

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require information other than cost or pricing data to support a determination of price reasonableness or cost realism.”²⁸²

The text of TINA provides:

When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the contracting officer shall require that the data submitted include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.²⁸³

The FAR mandates that, in establishing the reasonableness of prices, a contracting officer must not obtain more information than is “necessary.”²⁸⁴ If “the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data. . . .”²⁸⁵

In light of the use of the phrase “other than” in conjunction with “cost or pricing data,” it is not entirely clear from the TINA statute or the implementing regulation in the FAR what qualifies as “information other than cost or pricing data.” Neither statute nor the FAR specify the difference between “cost or pricing data” and “information other than cost or pricing data.” For example, it is not clear from the regulation whether the category “information other than cost or pricing data” necessarily encompasses the same types of cost or price-related information as “cost or pricing data,” and if it then differs from “cost or pricing data” only in regard to certification and defective pricing implications.

Although the FAR does not describe the differences between “cost or pricing data” and “information other than cost or pricing data,” it sets forth the following order of precedence for seeking “information other than cost or pricing data” when cost or pricing data are not required and there is no “adequate competition”:

Information related to prices (*e.g.*, established catalog or market prices or previous contract prices), relying first on information

²⁸² *Id.*

²⁸³ 10 U.S.C. § 2306a(d)(1); *See also* 41 U.S.C. § 254b(d)(1).

²⁸⁴ *See* FAR 15.402(a).

²⁸⁵ FAR 15.403-3(a)(1).

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available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

Cost information, that does not meet the definition of cost or pricing data at [FAR] 2.101.²⁸⁶

Thus, the order of precedence for “information other than cost or pricing data” looks first to price information and, secondarily, to cost information. The FAR does not further identify or describe “information other than cost or pricing data.”

Under the FAR, “information other than cost or pricing data” may be requested for commercial items where there is no adequate price competition.²⁸⁷ The FAR provides:

(i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

(ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.²⁸⁸

The FAR includes instructions (located in Table 15-2) for submission of proposals when a contractor is required to submit cost or pricing data. The table is entitled “Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required.” The instructions address various “cost elements,” including materials and services, direct labor, indirect costs, and other costs. The FAR provides detailed guidance regarding submission of the information.²⁸⁹ Although “information other than cost or pricing data” is addressed in FAR Subpart 15.4, the FAR does not include instructions for how to submit “information other than cost or pricing data.” Instead, the FAR specifies²⁹⁰ that the “contractor’s format for submitting the information

²⁸⁶ FAR 15.402(a)(2)(i), (ii).

²⁸⁷ See FAR 15.403-3(c)(1).

²⁸⁸ FAR 15.403-3(c)(2)(i), (ii).

²⁸⁹ See FAR 15.408 (tbl. 15-2).

²⁹⁰ FAR 15.403-3(a)(2).

should be used,” although FAR 52.215-20 Alternate IV also enables the Government to provide “a description of the information and the format that are required.”

3. GSA Schedule Pricing Policies

Because the services and products on GSA schedule contracts are commercial items and such contracts are awarded on commercial terms and conditions, GSA uses a price-based approach to negotiate contract pricing. This approach relies on the prices of the supplies/services that are the same or similar to those in the commercial marketplace. Under this approach, submission of cost or pricing data is not required.

GSA’s negotiation objective is to receive prices that are equal to, or better than, a company’s “Most Favored Customer” pricing for a comparable requirement. To arrive at a price that the Government considers fair and reasonable, offerors are required to submit significant amounts of data pertaining to their commercial sales and discounting practices using the standard Commercial Sales Practices Format.

GSA schedule contracts contain an Economic Price Adjustment clause under which schedule contractors may increase or decrease prices according to their commercial practice. Price decreases may be submitted at any time during the contract period. Price increases, resulting from a reissue or modification of the contractor’s commercial catalog that formed the basis for award, can only be made effective on or after the initial 12 months of the contract period and, then, periodically thereafter for the remainder of the contract term. Under a standard GSA clause, MAS contractors are required to maintain and provide current Federal Supply Schedule Price Lists with detailed data on all price, price-related information, and pertinent ordering instructions (I-FSS-600).

A contractor’s pricing and discount information is subject to audit by the GSA Inspector General. GSA schedule contracts also contain a “most-favored customer” clause that requires contractors provide and maintain auditable data establishing that, for the class of item offered, the Government has received the most favorable price and discount arrangement. If it is discovered that the contractor offered more favorable pricing arrangements to its commercial customers, the Government will be entitled to a rebate. GSA’s Office of Inspector General uses its investigatory powers (including subpoenas) and the Civil False Claims Act to pursue such rebates. The MAS program thus is unique in that it relies on commercial pricing but uses the audit, investigatory, and fraud prosecution powers of the Government to enforce its price terms.

G. Unequal Treatment of the Parties

A fundamental difference between government and commercial contracting is unequal treatment of the parties in the contracting process. The Government enjoys certain contractual “advantages” by virtue of its status as the “sovereign” resulting in benefits from the centuries-old, judicially-created doctrine of sovereign or governmental immunity. The prime example of

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this doctrine is that the Government cannot be sued unless (and only to the extent that) it *consents* to be sued.²⁹¹ Application of this doctrine to the contracting process means that contractors can sue the Government only as permitted by the Tucker Act,²⁹² which does not authorize suits in United States District Courts, jury trials, and certain types of relief such as specific performance, injunctions (except in bid protest cases), interest on damages, etc. Related doctrines are “official” immunity, precluding lawsuits against government employees for their contractual activities,²⁹³ and the “sovereign acts” doctrine, which shields the Government from contractual liability for actions taken in its sovereign capacity.²⁹⁴

The Government also enjoys special protection under the U.S. Constitution by virtue of the Appropriation Clause precluding payments from the Treasury unless authorized by a Congressional appropriation statute.²⁹⁵ Additional favored treatment for the Government in contracts is provided in numerous statutory provisions, such as the Anti-Deficiency Act,²⁹⁶ Contract Disputes Act of 1978,²⁹⁷ Defense Production Act, False Claims Act,²⁹⁸ Forfeiture of Claims Statute,²⁹⁹ Procurement Integrity Act,³⁰⁰ and the Truth in Negotiations Act.³⁰¹

The United States Supreme Court, however, has held for some 130 years that the same rules of contract interpretation and performance apply both to the Government and contractors. The Supreme Court stated in 1875 that the Government is subject to the same rules as contractors. In *Cooke v. United States*,³⁰² the Court said that, when the United States became parties to commercial papers, they incur all the responsibilities of private persons under the same circumstances. The Court then said:

If [a government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.³⁰³

Two years later, in a case involving the Government’s obligations under a lease, the Court said:

The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf.

²⁹¹ *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

²⁹² 28 U.S.C. § 1491(a)(1).

²⁹³ See *Westfall v. Erwin*, 484 U.S. 292, 295-96 (1988).

²⁹⁴ *Horowitz v. United States*, 267 U.S. 458 (1925).

²⁹⁵ See *OPM v. Richmond*, 496 U.S. 414 (1990).

²⁹⁶ 31 U.S.C. § 1341(a)(1).

²⁹⁷ 41 U.S.C. § 601 *et. seq.*

²⁹⁸ 31 U.S.C. §§ 3729-3731.

²⁹⁹ 28 U.S.C. § 2514.

³⁰⁰ Office of Fed. Procurement Policy Act, 41 U.S.C. § 423.

³⁰¹ 10 U.S.C. § 2306(f).

³⁰² 91 U.S. 389 (1875).

³⁰³ *Id.* at 398.

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All obligations which would be implied against citizens under the same circumstances will be implied against them.³⁰⁴

In the *Lynch* case involving government insurance, the Court said:

When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.³⁰⁵

More recently, the Court said in *Franconia Associates v. United States*:³⁰⁶ “When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals,” quoting *Mobile Oil Exploration & Producing Southeast, Inc. v. United States*.³⁰⁷

The Panel considered areas in which the courts and boards of contract appeals have not followed the guidance in the Supreme Court’s decisions and have provided the Government more favorable treatment than contractors even when the disparate treatment is not based on the Constitution, statutory provisions, or contract clauses. These areas included the presumption of regularity (that actions of the Government were conducted properly and correctly),³⁰⁸ estoppel against the Government,³⁰⁹ the presumption of good faith,³¹⁰ and interest as damages.³¹¹

The Panel gave considerable attention to the legal presumptions, primarily because of a scholarly opinion by Judge Wolski in the United States Court of Federal Claims decision in *Tecom, Inc. v. United States*³¹² decided during the Panel’s deliberations and a recommendation by the American Bar Association’s Section of Public Contract Law.

The *Tecom* case discussed the history and application of the presumptions of regularity and good faith. The presumptions have their root in the English law of evidence, and the presumptions initially applied to both government officials and private persons (the law presumed every man, in his private and official character, did his duty, and all things were rightly done, until the contrary is proved).³¹³ The Supreme Court of the United States initially did not limit the presumptions to government officials but applied them also to private persons.³¹⁴ The *Tecom* decision discussed the judicial precedent involving the burden of proof needed to

³⁰⁴ *United States v. Bostwick*, 94 U.S. 65, 66 (1877).

³⁰⁵ *Lynch v. United States*, 292 U.S. 571, 579 (1934).

³⁰⁶ 536 U.S. 129, 141 (2002).

³⁰⁷ 530 U.S. 604, 607 (2000).

³⁰⁸ See, e.g., *Astro Sci. Corp. v. United States*, 471 F.2d 624, 627 (Ct. Cl. 1973) (government tests were conducted properly).

³⁰⁹ See, e.g., *Rumsfeld v. United Tech. Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003).

³¹⁰ *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982).

³¹¹ *See England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372 (Fed. Cir. 2004).

³¹² 66 Fed. Cl. 736 (2005).

³¹³ *Id.* at 758.

³¹⁴ *Id.* at 760.

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rebut the presumptions and contrasted actions by government officials accused of fraud or quasi-criminal wrongdoing with their actions of the type that may be taken by a private party to a contract.³¹⁵ In fact, many of the cases discussed by Judge Wolski can be distinguished on the basis of actions taken by a government official in the Government's sovereign or contractual capacities.

The comments of the American Bar Association's Section of Public Contract Law (consisting of lawyers in private practice, industry, and government service) were contained in a letter to the Panel from the Section dated June 22, 2006. The Section noted that courts and boards of contract appeals, over time, have applied some presumptions to conduct of government employees acting in the contractual area, not merely the sovereign area. Much of the confusion, the Section said, comes from the mingling of (a) the duty of good faith and fair dealing (as recognized by Section 205 of the Restatement 2d of Contracts) that is implied into every contract with (b) the presumption of good faith that attaches to government employees acting in a sovereign capacity. The Section also noted that the unequal treatment of the Government and contractors by the misapplication of the doctrine has been compounded by some judges who have imposed a higher standard of proof on contractors in order to overcome the presumption. The Section concluded by recommending the following language:

The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party's attempt to rebut any legal presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

Representatives of the ABA Section discussed the recommendation at a meeting of the Panel and responded to numerous questions and comments by Panel members, including acceptance of several revisions to the quoted recommendation made during the meeting.

Part II – Findings

1. Commercial “Best Practices” Generally

Finding: “Best practices” by commercial buyers of services include a clear definition of requirements, reliance on competition for pricing and innovative solutions, and use of fixed-price contracts.

Discussion:

The Panel found a number of common “best practices” among commercial buyers in the commercial market place. Commercial buyers invest the time and resources necessary up front

³¹⁵ *Id.* at 769.

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to clearly define their requirement. They use multidisciplinary teams to plan their procurements, conduct competitions, and monitor contract performance throughout the terms of the contract. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative and high quality goods and services. Commercial buyers establish objective measures of performance and continuously monitor contract performance. They rely on carefully crafted standardized terms and conditions, developed with vendor input, to manage risk and ensure quality performance.

Commercial buyers also told the Panel that, when feasible, they preferred fixed-priced contracts. Well-defined performance-based requirements facilitated the use of fixed-price contracts. These same buyers avoided the use of cost-based contracts whenever possible. They indicated that cost-based contracts were too expensive and too burdensome on the company to manage. These commercial buyers typically use relatively short-term contracts; usually 3-5 years with some contracts lasting 7 years. Commercial buyers usually reserve the right to recompete before the contract has run full term.

2. Defining Requirements

Finding: 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. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative, high quality goods and services. Procurements with clear requirements are far more likely to meet customer needs and be successful in execution.

Discussion:

Effective services competition in the private sector rests upon a robust requirements-building process.³¹⁶ Gathering of requirements is a fundamental first step in commercial organizations' services acquisition strategy.³¹⁷ Companies with deep experience in services acquisition value acquisition process governance as highly as selecting the awardee providing the best functional expertise.³¹⁸ For buyers, detailed statements of work communicating specific contract requirements and expected levels of service quality are essential to a successful relationship with vendors.³¹⁹

Private sector companies spend significant amounts of time and resources developing business cases for services acquisition.³²⁰ They get the stake holders involved and use highly qualified personnel to develop the business cases. Business case development helps to prevent

³¹⁶ Test. of Janice Menker, Concurrent Tech. Corp., AAP Pub. Meeting (May 17, 2005) Tr. at 32 (culture change to focus on requirements definition is difficult, but the best written contract cannot fix poor requirements definition).

³¹⁷ Test. of Mark Stelzner, EquaTerra, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 360.

³¹⁸ *Id.*

³¹⁹ Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 80.

³²⁰ Test. of Todd Furniss, Everest Group, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 122.

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false trade-offs. Cost reduction is just one component of the business cases. They have found that too much focus on cost reduction can lead to missed opportunities and, in some cases, reduce service quality in other areas of the organization.³²¹ Stated differently, total cost of service acquisition does not equal total value captured through sourcing.³²² Companies that conducted successful sourcing transactions focused on total value when planning requirements. They also used specifications with well-defined scopes of desired services.³²³

3. Competition in the Commercial Marketplace

Finding: Commercial buyers rely extensively on competition when acquiring goods and services. Commercial buyers further facilitate competition by defining their requirements in a manner that allow services to be acquired on a fixed-price basis in most instances.

Discussion:

Commercial buyers strongly prefer head-to-head competition among vendors. Successful commercial organizations rely on competition to deliver the best quality and the greatest value. As a result, they minimize use of sole-source, or other contract forms that restrict competition. One company testified that its standard practice is to send RFPs to four leading vendors and hold discussions with at least two of the four.³²⁴ Consultants recommend maintaining competition throughout the procurement process.³²⁵

Competition in the commercial marketplace is achieved by starting with an in-depth analysis of company needs, internal strengths and weaknesses and strategic goals.³²⁶ The process often begins with wide-ranging requests for information (“RFIs”) to gather information about services and vendors available in the commercial marketplace.³²⁷ Competition does not end when the sourcing transaction contract is signed. Rather, Six Sigma-style, continuous evaluation is the predominant model for continuously measuring vendor/supplier performance.³²⁸ Vendors expect ongoing monitoring, and continually face the prospect of losing business if technology or strategic direction changes, or if service metrics fall below target levels.³²⁹ Commercial companies with robust sourcing activities are aligned around common objectives, with buy-in at all levels of the organization, so that vendors and company employees managing

³²¹ *Id.* at 121; Test. of Tony Scott, Walt Disney Co., AAP Pub. Meeting (Apr. 21, 2006) Tr. at 11.

³²² Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 116.

³²³ Testimony of Ronald Casbon, Bayer, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 218.

³²⁴ Miller Test., AAP Pub. Meeting (Mar. 30, 2005) at 79.

³²⁵ See Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 142.

³²⁶ See notes 1 – 32, *infra*, and accompanying text.

³²⁷ See notes 14-16, *infra*, and accompanying text.

³²⁸ See notes 13, 33 – 34, 44 – 48, *infra*, and accompanying text.

³²⁹ See notes 47 – 48, *infra*, and accompanying text.

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vendors understand their objectives and have profit-and-loss responsibility for their transactions.³³⁰

4. Contract Terms and Conditions Used in Commercial Contracts

Finding: Large commercial buyers generally require sellers to use the buyers' contracts which include the buyers' standard terms and conditions. This allows all offerors to compete on a common basis. The use of standard terms and conditions streamlines the acquisition process, making it easier to compare competing offers, eliminating the need to negotiate individual contract terms with each offeror, and facilitating contract management.

Discussion:

The commercial buyers who addressed the Panel said that they use tight deal terms in their solicitation, *e.g.*, detailed pricing structure, work breakdown matrices, description of work, *etc.* The commercial buyers also have developed and use their own standard contracts in large procurements. These standard contracts have several important advantages to the seller. They provide consistency and predictability. Sellers know what to expect. Also standard contract terms create a common baseline for evaluating offers in a competitive acquisition. Standard contract terms also benefit the buyer. They streamline the acquisition process by simplifying the comparison of competing offers and by eliminating the need for negotiation of terms and conditions with individual vendors. Commercial buyers seldom grant deviations to their standard contract terms. Rather than tailoring terms for individual offerors, the buyers instruct the sellers to adjust their price to account for any risks associated with the buyer's standard contract terms.

Unlike commercial practices, government contracts using the streamlined procedures of FAR Part 12 normally incorporate the sellers' terms and conditions verbatim along with several mandatory FAR clauses. Analyzing the seller's terms and conditions, and negotiating changes to them can be very time consuming. The risk allocations under commercial terms frequently differ from those under the FAR provisions for traditional procurements. For example, a seller's commercial terms might limit its risk by defining when acceptance occurs or by limiting remedies for nonperformance. Also under FAR Part 12, the government cannot unilaterally direct changes. The seller must first agree to both the change and the price.

5. Pricing of Commercial Contracts by Commercial Buyers

Finding: Commercial buyers rely on competition for the pricing of commercial goods and services. They achieve competition by carefully defining their requirements in a manner that facilitates competitive offers and fixed-price bids. In the absence of competition,

³³⁰ See notes 29 – 30, *infra*, and accompanying text.

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commercial buyers rely on market research, benchmarking, and in some cases, cost-related data provided by the seller, to determine a price range.

Discussion:

Commercial buyers rely upon well-defined requirements and head-to-head competition for pricing. They define requirements in a manner that facilitates fixed-price bids. Commercial buyers conduct extensive market research and use that information to support competition for their solicitations. In the absence of competition, (which is relatively rare), commercial buyers rely on their own market research and sometimes seek data from other vendors. Commercial buyers occasionally use vendor cost data from sellers to establish price reasonableness. However, commercial buyers generally do not request detailed cost data from commercial sellers.

There is an unequivocal mandate for competition that runs through the statutes and regulations that govern federal procurement. Despite this clear mandate, reports by the GAO and DOD IG show that the federal government continues to award a significant proportion of task orders noncompetitively. These noncompetitive actions are not limited to traditional procurements; they include commercial items and services. In contrast, commercial buyers repeatedly told the Panel that competition results in better quality good and services and lower prices. As a result, commercial buyers avoid sole source arrangements.

6. “Commercial Practices” Adopted by the Government

(a) Finding: The government has implemented a number of different approaches to acquiring commercial items and services. Each approach has distinct strengths and weaknesses. The extent to which each of these approaches achieves competition, openness, and transparency varies. Competition for government contracts differs in significant respects from commercial practice, even where the government has attempted to adopt commercial approaches.

Discussion:

Competition for government contracts for commercial items differs in significant respects from actual commercial practice, even where government has attempted to adopt commercial approaches. Reasons for this include the budget and appropriations process which largely limits availability of funds to a single fiscal year period, the government’s need to accomplish mission objectives, policies and statutory requirements requiring transparency and fairness in expenditure of taxpayer funds, use of the procurement system to accomplish various government social and economic objectives, and the audit and oversight process designed to protect from fraud, waste and abuse. The Panel found that government practices vary from providing very structured acquisitions processes with carefully defined requirements and a competitive selection process on the one hand, to ill defined requirements and minimal, if any head-to-head competition on the other.

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(b) Finding: The Panel received evidence from witnesses and through reports by inspectors general and the GAO concerning improper use of task and delivery order contracts, multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts, including improper use of these vehicles by some assisting entities. Nonetheless, the Panel strongly believes that when properly used these contract vehicles serve an important function and that the government derives considerable benefits from using them. Accordingly, the Panel has made specific recommendations in an effort to balance corrections to the identified problems while preserving important benefits of such contract vehicles.

Discussion:

Evidence received by Panel through witnesses and reports identified recurring problems with multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts. These problems include poorly defined requirements, lack of effective competition, the use of sole source awards without adequate justification, fiscal law violations, and the failure to manage the work once awarded. While these problems are serious and need to be addressed, they do not reflect underlying deficiencies in the contract vehicles. Rather they indicate management and contract administration failures that can be corrected. The Panel also heard testimony of corrective action taken by agencies to address these problems.

(c) Finding: The evidence received by the Panel regarding federal supply schedule and multiple award contracts included the following:

(1) Solicitations for task and delivery order contracts often include an extremely broad scope of work that fails to produce meaningful competition.

Discussion:

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.³³¹ The Panel noted that many agencies have put in place, for example, broadly defined contracts for IT services.

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.³³² For example, many agencies opt for broadly defined contracts for IT services in an effort to encourage multiple bidders and, ultimately, multiple awardees. These efforts seek to encourage flexibility and spur competition on future task orders.

³³¹ U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts*, Audit Rep. No. 99-116, 4-7 (1999); U.S. GAO, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, GAO/NSIAD 00-56, 12-13 (2000); Test. of Henry Kleinknecht, DOD IG, AAP Pub. Meeting (June 29, 2006) Tr. at 54-56.

³³² U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts*, Audit Rep. No. 99-116, 4-7 (1999); GAO/NSIAD 00-56; Kleinknecht Test. at 54-56.

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Testimony from large private sector buyers stated that those buyers were capable of defining their requirements for information technology services and competing them head-to-head – without resort to a secondary ordering process. The Panel questions whether the large IDIQ contracts being used by the government involve sufficient rigor in the requirements process for the base contract and whether there is meaningful competition for these contracts and for task orders issued under these contracts.

(2) Orders placed under task and delivery order contracts frequently indicate insufficient attention to requirements development.

Discussion:

The Panel heard criticism that orders often are placed under task and delivery order contracts with insufficient attention to requirements development. Testimony before the Panel by senior agency procurement officials³³³ and oversight organizations strongly indicates that these orders frequently involve insufficient requirements development.

(3) The ordering process under task and delivery order contracts, in some instances, occurs without rigorous acquisition planning, adequate source selection, and meaningful competition.

Discussion:

Reviews by GAO and the DoD IG over several years have repeatedly called into question the competitiveness of the ordering process under task and delivery order contracts. These reviews have found overuse of the waiver authority to direct the work to a particular contractor. A review currently underway by the DoD IG indicates that the proportion of sole-source orders is significant.³³⁴ In addition to the concerns about the waivers, GAO found in 2004 that for orders that were available for competition, buying organizations awarded more than one-third of the orders after receiving only one offer.

Although anecdotal, the Panel is familiar with situations where a statement of work was issued with proposals due in two or three days. The Panel observes that the contract holders confronted with such solicitations readily determine that it is not worth the time and cost to submit a proposal.

Testimony before the Panel indicated concern that the Schedules may be used, in some instances, for large services procurements without adequate planning and source selection procedures.³³⁵ Agencies placing large orders typically use a form of negotiated, best value-like

³³³ Test. of Glenn Perry, DoE, AAP Pub. Meeting (Feb. 23, 2006), Tr. at 136,140-44, 146-51. Test. of Shay Assad, DPAP, AAP Public Meeting (June 14, 2006) Tr. at 25-28, 55-58, 96-97.

³³⁴ U.S. DoD IG, *Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration*, D-2007-007, (2006).

³³⁵ Perry Test. at 177-78.

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process, but are not required to adhere to any particular procedures for defining of requirements, evaluating proposals, or making a source selection decision.

(4) Finding: Agencies frequently make significant purchases of complex services using task and delivery orders.

Discussion:

Large orders under these contracts are being used for acquisition of complex services. The Panel analyzed FPDS-NG data for 2004 and determined that of the \$142 billion in interagency transactions, \$66.7 billion was expended in single transactions over \$5 million, with services accounting for 64% or \$42.6 billion. For 2005, there was \$132 billion in interagency transactions with \$63.7 billion expended in single transactions over \$5 million, with services accounting for 66% or \$42 billion. The Panel believes these numbers to be understated because the numbers reflect single transactions, not the total order value (*i.e.*, base year plus options).

(5) Use of task and delivery order contracts by agencies for the acquisition of complex services on a best value basis has been increasing. Guidance on how to conduct best value procurements using these contract vehicles is not adequate.

Discussion:

The Panel notes that agencies use best value type source selection procedures for larger orders, including use of evaluation factors, cost/technical trade-offs and best value decisions. As the orders grow in size and the agencies use FAR Part 15-like procedures, the Panel has reservations about whether the standards for competition are adequate.

(6) Agency management control of orders placed using multi-agency contracts have varied in adequacy and effectiveness.

Discussion:

Evidence received by the Panel indicates that agency management controls of orders placed using multi-agency contracts have varied widely in adequacy and effectiveness. For example, DoD IG reports in 2005 and 2006 addressing multi-agency contracts have cited poor acquisition planning, inadequate interagency agreements, lack of adequate quality assurance surveillance, and failure to clearly establish roles and responsibilities for contract administration between the contracting agency and the requiring agency.³³⁶ The Panel also heard testimony from officials from various agencies, including GSA, of efforts to strengthen contract administration and better delineate roles and responsibilities for administration.

³³⁶ See U.S. DoD IG, Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration, D-2007-007, (2006) and DoD Purchases Made Through the General Services Administration, D-2005-096 (2005).

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(7) The unit price structure commonly used on Federal Supply Schedule Contracts and many Multiple Award Contracts is not a particularly useful indicator of the true price when acquiring complex professional services.

Discussion:

The current structure of the GSA Schedules was established for acquiring commercial commodities based on unit prices. Unit prices are not a particularly useful indicator of the true price for acquisition of complex professional services such as design, development and implementation of IT systems. Obtaining best value for these acquisitions depends on the capabilities and expertise of a vendor, the mix of skills, and well-defined requirements -- not merely hourly rates.

For such transactions, the Panel found that commercial practice for acquisition of such services involves careful requirements definition, head-to-head competitive negotiations, and best value source selection procedures.

(8) Finding: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.

Discussion:

The Panel noted the comments from GAO and others regarding the use of pre and post-award audits of vendor commercial pricing to aid in negotiation and establishment of the prices most favorable to the government. With particular reference to services, the Panel finds that competition for services awards that is based on good quality requirements definition likely will be more effective than reliance on certifications and audits in establishing fair and reasonable prices for services on the Schedule.

7. Time & Materials Contracts

Finding: Commercial buyers have a strong preference for the use of fixed-price contracts and avoid using Time and Materials contracts whenever practicable. Although difficult to quantify precisely due to limited data, the government makes extensive use of time and materials contracts.

Discussion:

Commercial buyers who spoke with the Panel provided many sound reasons not to use time and materials ("T&M") contracts.³³⁷ They noted that commercial clients in-source, or bring

³³⁷ See Bajaj Test. at 203-06.

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the work in-house, rather than use T&M contracts.³³⁸ T&M contract structure encourages contractors to provide people to perform services while under the purchaser's direction. The purchaser becomes the project manager rather than shifting project management risks and rewards to the vendor. The T&M vendor has no incentive to be efficient, "because if they do so, they won't be able to provide more T&M bodies...."³³⁹ This view was not unanimous with ## others suggesting that checks and balances inherent in the existing process do provide incentive for vendors to work efficiently. Such incentives include the threat of poor past performance citations and failure to receive contract options or follow-on work.³⁴⁰

Despite concerns about efficiency, commercial organizations do use T&M contracts for some specific types of work. One large company, for example, uses T&M contracts for design engineering/development work, construction, and repair work.³⁴¹ Another uses T&M contracts for unique work, such as building capital equipment that was designed internally.³⁴² These companies are aware of the risks associated with T&M contracting and endeavor to maintain tight controls over the contracting process, costs, and levels of effort.³⁴³

8. Statutory and Regulatory Definitions of Commercial Services

Finding: The current regulatory treatment of commercial items and services allows goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as "commercial" and acquired using the streamlined procedures of FAR Part 12.

Discussion:

The FAR definition of stand-alone commercial services in FAR 2.101 added the phrase "of a type" between the words "Services" and "offered" in the first line of the statutory definition of commercial services quoted below. There was no discussion of the addition of this phrase in the two proposed rules to implement the FASA definitions published in 60 Fed. Reg. 11198 (March 1, 1995) and 60 Fed. Reg. 15220 (March 22, 1995). Notwithstanding having received 559 written comments to these proposed rules, the final rule implementing the statutory provisions for the acquisition of commercial items did not mention this variance between the statutory definition and the FAR definition.

³³⁸ *Id.* at 203.

³³⁹ Bajaj Test. at 205; Test. of John P. McMonagle, GE Corporate Initiatives Group, AAP Pub. Meeting (May 18, 2006) Tr. at 171.

³⁴⁰ Test. of Bruce Leinster, ITAA, AAP Pub. Meeting (Aug., 18, 2005) Tr. at 121-22.

³⁴¹ Panel communications with Casbon, Bayer, Spring 2006.

³⁴² Panel communications with Miller, Procter & Gamble, Spring 2006.

³⁴³ Panel communications with Casbon and Miller, Spring 2006.

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The definition of stand-alone “commercial services” in 41 U.S.C. § 403(12)(F) is:

Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog [or market] prices³⁴⁴ for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

The definition of a “commercial item” in subsection (12)(A) of the same statutory section, however, refers to any item that is “of a type” customarily used by the general public (with additional requirements). The omission of the phrase “of a type” from the statutory definition of stand-alone “commercial services” is significant.

This definition for commercial services is adopted in FAR 2.101 as follows:³⁴⁵

(6) Services *of a type* offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services –

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors. (emphasis added).

³⁴⁴ The words “or market” were added by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996).

³⁴⁵ FAR 2.101 also provides the following definition for commercial services directly related to a commercial item:

(5) Installation services, maintenance services, repair services, training services, and other services if –

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

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The most critical element of this definition is that a service must be “offered and sold competitively, in substantial quantities, in the commercial marketplace.” When commercial services are sold in substantial quantities, commercial market forces determine both price and the nature of the services offered.

The current regulatory definitions of commercial items and services allow goods and services not sold in substantial quantities in the commercial market place to be classified nonetheless as “commercial” and acquired using the streamlined procedures of FAR Part 12. This can put the government at a significant disadvantage with respect to pricing when there is limited or no competition.

It is clear that Congress has always intended that pricing for commercial items and service be based on either competition or market prices. The conference report accompanying the National Defense Authorization Act for Fiscal Year 1996, which added "market prices" to the FASA definition of commercial item applicable to services, 41 U.S.C. 403(12)(F) (1994), states that market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror.³⁴⁶

The Panel believes that there is an appropriate balance between the use of commercial procedures under FAR Part 12 and more traditional methods of procurement. Commercial items and commercial services that meet the various statutory and regulatory definitions can and should be acquired under the streamlined procedures of FAR Part 12 whenever appropriate. It is the operation of commercial market forces that makes FAR Part 12 work. Extending the streamlined commercial procedures of FAR Part 12 to items and services that are not commercial under the statutory and regulatory definitions (with the changes recommended by the Panel), and therefore not subject to commercial market forces, disadvantages the government in pricing, limits competition, reduces transparency, and creates the opportunity for abuse. When commercial market forces do not exist, the Panel believes that the more traditional methods of procurement should be used.

9. Time Required for Commercial Services Contracts

Finding: Commercial buyers can award a contract for complex services acquisitions in about 6 months, depending on the size of the acquisition and how much work is necessary for requirements definition. For larger contracts, if the process begins with requirements definition, the total cycle time to award may be six to twelve months. If some market research and requirements definition has been done in advance, commercial buyers stated they could get under contract in three to six months, even for larger contracts.³⁴⁷

³⁴⁶ H.R. Conf. Rep. No. 104-450, at 967.

³⁴⁷ Bajaj Test. at 192; Test. of Neil Hassett, United Tech. Corp., AAP Pub. Meeting (Apr. 19, 2005) Tr. at 123; Test. of Michael Bridges, GM, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 191.

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Discussion:

The commercial buyers and consultants who testified before the Panel said that they generally required about six months to award a complex services contract. Large acquisitions, such as corporate-wide information technology contracts, could take up to a year. Factors that facilitate a prompt award included market research, well defined requirements, and direct involvement by key corporate stakeholders.

10. Impact of the Annual Budget and Appropriations Processes

Finding: A fundamental difference between commercial and government acquisition is the fiscal environment in which decisions on acquisition processes are made. Commercial acquisition planning decisions can take place in a fiscal environment relatively unconstrained with respect to the availability of funds over time. In contrast, Government acquisition decisions are driven to a significant extent by the budget and appropriations process which often limits availability of funds to a single fiscal year period.

Discussion:

Unlike commercial firms, federal agencies must plan and execute acquisition decisions within strict fiscal rules established by Congress. Most agencies' operations and programs are funded on an annual basis. Fiscal rules limit when funds can be obligated. For example, operations and maintenance funds are only available for obligation within a single fiscal year. If not obligated, these funds cannot be rolled over into the next fiscal year. Fiscal rules also limit agencies' flexibility in using funds for any purpose other than that for which the funds were specifically provided. Reprogramming of funds normally requires Congressional approval. The inherent limitations created by an annual funding process are compounded when Congress fails to make these annual appropriations on time.³⁴⁸ Late appropriations disrupt acquisition planning and compress the amount of time that agencies have to award new contracts or exercise options under existing contracts.

In this environment, the ability to obligate funds before they expire or are reprogrammed is treated as one measure of success by both Congress and agencies. In contrast to commercial companies, agencies have a fundamental incentive to follow acquisition processes that allow them to obligate funding as expeditiously as possible. At times, this occurs at the expense of obtaining the best business deal. The Panel recognizes that this significant difference between the commercial sector and the Federal government has to be taken into account in considering the application of commercial acquisition practices to federal agencies.

³⁴⁸ For example, Congress only enacted 2 of 10 major appropriations acts for fiscal year 2007 before the fiscal year began forcing many agencies to operate on short term continuing resolutions.

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11. Unequal Treatment of the Contracting Parties

Findings: The failure to provide equal treatment for both parties to a government contract is inconsistent with commercial practices. Equal treatment should be afforded to the Government and contractors in contractual provisions unless the Constitution of the United States or special considerations of the public interest require otherwise.

Discussion:

Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute, in performance disputes with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Under current legal precedent the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

Part III – Recommendations

1. Definition of Commercial Services

Recommendation: 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.

Discussion:

The Panel observed that the regulatory definition of commercial services is broader than the statute and can include services not sold in substantial quantities in the marketplace. The statute defining commercial services does not include the phrase “of a type.” Based on the Panel’s research and basic statutory construction, it is 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 proposes that the FAR be revised to be consistent with the statutory definition.³⁴⁹ However, the regulatory coverage can be improved in two specific areas as proposed in Recommendations 1 and 6.

The Panel considered whether the statutory definitions of commercial services should be changed. After reviewing the legislative and regulatory origins of commercial services, and hearing evidence as to how the private and government sectors acquire commercial services, the Panel concluded that the current statutory definition of commercial services was adequate and does not need to be changed. The statutory definition of commercial services correctly focuses on the key concept – whether the services are sold in substantial quantities in the marketplace.

³⁴⁹ *Lindh v. Murphy*, 521 U.S. 320, 326-30 (1997).

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The regulatory drafters added the phrase “of a type” to the statutory definition of commercial services. Their intention in adding this phrase was to allow the acquisition of commercial services when catalog prices did not exist. The drafters used grass cutting and janitorial contracts as some examples.³⁵⁰ Today, 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.

The Panel received some public comments critical of this proposed change. Some even accused the Panel of “rolling back the clock” on procurement reform. These critics, apparently confused, assumed that the Panel’s recommendation extended to both commercial items and commercial services. In fact, the Panel’s recommendation regarding the deletion of the phrase “of a type” is limited to commercial services.

The Panel also considered whether the statutory definition of commercial items should be changed. For the reasons described above, the Panel concluded that the current statutory definition of commercial items was adequate and does not need to be changed. The “of a type” language with respect to items enables the government to acquire the next generation of commercial items when they become available. Existing market forces generally are adequate to enable the government to price new commercial items that are “of a type.” The Panel did hear anecdotal evidence of items being mischaracterized as commercial items by virtue of being “of a type.”³⁵¹ However, correction of these mischaracterizations does not require a legislative change.

2. Improving the Requirements Process

Recommendation: 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.

Discussion:

Testimony before the Panel from commercial buyers overwhelmingly emphasized the importance of requirements definition to successful competition and performance of services contracts. DoD officials also testified that “it’s all about requirements.”³⁵² The Panel’s findings

³⁵⁰ See Appendix B.

³⁵¹ The characterization of the Air Force KC-767 tanker and C-130J tactical transport aircraft as commercial items are two recent examples. U.S. DoD IG, *Acquisition of the Boeing KC-767A Tanker Aircraft*, D-2004-064 (2004); *Contracting for and Performance of the C-130J Aircraft*, D-2004-102 (2004); *Contracting and Funding for the C-130J Aircraft Program*, D-2006-093 (2006).

³⁵² Assad Test. AAP Pub. Meeting (June 14, 2006) at 67.

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demonstrate 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 requirements definition for services contracts. Without review and sign off from the senior program executive and the 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.

3. Improving Competition

(a) Recommendation: 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.

Discussion:

Section 803 of the National Defense Authorization Act for 2002 (P.L. 107-107) changed the process for orders for services over \$100,000 placed against multiple award contracts, including Federal Supply Schedules. Defense Federal Acquisition Regulation Supplement (DFARS) implements Section 803 and requires the contracting officer to contact as many as schedule holders that are capable of performing the work as practicable and ensure that at least three responses are received, or, alternatively, contact all the schedule holders. If the order is placed against multiple award contracts that are not part of the Federal supply schedules program, the contracting officer must contact all awardees that are capable of performing the work and provide them an opportunity to submit a proposal that must be fairly considered for award. Program managers and other requiring offices must assist in determining which contractors are capable of performing the desired work.³⁵³

Under the Federal Supply Schedule program, the requirements of Section 803 apply to orders placed directly by DoD and orders placed by non-DoD activities on behalf of DoD. In contrast, civilian agencies must place orders in accordance with Federal Acquisition Regulation (FAR) Subpart 8.4. Civilian agencies must comply with FAR 16.5 when placing orders against multiple award contracts authorized by FASA.

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

³⁵³ DFARS 208.405-70 and 216.505-70.

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under multiple award multi-agency contracts. Further the Panel believes there is no logical basis for limiting the requirements of Section 803 to services. It should apply to all orders.

The proposed change would generally provide that for schedule orders over the simplified acquisition threshold the ordering agency must either provide notice to all schedule holders capable of meeting the requirement (via e-Buy or other electronic medium) or as many as practicable to reasonably ensure receipt of at least three offers. In the case where agency provides notice under the second scenario, if less than three offers are received, the contracting officer would be required to document the file outlining the efforts to obtain competition before an award could be made. For multiple award contracts authorized by the Federal Acquisition Streamlining Act of 1994 (FASA), notice and a fair opportunity to submit an offer for all contract holders would be required for all orders over the simplified acquisition threshold.

(b) Recommendation: 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 synopsise the requirement or solicit or accept proposals from vendors other than those holding contracts.

Discussion:

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. A substantial volume of orders exceeds \$5 million and includes orders for services where the Agency uses best value type source selection. This approach facilitates head-to-head competition, but with a pre-qualified group of vendors. The Panel notes that it is not recommending use of all of the procedures in FAR 15.3, nor is it suggesting that a synopsis of the requirement be provided to all responsible sources. The exceptions to “fair opportunity” would be available consistent with the current DoD implementation of those exceptions which requires advance approval of a waiver. The Panel understands that the current regulations provide guidance on the structuring of best value acquisitions in the context of orders under multiple award contracts. However, 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.

The Panel believes that these recommendations are not inconsistent with the Small Business recommendations regarding award of contracts and task or delivery orders.

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(c) Recommendation: 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.

4. New Competitive Services Schedule

Recommendation: GSA be authorized 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.

Discussion:

The Panel recommends that GSA be authorized to establish a new information technology (IT) Schedule for professional services under which negotiation of the Schedule contracts is limited to terms and conditions other than price.³⁵⁴ Under this new Schedule, prices would be determined at the order level based on competition for the specific requirement to be performed. As discussed in the Findings above, the Panel believes that the pricing for services is requirement specific. The price for services depends, to a greater degree, on the level of effort and mix of skills necessary to meet the government's needs for an individual requirement (order). Rates play a role but are more often determined based on the specifics of the individual requirement and current market conditions.

The Panel envisions the proposed schedule working in the following manner. Negotiation of hourly rates based on Most Favored Customer pricing would be eliminated at the Schedule contract level. The Price Reductions Clause also would be eliminated. Offerors under the new IT Schedule would be required to meet the following terms: (1) offer a commercial service that meets the definition described above (sold in substantial quantities); (2) have a suitable record of past performance; (3) agree to specific GSA terms and conditions for purchase of commercial items. The IT Schedule contractors also would be contractually required to post labor rates on GSA Advantage!. The labor rates posted on GSA Advantage! would be established solely at each contractor's discretion and could be changed by the contractor at any time. However, proposed prices in response to a task order request would be binding on the contractor.

Contracting officers would use the posted labor rates, along with key terms and conditions, for market research and comparison purposes when reviewing potential competitors 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 able better compare and contrast the associated labor rates and services offered under this new IT schedule.

³⁵⁴ See Appendix C.

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Contracting officers seeking to place a task order against this new schedule would be required to conduct a task order competition consistent with the Section 803 ordering procedures. See Panel Recommendation 3 above. Contracting officers could only use this schedule if a firm requirement exists that has been converted to a Statement of Work or Statement of Objectives. To the maximum extent practicable, the requirement should be firm fixed price. If a labor hour task order is contemplated, the agency must ensure it has the infrastructure in place to manage the effort. See Panel Recommendation 6 below. Contracting officers will be strongly encouraged to use “e-Buy,” GSA’s electronic request for quote (RFQ) tool linked to GSAAAdvantage!. “e-Buy” currently provides notice and an opportunity to compete to all applicable Schedule contractors for RFQs posted at the site. Ordering activities will remain to be responsible for determining the reasonableness of the total price or prices proposed in response to an RFQ’s Statement of Work. The Federal Acquisition Regulation currently provides that for “services requiring a statement of work,” the ordering agency contracting officer determines the reasonableness of the price for the specific requirement by examining the level of effort and the labor mix. See FAR 8.405-2(d).

Audits under this schedule would more closely mirror commercial practice. Once the task order competition has taken place, audits may be performed on a contractor’s performance. However, since task order awards under this schedule will be based on competition, an examination of the individual rates or their corresponding “cost build up” would not be authorized. Audits would be limited to examining whether a contractor performed a task consistent with the contract and/or task order terms and conditions. Audits based on cost data or pricing practices, including post-award audits of pre-award price information and Price Reductions Clause compliance would be eliminated. While prices established by competition will require less audit attention, GSA’s current regulations, amended to adopt this recommendation, would provide sufficient basis for review of prices to ensure that the price proposed is consistent with the price paid.

Testimony before the Panel revealed that it is commercial practice to audit performance of a contract or task.³⁵⁵ The private sector will audit whether a contract has been performed in accordance with applicable terms and conditions. In essence, a typical commercial audit includes whether the buyer get what he or she paid for under the contract. Generally, when competition exists, commercial audits do not examine cost data or cost build ups associated with performance of a requirement.³⁵⁶ In contrast, it is current GSA schedule policy that, at the time of contract formation, GSA requires the submission and potential audit of sensitive information regarding a commercial firm’s pricing practices and policies. See GSAR 52.215-20. GSA uses this data to identify the “Most Favored Customer” pricing negotiation objective. GSA also uses the data to identify a class of customer for Price Reductions Clause application during performance of the contract. Testimony before the Panel revealed that, in the case of professional services, it is commercial practice to price based on the specific task to be

³⁵⁵ MacMonagle Test. (May 18, 2006) at 164-165; Bajaj Test. (Mar. 17, 2006) at 153.

³⁵⁶ Bajaj Test. at 189-191.

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performed.³⁵⁷ The use of Most Favored Customer and Price Reductions Clause mechanisms are not conducive to commercial practices for pricing services. Accordingly, the use of the Price Reductions clause today for professional IT labor rates produces little benefit – the facts driving the cost of the project are the proficiency of the personnel and the mix of skills. This is particularly relevant if the requirement is large and complex such as in IT services procurement.

Currently, GSA and the contractors focus a great deal of time and energy on the negotiation of rates and audits of those rates. GSA has invested millions of dollars building an extensive infrastructure focused on the negotiation and audit of labor rates under the Schedules program. Schedule contracting officers spend a significant portion of their work life negotiating pricing for professional service contracts that more often than not is not relevant to the actual performance of a complex professional service order requiring a statement of work.³⁵⁸ GSA has also built structures to monitor and audit contractor performance with an emphasis on compliance with the Price Reductions Clause. Similarly, contractors invest major resources in submitting, negotiating and creating compliance programs for schedule contracts including compliance with the Price Reductions Clause. By eliminating the MFC price negotiation model at the contract level as well as the Price Reductions Clause and focusing on competition at the order level, both industry and GSA can save money, improve efficiency and provide greater opportunity under the Schedules program. Under the proposed model, GSA would be able to focus more on negotiating key terms and conditions relating to services, establishing a more uniform description of the services being offered, as well as continuing to improve its e-tools for stronger task order competition. This approach could provide a more efficient and effective program for delivering services to the federal government.

From the contractor's perspective, providing pricing information at time of basic Schedule contract offer also has significant implications for continued compliance with the Price Reductions and audit clauses. Under GSAR 515.215-71, Examination of Records by GSA (Multiple Award Schedule), GSA maintains the right to examine contractor records up to three years after final payment relating to overbillings, price reductions, and compliance with the Industrial Funding Fee (IFF). Although GSA has modified its audit procedures in 1997 and redefined the limited circumstances to use of the Examination of Records clause for MAS contracts, the contractor community has continually expressed concerns related to what may essentially lead to defective pricing audit. Even a slight possibility for such post-award defective pricing audit is a real risk to the Schedule holders and may drive business practices that are counter productive to both industry and to the Government. Such non-standard business practices are not consistent with commercial practices and end up driving up the cost of doing business with the Government. Additionally, the Panel's review found that the commercial service industry does not necessarily have a pre-defined set of standard labor categories as required by the Schedules program, and that commercial firms sometimes modify or create

³⁵⁷ Bridges Test. (Aug. 18, 2005) at 136; MacMonagle Test. at 141; Leinster Test. (Jan. 31, 2006) at 139; Bajaj Test. at 154.

³⁵⁸ Watson Test. (Aug. 18, 2005) at 25-28.

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separate government business divisions with corresponding price lists for services in order to meet that schedule requirements including MFC pricing.³⁵⁹

In adopting this recommendation the Panel was also concerned that the current schedule structure for professional IT services remains static at a time of increased dynamism in the commercial sector. Currently, the IT schedule program includes over 4,000 contractors offering professional IT services.³⁶⁰ This number represents a dynamic market cutting across all types and sizes of commercial firms. In addition, each year the IT schedule receives over 1,200 offers.³⁶¹ Under the IT Schedule, approximately 64 percent or \$10.8 billion out of \$17.0 billion FY 2006 sales was for services.³⁶² However, the basic pricing strategy for negotiating and awarding schedule contracts is built on a framework established at a time when supplies accounted for the vast majority of purchases under the schedules program. Over time, the framework has evolved to accommodate the addition of professional IT services to the schedules program but the accommodation reflects trying to put a square peg in a round hole. Accordingly, the Panel's recommendation will foster a more dynamic model, improve efficiency and reduce costs for government and industry, and foster greater competition and transparency.

5. Improving Transparency and Openness

(a) Recommendation: 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.³⁶³

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.

Discussion:

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 the opportunity 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.

³⁵⁹ *Id.* at 26-27, 78; Leinster Test. at 102; Trowel Test. (Jan. 31, 2006) at 113.

³⁶⁰ GSA Data at ____.

³⁶¹ GSA Data, IT Acquisition Center (FCI).

³⁶² GSA Data, *Contractors Report of Sales - Sales by Service/Commodity Code for FY 2006*, (Oct. 16, 2006).

³⁶³ Multiple award contracts has the same meaning here as in Section 803 of the National Defense Authorization Act for 2002, Pub. L. No. 107-107).

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The degree of transparency provided in today's contracting system notwithstanding, the growth of indefinite delivery indefinite quantity (IDIQ) contracts since FASA and the growth of the Multiple Award Schedules (MAS) program over the last decade, have reduced the visibility that the public has into more than 10 percent of the non-defense system procurements made annually and that percentage continues to grow. FPDS-NG data for 2004 indicates that \$142 billion, or 40% of all government-wide obligations were against multi-agency contracts including multiple award IDIQ and MAS contracts. Currently once an IDIQ or a MAS contract is awarded there is no provision for publishing information, pre-award, of the task or delivery orders placed against that contract. The first time the public learns about these awards is when the data on the award is published in the FPDS database, often many months after the award was made. 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.

(b) Recommendation: 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.

Discussion:

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 Part 8 encourages debriefings for Schedule orders, it does not require them. 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.

6. Time-and-Materials Contracts

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

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(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.

Discussion:

The issues that give rise to concern by the Panel over the use of time & materials 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.

7. Protest of Task & Delivery Orders

Recommendation: 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.

Discussion:

The Panel has serious concerns about the use of task order to conduct major acquisitions of complex services without review. The Panel has obtained and analyzed data from FPDS-NG

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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.

8. Pricing When No or Limited Competition Exists

Recommendation: 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.

Discussion:

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

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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)).

See proposed regulatory changes in Appendix D.

9. Improving Government Market Research

Recommendation: 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.

Discussion:

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 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.

10. Unequal Treatment of the Contracting Parties

(a) Recommendation: 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.

Discussion:

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.³⁶⁴ Indeed, this approach is specified in the statutory provisions that Congress has enacted authorizing

³⁶⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416 (1971)

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judicial review of government action in most contexts,³⁶⁵ and it is meant as a safeguard against what we today might call inappropriate “judicial activism.”³⁶⁶ 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.

(b) Recommendation: 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.

Discussion:

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.

³⁶⁵ Administrative Procedure Act, 5 U.S.C. §706(2)(A)(arbitrary and capricious standard of review).

³⁶⁶ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (“The court is not empowered to substitute its judgment for that of the agency.”)

Appendix A

Statutory Evolution of “Commercial Item”

This appendix traces the statutory and regulatory evolution of the term “Commercial Item” beginning with the Federal Acquisition Streamlining Act of 1994. Successive changes to the FAR are marked and highlighted.

1. Federal Acquisition Streamlining Act of 1994¹

The term ‘commercial item’ means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(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.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

¹ Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994).

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(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

2. The Clinger-Cohen Act of 1996²

The term 'commercial item' means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

- (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.*

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

- (i) modifications of a type customarily available in the commercial marketplace,*
or
- (ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).*

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

- (i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and*
- (ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.*

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions.”³

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

² Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996).

³ Pub. L. No. 104-106, § 4204 (Feb. 10, 1996). Note that this language was already present in the FAR definition of “commercial item.” See also 60 Fed. Reg. 48231 (Sept. 18, 1995).

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

3. The National Defense Authorization Act for Fiscal Year 2000⁴

The term 'commercial item' means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

- (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.*

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

- (i) modifications of a type customarily available in the commercial marketplace,*
- or*

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

- (i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and*

(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public—the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions.”

⁴ Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996) and Pub. L. No. 106-65 § 805 (Oct. 5, 1999).

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(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

4. The Services Acquisition Reform Act of 2003⁵

The term 'commercial item' means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

- (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.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

(i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services—

(i) ~~offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions~~ the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) ~~offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public~~ the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

⁵ Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996), Pub. L. No. 106-65 § 805 (Oct. 5, 1999), and Pub. L. No. 108-136, § 1433 (Nov. 24, 2003).

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(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

5. Current FAR Definition of “Commercial Item” (as distinguished from the current statutory definition)

“Commercial item” means—

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for 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;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for --

(i) Modifications of a type customarily available in the commercial marketplace;

or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if--

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

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(ii) *The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;*

(6) *Services **of a type** offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—*

(i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) *Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or*

(8) *A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.⁶*

⁶ FAR 2.101

APPENDIX B



DEPARTMENT OF THE AIR FORCE
WASHINGTON DC



OFFICE OF THE ASSISTANT SECRETARY

16 November 1994

MEMORANDUM FOR PROJECT MANAGER, FEDERAL ACQUISITION
STREAMLINING ACT IMPLEMENTATION PROJECT

FROM: Commercial Items Drafting Team

SUBJECT: Federal Acquisition Regulation (FAR) Case 94-790, Acquisition of Commercial
Items

The Commercial Items Drafting Team was tasked to prepare proposed FAR language to implement Title VIII of the Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103-355). This report responds to that tasking and is prepared in accordance with the format prescribed in DOD FAR Supplement 201.201-1.

I. PROBLEM:

The Federal Acquisition Streamlining Act of 1994 included Title VIII, entitled Commercial Items (Tab D). This Title made numerous additions and revisions to both the civilian agency and Armed Service acquisition statutes to encourage the acquisition of commercial end items and components by Federal government agencies as well as contractors and subcontractors at all levels. The Commercial Item Drafting Team was organized and tasked with reviewing the Act and preparing implementing language for the FAR.

II. RECOMMENDATION:

The Team recommends adopting the proposed revisions to FAR Parts 10, 11, 12 and 52 as well as various other conforming changes throughout the FAR. The proposed FAR revisions are at Tab A.

III. DISCUSSION:

Drafting Team Tasking.

On 3 October 1994, the Commercial Items Drafting Team was officially tasked by the FAR Council and the FASA Implementation Project Manager to draft proposed FAR language to implement the following sections of Title VIII of the Act:

Subtitle A -- Definitions and Regulations

Section 8001 Definitions

Section 8002 Regulations on acquisition of commercial items

Section 8003 List of inapplicable laws in Federal Acquisition Regulation

94-790

Subtitle C -- Civilian Agency Acquisitions

Section 8201 Relationship to other provisions of law

Section 8202 Definitions

Section 8203 Preference for acquisition of commercial items

Section 8204 Inapplicability of certain provisions of law

Subtitle D -- Acquisitions Generally

Section 8301 Inapplicability of certain provisions of law

Section 8302 Flexible deadlines for submission of offers of commercial items

Section 8303 Additional responsibilities of advocates for competition

Section 8304 Provisions not affected

Subtitle B of the Act addresses Armed Services acquisitions and is not specifically implemented by this case. However, most of the Act's provisions related to Armed Services acquisitions closely parallel the civilian agency provisions. The DOD-unique sections of Title VIII will be implemented in the DOD FAR Supplement (DFARS) at a later date under a separate tasking. These sections remaining to be implemented are:

Subtitle B Armed Services Acquisitions

Section 8101 Establishment of a new chapter in Title 10

Section 8102 Relationship to other provisions of law

Section 8103 Definitions

Section 8104 Preference for acquisition of commercial items

Section 8105 Inapplicability of certain provisions of law

Section 8106 Presumption that technical data under contracts for commercial items are developed exclusively at private expense

At the kickoff meeting at the Office of Federal Procurement Policy (OFPP), Dr. Steven Kelman, Administrator of OFPP, and Ms Colleen Preston, Deputy Under Secretary of Defense for Acquisition Reform, challenged the drafting teams to be innovative and aggressive in drafting implementing language for the regulation and to "think out of the box." Dr. Kelman stated that although the Act decreased the burden on the system and increased room for contracting officer judgment, the revised regulations were necessary to bring these important changes to reality. This challenge was reiterated during our Team meetings by our Legislative Team Liaisons who continually prodded us to "do something different." The Team took these challenges very much to heart and endeavored throughout our discussions to challenge every assumption, practice and policy by asking "How does the commercial market place address this issue?" As a result, the Team developed proposed FAR language that took a "different" approach to the government's acquisition of commercial items.

Team Objectives.

The Team established a series of objectives that guided our discussions and drafting of the proposed FAR language and would result in the development of revisions that were a clear break from past practices for the acquisition of commercial items. Our objectives were to:

- Revise the FAR to establish Federal government policies and practices specifically designed to the acquisition of commercial items and more closely aligned to those of the commercial market place;
- Attract new commercial businesses by making the Federal government a more attractive customer;
- Make it easier for businesses to sell their commercial supplies and services to the Federal government;
- Make it easier for government acquisition personnel to acquire commercial supplies and services from the commercial market; and
- Provide the necessary flexibility for contracting officers to adapt to the customary practices of specific markets.

Team Approach.

The Team began its review of the Act and discussion of a proposed implementation approach on 4 October 1994. Before beginning the drafting process, the Team discussed in detail the provisions of the Act as well as a number of related reports and documents including the Joint Explanatory Statement of the Committee of Conference to accompany S.1587 (Conference Report 103-712), the DFARS Part 211 implementation of Section 824 (b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Pub. L. 101-189; 10 U.S.C. 2325 note); the Report of the Acquisition Law Advisory Panel (Section 800 Panel) Chapter 8, Commercial Items; and numerous reports and correspondence relating to the use of commercial practices by the Federal government. A wider review of source documents on government use of commercial acquisition practices was limited by the time constraints imposed on the Team. While not directly adopting the recommendations of the sources reviewed, the Team found each a useful source of information and ideas and used concepts from each in arriving at its recommended FAR language.

Team Findings.

After discussing the Act at length and reviewing the available source documents, the Team agreed to findings that guided our development of the proposed FAR language. These findings were:

- The adoption of the Uniform Commercial Code (UCC) as the basis for Federal government contracting for commercial items is not appropriate. The concept of utilizing the UCC for the acquisition of commercial items has been studied and discussed many times over the years. While the Team made steps towards the establishment of UCC-like practices, the Team concluded that adoption of the UCC *in toto* would be inappropriate. A White Paper describing in more detail the conclusions of the Team on this matter is attached to this report (Tab B). The Team's recommendations regarding the use of certain UCC-like language in certain clauses and provisions is discussed elsewhere in this report.

- The proposed language developed by the Team reflects our belief that we were not striving to establish a method of "commercial contracting." Rather, we developed proposed revisions to the FAR to facilitate the Federal government's contracting for commercial items. While this seems like a subtle difference, it reflects our conclusion that adopting "commercial

contracting" practices is inappropriate. The proposed FAR revisions exist within the general framework of Federal government contracting, albeit for commercial items.

- Notwithstanding conventional thinking on this matter, the Team concluded after reviewing many commercial contracts, purchase orders and similar documents that there is no one "standard" commercial practices that could be adopted across the board for government contracts, but many customary commercial practices that vary by market sector. There are 10 -12 topic areas commonly discussed in commercial contracts, but the treatment of the topic in each contract often varies widely. (See attached White Paper on the UCC, Tab B.) Most of these same topics are also presently discussed in the FAR, albeit often with an approach different from those found in industry. It was also interesting to note that, in the opinion of the Team, the current FAR clauses tend to be more balanced in their approach to the rights and responsibilities of both the buyer and seller. The commercial contract language tended to vary widely depending upon the party's role in the acquisition (buyer vs. seller) and relative bargaining position (weak vs. strong) of the parties.

-- In adapting customary commercial practices to provisions and clauses appropriate for the government's acquisition of commercial items, the Team chose to not spell out in great detail the requirements of applicable statutes and executive orders. Where some discussion was necessary, abbreviated language was developed. Where a reference to statute was adequate to alert contractors to their responsibilities, the Team mirrored the approach seen in many commercial contracts of providing only a reference to the statute or executive order. This was done to simplify the solicitation and contract documents and adopt the often mentioned commercial practice of brevity.

--The Team's recommended provisions and clauses, and a discussion of their relationship to customary commercial practices is provided elsewhere in this report.

- Just as the Team concluded there is no one "standard" commercial practice that could be adopted, there is also no single "market place" in which the government will operate. The Federal government awards over 11 million contracts every year for the widest possible range of supplies and services. As a result, the government operates in virtually every market place, both in the U.S. and overseas. This fact makes it very difficult to create a single set of policies, procedures, provisions and clauses that would reflect the customary commercial practice across all these markets. The Team has opted for creating policies, procedures, provisions and clauses that reflect some generalized set of conditions across a variety of markets, but has left sufficient flexibility for contracting officers to use their understanding of the market they are working in and their business judgment to adapt to the particular conditions. The acquisition of commercial items as contemplated in the law and the proposed coverage would give unprecedented flexibility to our contracting officers and, at the same time, demand far more in terms of the exercise of good business judgment and in adapting to the ever changing business conditions in the markets in which they operate. This very flexibility itself is consistent with commercial practices where buyers and sellers have the ability to tailor each contract to a particular acquisition's circumstances.

- Revisions to the FAR alone will be inadequate to ensure the Federal government fully implements the Act's stated preference for the acquisition of commercial items and limits its use of solicitation provisions and contract clauses to those consistent with commercial practices. Full implementation will require a culture change within both the government requirements-generating and contracting communities as well as a parallel cultural change in industry. For both parties, the implementation of the Act must result in a significant change from past practices. To take the first step in facilitating this cultural change, the Team completely rewrote the current FAR Parts 10, 11 and 12 as follows:

-- We retitled Part 10 from "Specifications, Standards, and Other Purchase Descriptions" to "Market Research." In the process, we moved and rewrote much of the coverage formerly found in Part 11. This new Part is intended to emphasize the importance of market research as the first step in the acquisition process and an essential element in describing the agency's need, the overall acquisition strategy and to some degree, any terms and conditions unique to the item being acquired.

-- We retitled Part 11 from "Acquisition and Distribution of Commercial Products" to "Describing Agency Needs." The new Part 11 contains much of the coverage formerly found in Part 10 regarding documenting the government's need, but takes a much more streamlined approach (see footnotes in Part 11). In addition, the new Part 11 clearly states the government's order of preference for stating requirements (functions to be performed, performance required, or essential physical characteristics), and the order of preference for documenting requirements (performance-oriented over design-based, voluntary over federal specifications, commercial over military-unique). Part 11 also contains most of the language from the current Part 12 regarding deliveries and performance.

-- We retitled Part 12 from "Contract Deliveries or Performance" to "Acquisition of Commercial Items." We created this entirely new coverage to address, in one Part, both the policies and procedures for the acquisition of commercial items. This approach was taken to reinforce the expected sequence of events in approaching a given acquisition . . . market research (Part 10), description of agency need (Part 11), acquisition of commercial items, if they meet the agency's needs (Part 12); and acquisition of other than commercial items using current FAR procedures if commercial items are not available or adequate to meet the need (Parts 13, 14 and 15). More important than putting the acquisition events in some order of sequence, the Team believes that moving the policies and procedures for the acquisition of commercial items to Part 12 creates a clean break with past policies and procedures such as the Acquisition and Distribution of Commercial Products (ADCOP) program initiated in 1978 and currently described in Part 11, and the DFARS 211 implementation of Section 824 (b) of the 1990 - 1991 DOD Authorization Act. The Team strongly believes that a real cultural change will require a significant shift in thinking and proposes this approach to take the first step in creating this change.

- The Team concluded that the proposed procedures would be used for the acquisition of commercial items regardless of dollar value. The Act gave no threshold, and the Team felt none

was appropriate. The procedures described in the proposed language are appropriate for the acquisition of any commercial item unless a simpler procedure (e.g., micro-purchases) is available.

- Finally, the Team made the assumption that where the prime contract is for a non-commercial item, subcontracts could be for either commercial or non-commercial items. Where the prime contract is for a commercial item, subcontracts will likewise be for commercial components. This assumption is reflected in our drafting of clauses and provisions and any associated flow down.

Highlights of proposed FAR revisions.

The Team's proposed revisions to the FAR are at Tab A. At appropriate points in the proposed coverage, footnotes point out the section of the Act being implemented or significant changes or points of information. Some additional points regarding these proposed revisions are discussed below.

Part 2. Definitions of Words and Terms. The Team incorporated the definitions of "commercial item," "component," "commercial component" and "nondevelopmental item" from the Act with modifications in two areas:

- The Team expanded on the definition of "minor modification" to further explain the difference between "modifications" and "minor modifications." The added language is based, in part, on the Senate Report of the Committee on Governmental Affairs on S. 1587.

- The Team revised slightly the definition of commercial services at paragraph (f) by adding the terms "of a type" and "or market price."

-- The Streamlining Act defines services (other than installation, maintenance, repair, training and other services incidental to support of the item) as "Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under commercial terms and conditions."

-- This definition restricts the Federal government to acquiring commercial services based only on "established catalog prices." There are many services sold in the commercial market that are offered on the basis of prices for specific tasks performed, but not based on a "catalog" price. For example, lawn-cutting services are often sold based on the size of the job, cleaning services are sold based on the physical layout and size of the building, storage services are sold based on the type and size of the facility needed, etc. The company has a standard price for the task based on the current market price, but the company does not maintain any sort of catalog. These services are clearly commercial in nature and should be eligible for streamlined acquisition procedures. For the government to require the existence of a catalog would impose unnecessary paperwork on industry with no real benefit. In addition, the law could easily be circumvented by firms creating catalogs solely to be eligible for use of streamlined commercial acquisition procedures; such a response to the language of the Act would not be beneficial to either government or industry.

-- Finally, FAR 15.804-3, as well as the new Truth in Negotiations Act legislative amendments, already discusses both catalog prices and market prices as going hand-in-hand. To separate the two concepts would be contrary to commercial practice and also cause confusion in the acquisition community that already deals with catalog and market prices together. The type of service provided, not the existence of a catalog, should be the only factor determining whether or not a service meets the definition of a commercial item. If the government is buying a service commonly sold by commercial firms to other businesses, then the government should emulate commercial practice as much as possible. This was clearly the thrust of the new legislation and the rationale for the Team's proposed revision to the definition.

Part 12. Acquisition of Commercial Items.

- Subpart 12.3 - Preparing solicitations and contracts for commercial items.

-- The Act and much of the related congressional report language, discusses the concept of uniform contract clauses for commercial items. The Act states that, to the maximum extent possible, "...only those contract clauses - (A) that are required to implement provisions of law or executive order applicable to acquisitions of commercial items or commercial components, as the case may be; or (B) that are determined to be consistent with standard commercial practice" may be included in contracts for commercial items. In order to implement this and other requirements of the Act, the Team concluded that a standardized solicitation and contract format would be the most straightforward method. In addition, such an approach, if streamlined and with sufficient flexibility, would serve as an incentive to contracting officer to use it by simplifying the process and reducing procurement lead-time.

-- The proposed standard solicitation contemplates use of negotiated procedures for selection of the successful offeror. While sealed bids could be used for commercial items, the Team expects that the government's best interest will be served by use of negotiated procedures as is typically done in the commercial market place. Moreover, the concept of the firm bid rule in government contracts is itself alien to commercial practices.

-- The Team proposes establishment of three solicitation provisions (Instructions to Offerors, Evaluation, and Representations and Certifications) and two contract clauses (Contract Terms and Conditions and Contract Terms and Conditions Required to Implement Statutes or Executive Orders). The specific language of these provisions and clauses is discussed below. The Team believes this approach is appropriate for a very large percentage of our commercial item acquisitions, would serve to simplify the process for contracting officers and contractors and aid in the implementation of the requirements of the Act.

-- The Team proposes the establishment of a new form, the Standard Form XXXX, Solicitation/Contract/Order for Commercial Items. The proposed SF XXXX combines features of the SF 33, Solicitation, Offer and Award; the SF 1447, Solicitation/Contract; and the DD 1155, Order for Supplies and Services. The most significant element is the addition of acceptance blocks at the bottom of the form (patterned after the DD Form 1155). This will allow suppliers of commercial items to utilize the SF XXXX to document receipt of the supplies or

services by the government avoiding the need for preparation of separate receipt/acceptance forms.

-- As a result of the creation of these provisions and clauses and the new standard form, the Team believes that a much more streamlined solicitation and contract is possible. Where the description of a particular need is relatively brief, and where the contracting officer can use the standardized provisions and clauses without addendum, the documents necessary for the acquisitions of commercial items would be:

--- A solicitation document consisting of (1) a SF XXXX; (2) the provision at 52.212-3, Offeror Representations and Certifications - Commercial Items, for the offeror to complete; and (3) the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items, with any required clauses checked in paragraph (b). The other solicitation provisions (52.212-1, Instructions to Offerors - Commercial Items, and 52.212-2, Evaluation - Commercial Items) and contract clause (52.212-4, Contract Terms and Conditions - Commercial Items) would be incorporated by reference.

--- A contract consisting of (1) the completed SF XXXX; and (2) the clause at 52.212-5 with paragraph (b) completed.

--- The Team believes that given the mandate to acquire items from the commercial market place, to minimize government-unique detailed specifications, and to use only selected provisions and clauses, such a streamlined solicitation and contract document is possible in a wide variety of acquisitions.

- Subpart 12.4 - Procedures for solicitation, evaluation and award of contracts for commercial items.

-- The Team took advantage of the Act's provision that allows flexibility in establishing response times for offers as pointed out in the associated footnote at 12.403.

-- In addition to providing a standardized format for the solicitation and contract award, the Team established in Subpart 12.4 an alternate method of soliciting for commercial items. We assumed that when acquiring commercial items, the government's needs can often be stated succinctly using commercial item descriptions, or other performance related documents. If the requirements documents are relatively brief and the contracting officer can use the standard solicitation terms and conditions with relatively few changes, it would be possible to alert contractors to all the essential information necessary to prepare an offer by combining the CBD synopsis and the solicitation into a single document. Soliciting offers through the CBD offers many advantages to both government and industry for the acquisition of commercial items. These advantages include making the CBD synopsis a more meaningful description of the government's need, elimination of the time and effort required for industry to request copies of the solicitations, eliminating the need to prepare and issue paper solicitations, and a reduction of lead time by eliminating the need to wait 15 days between the CBD synopsis and issuing the solicitation. A sample solicitation prepared using this technique is attached (Tab C).

-- The Team established a standard evaluation technique in the provision at 52.212-2, Evaluation - Commercial Items, based on the use of "best value" techniques. As pointed out in 12.209, the Team recognizes that this technique may not be appropriate for every acquisition, and will often require more detailed evaluation factors and related information. However, the Team believes that, in general, the use of best value techniques is appropriate for the acquisition of commercial items, and that the establishment of this technique in 52.212-2 as the baseline clearly conveys that message to both government and industry.

- Subpart 12.5 - Using other procedures for acquiring commercial items.

-- The Team believes that some standardization is beneficial to implementing the Act and offers contracting officers and industry an easy to use, simplified method for acquiring commercial items. However, the Team also recognizes that it is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the market place for that item. Subpart 12.5 gives contracting officers broad authority to tailor most aspects of solicitations and contracts without need for a formal deviation. The Act requires that some constraints be placed on this authority to tailor, and that has also been accommodated in this subpart in regards to the clauses at 52.212-3, Offeror Representations and Certifications, and 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders. Other provisions and clauses may be tailored consistent with commercial practices.

- Subpart 12.7 - Laws inapplicable to commercial item acquisitions.

-- Section 8003 (a) of the Act requires that the FAR contain a list of laws determined to be inapplicable to prime contracts for commercial items. The language of the Act further states that the laws covered by this provision (and therefore inapplicable to the acquisition of commercial items) are those enacted after the date of enactment of FASA, unless (1) it provides for criminal or civil penalties; (2) specifically refers to Section 34 of the OFPP Act and provides that, notwithstanding Section 34, it is applicable to the acquisition of commercial items; or (3) the Federal Acquisition Regulation Council makes a written determination that it would not be in the best interest of the government to exempt contracts from the provision.

--- The list of laws that meet the criteria in Section 8003 (a) of the Act and are determined to be inapplicable to the acquisition of commercial items is currently being developed. Once complete, the list will be reflected in 12.702 (b).

--- The coverage at 12.702 (b) will include all of those statutes waived by Title VIII of this Act that apply to both DOD and civilian agencies, but will not include those laws that only apply to DOD. The statutes applying only to DOD will be addressed in a subsequent DFARS case.

--- The Team is also considering including two other statutes the Team believes are not applicable to commercial item acquisitions:

---- 41 U.S.C. 416(a)(3), Minimum Response Times under the Office of Federal Procurement Policy Act. Section 8302 of the Act modifies 41 U.S.C. 416(a) to provide flexible deadlines for the submission of bids or proposals for the procurement of commercial items; and

---- 41 U.S.C. 43, Walsh-Healey Act. The Walsh-Healey Act does not apply to items "offered for sale on the open market." The Team interprets this phrase as an exception for commercial items.

-- Section 8003 (b) of the Act requires that the FAR contain a list of provisions of law that are inapplicable to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items or components. The language of Section 8003 (b) of the Act regarding which laws are inapplicable to subcontracts is very similar to the prime contracts language discussed above except for the phrase "...that is enacted after the date of the enactment of the Federal Acquisition Streamlining Act of 1994..." which does not appear in Section 8003 (b). For this reason, the list of laws not applicable to subcontractors will not be limited to laws enacted after 13 October 1994 and will therefore be much broader than that applying to prime contractors. Once completed, the list will be reflected in 12.702 (c).

Part 52. Solicitation Provisions.

- 52.212-1 Instructions to Offerors - Commercial Items.

-- This provision contains information unique to government procurement that is provided to all offerors to ensure that they understand the solicitation requirements. The information has been simplified and tailored to meet the requirements of commercial items. For the most part, the simplified paragraphs in the new provision do not contain new concepts, nor were they intended to do so. The information is compiled from a number of FAR provisions prescribed in Parts 14 and 15. The paragraph entitled "Late Offers" contains a new concept that a late offer received prior to the evaluation of offers may be considered if it offers significant cost or technical advantages to the government. This concept was taken from a provision that is currently being used in solicitations by Public Health Service.

- 52.212-2 Evaluation - Commercial Items

-- The new solicitation provision included at 52.212-2, "Evaluation - Commercial Items" contains information unique to government procurement that has been simplified and tailored to meet the requirements of commercial items. Again, the new provision does not contain new concepts and is generally compiled from provisions prescribed in Parts 14 and 15. As mentioned earlier in this report, this provision utilizes "best value" techniques in the selection of successful offerors, and includes the use of past performance in the evaluation of offers as required by Section 8002 (e)(3) of the Act.

- 52.212-3 Offeror Representations and Certifications - Commercial Items.

-- There are numerous FAR certifications required to comply with laws or executive orders. Instead of using the certification language contained in the FAR, the Team

drafted one provision at FAR 52.212-3, Offeror Representations and Certifications - Commercial Items, which distills the required certifications into a single provision for the acquisition of commercial items. Again, this effort was substantially based on a previous DOD effort that resulted in a provision currently found at DFARS 252.211-7020. The DOD provision combined a number of representations associated with FAR Part 19 into one provision. Certifications Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352), Procurement Integrity Certification (41 U.S.C. 423), and Taxpayer Identification Number (TIN) (26 U.S.C. 6050M) were added to the DOD provision.

-- FAR 52.212-3 satisfies the requirements contained in the following FAR certifications:

- FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- FAR 52.204-3, Taxpayer Identification
- FAR 52.219-1, Small Business Concern Representation
- FAR 52.219-2, Small Disadvantaged Business Concern Representation
- FAR 52.219-3, Women-Owned Small Business Representation
- Paragraph (1) of FAR 52.203-8, Requirement for Certificate of Procurement Integrity

-- Certifications required by executive orders are still being reviewed and will be added as necessary.

Part 52. Contract clauses.

Section 8002 of the Act requires the FAR be amended to contain a list of clauses for the acquisition of commercial items which will include, to the maximum extent practicable, only those clauses -

- (a) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components; or
- (b) that are determined to be consistent with standard commercial practice.

The Team implemented this requirement by creating two clauses for inclusion in contracts for commercial items. The first clause contains provisions that the Team believes are consistent with customary commercial practices. The second clause contains requirements that implement

provisions of law or executive orders that are applicable to government acquisitions of commercial items or commercial components.

- 52.202-1 Definitions.

-- This clause was revised to include the definitions of "commercial item," "component" and "commercial component." This was necessary to ensure that the contractors had access to the definitions when preparing solicitations and contracts for their subcontractors and suppliers.

- 52.212-4 Contract Terms and Conditions - Commercial Items.

-- This clause contains the terms and conditions the Team believes are consistent with customary commercial practice. The clause addresses general areas that previous studies have identified as the "core" areas covered by commercial contracts. These "core" areas were identified by DOD as part of the implementation of Section 824(b) of Pub. L. 101-189 (and the resulting DFARS Part 211), and in an earlier study prepared by Wendy Kirby formerly of the law firm Hogan & Hartson (See Tab B).

-- This clause represents the core terms and conditions of a government contract for commercial items and is intended to respond to the Act's requirement to limit clauses to those ". . .that are determined to be consistent with standard commercial practice."

-- Some of the concepts in this clause are required to implement statutes or executive orders and a few represent unique government procurement practices. However, the Team believes all the concepts in this clause are either consistent with customary commercial practice or, if not consistent, would represent an improvement over customary commercial practice from the perspective of a commercial industry. An example of the latter is the provision that failure of the parties to reach agreement on any request for relief, claim, appeal or action arising under or related to the contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated by reference. While this is required to comply with the Contract Disputes Act of 1978, it also represents a significant benefit to both parties by providing a dispute resolution procedure under the contract in lieu of the more uncertain commercial practice of resorting to formal legal proceedings. Similarly, FAR 52.212-4 provides that the government will pay an interest penalty in accordance with the Prompt Payment Act for late payments. This language eliminates the need to include FAR 52.232-25, Prompt Payment; a clause the public complained was too confusing. FAR 52.212-4 also contains a simple statement allowing the assignment of claims. This statement replaces FAR 52.232-27, Assignment of Claims. Where an element within the clause at FAR 52.212-4 implements a statute or executive order, the paragraph contains the appropriate statutory cite.

-- Several concepts included in the clause at 52.212-4 are significant changes from standard government practices and represent what the Team believes are very close to commercial practices. These include language stating that all changes to the contract be made only by written agreement of the parties; that the government's right to inspect and test is limited to items

tendered for acceptance; that revocation of acceptance shall occur before there is any substantial change in the commercial items; and that the implied warranties of merchantability and fitness for use apply in addition to any express warranties. Moreover, the proposed coverage adopts a more flexible standard regarding revocation of acceptance and contractor notification of excusable delay. These changes to the "Acceptance" and "Termination for Cause" language are based on principles in the UCC.

-- Because the government's unilateral right to terminate a contract has frequently been cited as an extraordinary contractual right of the government unique to government contracts, the Team considered not including this language in the clause at 52.212-4. However, the provision must be included because the government's protest procedures requires the government have the right to order a contractor to stop work, and subsequently to terminate a contract in the event of a successful protest of an award. However, the Team also noted that, in spite of the common perception, the concept of termination for convenience is neither extraordinary nor unique to government contracts. The earlier DOD review of commercial contracts found that approximately 50% of the commercial contracts reviewed contained termination for convenience language. The Team believes that the FAR termination clause is objectionable to commercial contractors because of the manner in which amounts payable in a termination settlement are specified; the termination language contained in the proposed clause for commercial items will overcome these objections. The language of the termination-related provisions ("Termination," "Excusable Delays", and "Termination for Cause") was all taken, with only minor revisions, from commercial contracts.

-- The Team incorporated other statutory requirements into the clause at 52.212-4 by reference only; this is a customary commercial method to require compliance with laws, executive orders, and other regulatory requirements. These were divided into two elements: Other Compliances and Compliance with Laws Unique to Government Contracts.

--- The first provision, entitled "Other Compliances," was drafted to highlight the laws, executive orders and other regulatory requirements that apply to the public at large. These provisions, therefore, apply to commercial contractors whether or not they are contained in a contract clause. The language in this paragraph was taken directly from one of the commercial contracts the Team reviewed; similar language was found in many other commercial contracts. The requirements include all applicable Federal, State and local laws, executive orders, and regulations thereunder and amendments thereto, including, Executive Order 11246 of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967, relating to Equal Employment Opportunity, the Federal Occupational Safety and Health Act of 1970, the Federal Hazardous Substances Act, the Transportation Safety Act of 1974, the Clean Air Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act.

--- The second provision, "Compliance with Laws Unique to Government Contracts," includes laws that only apply to government contracts. Generally, these are statutes related to business ethics. They include 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracting; 18 U.S.C. 431 relating to officials not to benefit; and 41 U.S.C. 251 related to whistle blower protections. The Team believes requiring

contractors to comply with these statutes by reference meets the requirements of the 31 U.S.C. 1352 (implementing FAR clause is at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions) and 18 U.S.C. 431.

- 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders - Commercial Items.

-- This clause implements provisions of law or executive orders applicable to government acquisitions of commercial items or commercial components. In preparing this clause, the Team used the list prepared for DFARS Part 211 as the basis for determining which provisions were required by statute or executive order. DFARS 211 had been thoroughly reviewed by both the DAR Council and OSD legal, and published as an interim rule. As a result of the publication of the interim rule in the Federal Register, DOD received and analyzed more than 500 public comments. A final rule was subsequently prepared, reviewed by the DAR Council and OSD counsel, and scheduled for publication when Pub. L. 103-355 was enacted. Therefore, this previous effort was considered an accurate baseline from which to proceed. In addition, the Team also reviewed other public comments and the Section 800 Panel report regarding commercial items.

-- After identifying an initial group of clauses and provisions required to implement statute or executive order, the Team analyzed each of the applicable statutes or executive orders to confirm the need for the clause, provision, representation or certification in solicitations and contracts. This research indicated that some statutes and executive orders did not require clauses be included in contracts. For example, the executive orders cited as authority for 52.225-11, Restrictions on Certain Foreign Purchases, do not specifically require a clause in contracts; the executive orders only prohibit anyone from doing business with certain countries. It is only the implementing Department of the Treasury regulations that require use of a clause similar to FAR 52.225-11 in government contracts. Because Section 8002 of the Act requires the FAR include a list of only those clauses required to implement provisions of law or executive orders applicable to acquisitions of commercial items, clauses implementing agency regulations, such as FAR 52.225-11, were not considered for incorporation in contracts for commercial items.

-- After reviewing the initial group of required clauses, the Team then examined FAR Part 52 to determine if there were any existing clauses that already contained an exemption for commercial items and to identify other clauses required by law or executive order. This research identified required clauses for the Service Contract Act provisions and the clauses implementing NAFTA and Trade Agreements Act. The Team did not include any construction-related clauses, since the Team does not believe construction projects meet the definition of "commercial items."

-- The Team believes the clause at 52.212-5 represents the minimum number of clauses required to implement statutes. In addition, the Team is presently reviewing numerous executive orders to determine their applicability to Federal contracts for commercial items and to contracts within the United States in general. Any executive orders determined to properly apply to prime contracts will be added to the clause.

-- The clause at 52.212-5 does not include FAR 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan. The Team understands that OFPP intends to revise the requirement for subcontracting plans to allow them to be done on a company-wide basis for commercial items. In addition, the coverage does not include FAR 52.219-16, Liquidated Damages - Small Business Subcontracting Plan. The Team believes a clause requiring liquidated damages for failure to meet subcontracting goals should not be included in contracts that do not contain a requirement to have a subcontracting plan. Consequently, the Team recommends OFPP include the requirement for liquidated damages when it promulgates its coverage on subcontracting plans. If these changes are not made, the related clauses must be included in contracts for commercial items.

- 52.244-XX Subcontracts for Commercial Items and Commercial Components.

-- This clause implements the preference at 10 U.S.C. 2377(b)(2) and 41 U.S.C. 314(b) for the acquisition of commercial items or nondevelopmental items other than commercial items as components of items to be supplied under Federal contracts. In addition, paragraph (e) of the clause at 52.244-XX provides that the contractor is not required to include any FAR provision or clause, other than those listed in the clause and as may be required to comply with cost or pricing data requirements, in a subcontract for commercial items or commercial components. The clauses to be included on this list and flowed down to subcontractors for commercial items is currently under review.

Other related comments.

The Team recognizes the relationship between the requirements of: (1) Section 8002 (b) of the Act for a list of contract clauses required to implement provisions of law or executive orders applicable to acquisitions of commercial items; and (2) Section 8003 of the Act for a list of provisions of law that are inapplicable to contracts for the acquisition of commercial items.

- The Team has chosen to implement the requirements of Section 8002 (b) through the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders, and to implement the requirements of Section 8003 through the language in 12.702. Maintaining this language in the FAR could become quite difficult as future laws are enacted and executive orders are signed. As a result, the Team has included language at 12.103 which states that future laws or executive orders will only be applied to the acquisition of commercial items if the provisions and clauses in Subpart 12.3 are revised accordingly. This eases the burden on the contracting officer, but places a tremendous responsibility on the FAR System to keep these provisions and clauses up to date. To do otherwise would surely result in a quickly outdated Part 12 whose usefulness would become increasingly limited over time.

Section 8301 (d) makes certain revisions to Section 26(f)(2) of the OFPP Act regarding the applicability of cost accounting standards to commercial items. The Team notes that this Section of the OFPP Act is under the responsibility of the Cost Accounting Standards Board. The appropriate revisions must first be made to 48 CFR Chapter 99; these will subsequently be incorporated into Appendix B of the FAR.

IV. COLLATERAL REQUIREMENTS:

Public Comments:

This proposed FAR revision will have a significant effect on contractors and offerors and requires publication in the Federal Register for public comment. In this regard, the Team recommends that in conjunction with requesting public comments, a public meeting should also be scheduled at an appropriate time to obtain further comments from the public.

Paperwork Burden Analysis.

The Paperwork Reduction Act (Pub. L. 96-511) applies. A separate analysis will be prepared and submitted to the Office of Information and Regulatory Affairs prior to publication of the proposed rule for public comment.

Regulatory Flexibility Act Analysis.

The proposed rule is expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et. seq., because the proposed FAR rule will significantly reduce the burden presently imposed on small businesses by (1) limiting provisions and clauses that can be made applicable to both large and small businesses at either the prime or subcontractor level; (2) by requiring that, except in unique circumstances, that the government utilize the contractor's quality assurance system; and (3) by clearly stating a preference for performance-based documents and commercial designs rather than government-specific designs. Therefore, an initial Regulatory Flexibility Analysis has not been completed. Comments from small entities concerning the affected FAR Parts will also be considered in accordance with Section 6120 of the Act.

V. CONCURRENCE:

The Commercial Items Drafting Team was comprised of the following members from the agencies indicated:

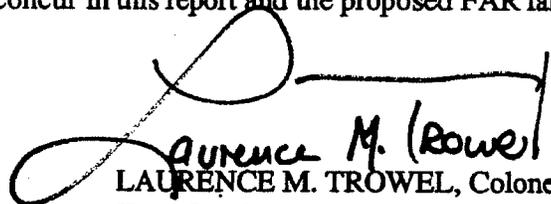
Colonel Larry Trowel, SAF/AQCF
Lou Gaudio, OUSD(A&T)DDP/MPI
Rob Lloyd, Office of the Procurement Executive, Dept of State
Eve Lyon, Office of General Counsel, NASA
Ludlow Martin, Office of General Counsel, Army Materiel Command
Anne Burleigh, HQ DLA
Pam Pilz, FISC Norfolk, Washington detachment, Washington Navy Yard
Les Davison, GSA(VP)

In addition, the following individuals were assigned to the Team as Legislative Team Liaisons. These individuals briefed the Team at the beginning of the drafting process on policy issues and legislative intent, participated in elements of Team discussions and reviewed drafts of the Team's proposed language and report:

Bill Mounts, Office of the Deputy Under Secretary of Defense for Acquisition
Reform (DUSD(AR))

Alan Brown, Office of Federal Procurement Policy (OFPP)

All members of the Drafting Team concur in this report and the proposed FAR language.


LAURENCE M. TROWEL, Colonel, USAF
Team Leader
Commercial Item Drafting Team

Tabs:

Tab A - Proposed FAR Language

Tab B - White Paper, Uniform Commercial Code

Tab C - Sample Combined CBD Synopsis/Solicitation

Tab D - Title VIII, Pub. L. 103-355

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Appendix C

SARA-CPWG: Statutory Revision for R-4 New Competitive Services Schedule

SUGGESTED PLACEMENT: 41 U.S.C. § 253h(g); add the following as related guidance.

**AUTHORITY TO ESTABLISH A NEW MULTIPLE AWARDS SCHEDULE FOR
PROFESSIONAL SERVICES**

(1) GSA Federal Supply Schedules program.-- Under the Multiple Awards Schedule program of the General Services Administration referred to in section 309(b)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(b)(3)) that is administered as the Federal Supply Schedules program, the Administrator of General Services may establish a new information technology (IT) Multiple Awards Schedule for professional services under which prices for each order are established by competition and not based on posted rates. Under this new Schedule model, prices would be determined exclusively at the order level based on competition for the specific requirement to be performed in accordance with the ordering procedures established by the General Services Administration. The ordering procedures for the new Schedule shall strongly encourage the use of "e-Buy," GSA's electronic request for quote (RFQ) tool, as a means to assure competition. This new Schedule model shall be reviewed in two years after implementation to see whether the process is producing competition and better pricing. If so, the Administrator of General Services may expand the new Schedule model to the other professional services Schedules.

APPENDIX D

**Proposed Changes to FAR Parts 12 and 15
to Implement Recommendation 8
Pricing When No or Limited Competition Exists**

12.209 Determination of price reasonableness.

~~(a) While t~~The contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable for any commercial item, which includes commercial services. As discussed below, the contracting officer should be aware of customary commercial business terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(b) 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. If the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited), the contracting officer may request the information in (i) or (ii) below from the offeror in the following order of preference, provided that the contracting officer should not request more information than is necessary to determine that an offered price is reasonable:

(i) Prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers. The contracting officer must limit requests for sales data relating to such items during a relevant time period. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

(ii) Available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs. The contracting officer must, to the maximum extent practicable, limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)). The contracting officer shall not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis (see 15.404-1(b)).

(c) A determination of price reasonableness shall be based on the information referenced in paragraph (b) of this section. The contracting officer shall not request that any information provided by the offeror pursuant to paragraph (b) be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit with regard to price reasonableness.

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(d) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)). (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

15.402 Pricing policy.

Contracting officers must—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (*e.g.*, established catalog or market prices, sales, or previous contract prices), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, ~~that does not meet the definition of~~ but in no event shall the offeror be requested to provide cost or pricing data as that term is defined in at 2.101 or to certify any such information.

(3) *Cost or pricing data.* The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

(b) Price each contract separately and independently and not—

(1) Use proposed price reductions under other contracts as an evaluation factor; or

(2) Consider losses or profits realized or anticipated under other contracts.

(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

15.403-3 Requiring information other than cost or pricing data.

(a) General.

(1) The contracting officer is responsible for obtaining information that is adequate for evaluating the reasonableness of the price or determining cost realism, but the contracting officer should not obtain more information than is necessary (see 15.402(a)). If the contracting officer cannot obtain adequate information from sources other than the offeror, the contracting officer must require submission of information other than cost or pricing data from the offeror that is adequate to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)). Unless an exception under 15.403-1(b)(1) or (2) applies, the contracting officer ~~must~~ may require that the information submitted by the offeror include, ~~at a minimum,~~ appropriate information on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price. To determine the information an offeror should be required to submit, the contracting officer should consider the guidance in Section 3.3, Chapter 3, Volume I, of the Contract Pricing Reference Guide cited at 15.404-1(a)(7).

(2) The contractor's format for submitting the information should be used (see 15.403-5(b)(2)).

(3) The contracting officer must ensure that information used to support price negotiations is sufficiently ~~current~~ to permit negotiation of a fair and reasonable price. ~~Requests for updated offeror information should be limited to information that affects the adequacy of the proposal for negotiations, such as changes in price lists.~~

(4) As specified in Section 808 of Public Law 105-261, an offeror who does not comply with a requirement to submit information for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

- (i) The effort made to obtain the data.
- (ii) The need for the item or service.
- (iii) Increased cost or significant harm to the Government if award is not made.

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(b) *Adequate price competition.* When adequate price competition exists (see 15.403-1(c)(1)), generally no additional information is necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional information is necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror. In addition, the contracting officer may request information to determine the cost realism of competing offers or to evaluate competing approaches.

(c) Commercial items.

~~(1) At a minimum, t~~The contracting officer ~~must~~ should use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see ~~15.404-1(b)~~12.209). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. ~~If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis (see 15.404-1).~~

~~(2) Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).~~

~~_____ (i) The contracting officer must limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.~~

~~_____ (ii) The contracting officer must, to the maximum extent practicable, limit the scope of the request for information relating to commercial items to include only information that is in the form regularly maintained by the offeror as part of its commercial operations.~~

~~_____ (iii) The Government must not disclose outside the Government information obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).~~

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CHAPTER 1A

COMMERCIAL PRACTICES

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

OBSERVATION: IMPACT OF FUNDING DELAYS

Although the Panel's Report makes no recommendations in this area, we believed that we should note our concern about the impact of the appropriations process on the acquisition system. Many Panel witnesses, both government and contractor, noted problems caused for meaningful acquisition planning, requirements development, and competition by uncertain funding that is limited to annual appropriations. Virtually every commission that has looked at the acquisition process has noted this point. Given the Constitutional and statutory issues involved, the Panel did not believe that we had the resources to make recommendations. Nonetheless, because of the obvious impact of these issues on acquisition practices, the Panel offers the following observations with the hope that a future Panel may be given the capacity to study this matter with the aim of making meaningful changes.

Federal Procurement Problems Resulting From Delays In Federal Procurement Officials Receiving Spending Authority

Each year, after the federal budget and appropriations processes are completed, federal procurement officials are allocated specific amounts of money to be expended on government programs for which they are responsible. Generally, the procurement officials must then reconcile spend plans against actual dollars appropriated to determine the best and most efficient course of action for that fiscal year. Once procurement officials decide how the allocated amounts of money will be most efficiently used, they then perform all necessary steps (such as perform competitions or justify sole-source procurements) in order to obligate those funds, *i.e.*, enter binding agreements that will result in the outlays of funds, either immediately or in the future, before the end of the end of the fiscal year.

Contracting inefficiencies resulting from the one-year nature of most government procurement have been noted in previous studies and reports regarding federal contracting, are the subject of substantial debate, and are discussed in other sections of this Report. Even taking the notion that most appropriations will continue to be annual as a given, however, the problems associated with yearly contracting have been exacerbated in recent years by the growing length of time required to complete the congressional budget and appropriations processes, as well as the uncertainties resulting from the DoD's increasing dependence on supplemental appropriations. Uncertainty regarding when final appropriations will occur and how much will be allocated for specific programs decreases the amount of time in which procurement officials can complete their yearly tasks. That delay and uncertainty also reduce the efficiency of that spending.

A. Legal Requirements That Must Be Completed Before Federal Money Can Be Obligated

Federal law requires that before the procurement officials may begin their annual task of determining the most efficient manner to spend government funds allocated to certain programs, numerous steps must be completed by the Nation's political leaders and the heads of the various Departments and Agencies. A general understanding of the steps that must occur before

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procurement officials may obligate government funds will be helpful in understanding the problems described below.

At the conclusion of the annual congressional budget and appropriations processes, 13 appropriations bills are enacted to fund the government's discretionary spending for the next fiscal year.¹ Technically, federal funds are made available for obligation and expenditure by procurement officials by means of those appropriations acts (or by other legislation, such as supplemental appropriations) and the subsequent administrative actions that release appropriations to the spending agencies.² The Executive Branch process required to release those funds to the spending agencies (and to procurement officials) requires several separate steps.

Congressional appropriations must first be apportioned by the Office of Management and Budget (OMB). Apportionments are plans to spend resources provided by law. The apportionment system distributes budget authority by time periods (usually quarterly) or by activities, and is "intended to achieve an effective and orderly use of available budget authority and to reduce the need for supplemental or deficiency appropriations."³ Thus, for instance, if Congress appropriates a certain amount of money for a given program, OMB generally will require that specified percentages of the appropriated amount be spent each quarter. Mechanically, the apportionment process begins when the appropriations bill is enacted and an affected spending agency submits a Form SF 132 to OMB, seeking approval for the proposed spending plan. OMB then considers and approves that plan, occasionally with limitations or restrictions. This process generally takes from one to three weeks.⁴

At the same time OMB is receiving, considering, and approving agencies' apportionment requests, the Treasury Department has a separate process by which it issues warrants authorizing spending. The appropriations legislation designates an amount of money that will be provided to the relevant "appropriations account" maintained by the Treasury Department, and the Treasury warrant is required before the funds that are appropriated to a specific account can be obligated.

After the apportionment and warranting processes are complete, authority to spend appropriated amounts is provided to the relevant Department or Agency. A series of steps must occur within the Department or Agency before the procurement official ultimately receives authority to obligate funds. For instance, in the Department of Defense, the funds must be

¹ Although the result of the presidential and congressional budget processes are discussed here, the details of those processes are beyond the scope of this discussion, because they occur before the Executive Branch allocates the money and provides authorizations to procurement officials. The congressional budget process is described at http://budget.senate.gov/republican/major_documents/budgetprocess.pdf, and the appropriations process is explained at <http://appropriations.senate.gov/budgetprocess/budgetprocess.htm>. A flow-chart explaining the overlap between the budget and appropriations processes can be found at <http://budget.senate.gov/republican/analysis/budgetprocess.pdf>.

² III GAO, *Principles of Federal Appropriations Law*, ch.1, at 1-2.

³ *Id.* at 1-31.

⁴ *Id.*; 31 U.S.C. §§ 1511-16.

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released by the Office of the Secretary of Defense, (2) allocated by the Secretary of the relevant Service; and (3) sub-allocated (or allotted) by the Comptroller of the relevant program authority.⁵ Each of those administrative approvals can be delayed or can, sometimes unexpectedly, involve holding back some portion of the funds apportioned to the program. After these steps are completed, the relevant program management office is authorized to obligate the funds to specified programs activities and execute agreements to spend the money. Although there is more variation in the length of time required to complete the different Department's and Agencies' release and allocation processes, those processes generally require approximately three weeks to complete. Thus, the overall apportionment, release, and allocation process requires approximately six weeks from the date the appropriations bill is enacted until the procurement official is empowered to obligate funds.

B. The Decreasing Amount Of Time Available To Obligate Federal Funds Resulting From Delays In The Appropriations Process

Federal procurement officials do not know the precise amount of money their programs will be finally provided in any given year until the congressional budgeting and appropriations processes, *and* the Executive Branch apportionment, release, allocation, and any sub-allocation processes are all completed. Although the congressional appropriations processes should be completed before the beginning of the fiscal year,⁶ in practice, they may not be finalized until several months of the fiscal year have passed. Although some necessary spending occurs in the interim pursuant to continuing resolutions, agencies generally may not spend, or commit themselves to spend, money in advance of or in excess of appropriations.⁷

Although procurement officials may experience substantial delay before the annual spending may be initiated, the date at the end of the fiscal year by which most funds must be obligated is inflexible. Many appropriations acts expressly provide that the appropriations are annual (or 1-year) appropriations, and all appropriations are presumed to be annual, unless the relevant appropriations act expressly provides otherwise.⁸ "If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have expired."⁹ In addition, if money is not obligated, the potential to use those funds "may not be extended beyond the fiscal year for which [the appropriation] is made absent express indication in the appropriation act itself."¹⁰

In sum, procurement officials are caught in a bind. They do not control when the congressional and Executive Branch processes will ultimately release funds for obligation, but

⁵ See 31 U.S.C. §§ 1513(d), 1514.

⁶ See, e.g., OMB Circular No. A-11, § 10.5 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html).

⁷ The Antideficiency Act, 31 U.S.C. § 1341.

⁸ 31 U.S.C. § 1301(c); III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-4.

⁹ III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-6.

¹⁰ *Id.* at 5-5; 71 Comp. Gen. 39 (1991).

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regardless of when that authority arrives, most of the money must be obligated by the end of the fiscal year. As a matter of standard operating procedure, procurement officials are warned that they will never receive the money for which they are responsible as quickly as they expect, and once the funds are received, they must be executed quickly or be lost.

During hearings and as part of other information gathering, the Panel received numerous complaints from procurement officials that, in practice, the amount of time available for obligating funds has been declining during recent years. Procurement officials generally perceive that this tightening of the annual schedule results in inefficiencies.

To analyze the source and extent of the delay in delivering spending authority to procurement officials, as explained above, there are two potential sources: (1) the congressional budget and appropriations processes, or (2) the Executive Branch apportionment and allocation processes.

Although the Executive Branch processes require some decision-making with respect to difficult or disputed apportionment or allocation issues, these processes appear to operate more mechanically than the congressional budget process. This results, in part, from the fact that the projections which were used to formulate the congressional budget originate in the spending agencies,¹¹ and those agencies monitor the congressional budget and appropriations processes closely. In short, Executive Branch procurement officials become adept at obtaining authorization to obligate funds as soon possible following final appropriation. Moreover, technology expedites the apportionment and allocation processes, as the relevant forms are submitted electronically to OMB and the relevant agencies.¹² Approvals from OMB generally follow within one to three weeks of submission of an apportionment requests,¹³ and from our discussions with relevant officials, there is no reason to believe that inordinate delays occur during the agencies' allocation processes.

The delay experienced by procurement officials with respect to receiving final authorization to obligate monies needed to operate government programs – and the decreasing amount of time they have to complete their annual procurement responsibilities – appears to result primarily from the congressional budget and appropriations processes. During the past ten years, there have been years in which the appropriations process experienced particularly severe delay. For instance, for fiscal year 2003, 11 of the appropriations bills were completed on February 20 – four and one-half months into the subject fiscal year – and were enacted as part of a large omnibus bill.¹⁴ But even putting aside the worst years, the trend is clearly toward delayed completion of the appropriations process. For instance, for fiscal years 2004-2006, the median

¹¹ See OMB Circular A-11, § 10.5.

¹² For instance, a SF 132 form proposing an apportionment plan must be submitted by the spending agencies as part of an Excel spreadsheet. See OMB Circular A-11, § 121 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/s121.pdf).

¹³ See OMB Circular A-11, § 10.5.

¹⁴ See <http://thomas.loc.gov/home/approp/app03.html>.

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completion date for appropriations bills was December 1; in contrast, the median completion date for the years 1997-1999 was more than one and one-half months earlier, October 13.¹⁵

In addition to the increasing delays in finalizing appropriations legislation, Congress' increasing use of supplemental appropriations to fund substantial parts of DoD's budget are causing difficulties with planning and executing procurements efficiently. Officials interviewed by the Panel explained that the delays with respect to when the Global War on Terrorism (GWOT) funding will be enacted each year, and uncertainty as to the final amount of that funding, are causing extreme difficulties for procurement officials. For instance, in fiscal years 2002, 2003, 2005, and 2006, supplemental appropriations were enacted during the second half of the year and provided a substantial part of the total budget of significant offices within DoD. That money then had to be obligated by September 30, causing a rush to execute those procurements at the last minute.

C. Effect Of Decreasing Amount Of Time To Obligate Funds And Procedures Procurement Officials Use To Mitigate The Negative Effect Of Appropriation-Related Delay

Among other negative effects resulting from delays in receiving final authorization to obligate funds in a given fiscal year, and uncertainty regarding the amount of those funds, are at least three major problems: (1) procurement officials believe they are unable to efficiently begin work on annual procurements until later in the year; (2) they have substantial uncertainty related to the amount and timing of supplemental appropriations needed to fund program activities; and (3) the compression of the schedule in which procurement decisions can be made results in inefficient year-end spending.

First, it must be noted that previous procurement panels have recognized that funding delay and instability are substantial factors reducing the efficiency of government procurement. For instance, in 1986, the Packard Commission complained:

[D]efense managers and defense procurement personnel around the world must implement late congressional decisions after the fiscal year has started. They are confronted with numerous changes that alter and delay their program plans, schedules, and contract decisions. This instability, in turn, spreads outward to the defense

¹⁵ See Exhibit __ (tracking annual information available from Congress' "Thomas" site, <http://thomas.loc.gov/home/approp/app07.html>, and, for earlier years, from the *Congressional Quarterly Almanac*); see also Exhibit __ (illustrating data from Exhibit __). This analysis is admittedly imperfect, as it does not adjust (or weight) the appropriations bills by size. For instance, the Defense appropriations are by far the largest and generally are among the earliest appropriations bills completed. In addition to the notion that other spending departments and agencies should not be given short shrift merely because their spending requirements are relatively small, the Defense Department's reliance on supplemental appropriations for substantial parts of its funding in recent years presents different, pressing problems.

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industry, whose investment and production plans must be hastily adjusted annually as a result of late congressional appropriations.¹⁶

As demonstrated above, the problem identified by the Packard Commission has become more substantial over time.¹⁷

In most years when the appropriations bills are not completed by the beginning of the fiscal year, the government does not shut down. Generally, the government continues to operate under a continuing resolution, which is a stop-gap legislative measure that does little to mitigate the harm of delayed final appropriations.

When operating under a continuing resolutions, a department or agency can spend money at a rate set by an OMB formula, which requires spending at a smaller daily rate than the agency expended money during the previous year.¹⁸ Although the operations of the Department or Agency continue, continuing resolutions result in what officials interviewed by the Panel referred to as “procurement paralysis.” Procurement officials are not, by law, permitted to execute contracts and obligate funds until the appropriation bill is signed. Because they do not know when that enactment will occur – or whether the amount requested for a program will be appropriated – procurement officials generally refrain from beginning competitions, even though such preparatory activities will be required (assuming the funds are appropriated) and are permissible while operating under a continuing resolution. In sum, procurement officials tend to “sit on their hands,” understandably waiting until the uncertainty is resolved – as opposed to potentially wasting effort on procurements that cannot be completed if not funded in the appropriation bill.

Second, as noted above, since the events of September 11, 2001, Congress has appropriated a substantial part of DoD’s overall budget as part of supplemental appropriations legislation. Procurement officials interviewed by the Panel explained that Service Commands are declining to release part of the funds needed by procurement officials responsible for various programs (*i.e.*, holding back part of sub-allocations) until they know the total amount of funding that will be provided in the GWOT supplemental appropriation. Procurement officials, in turn, have tended to exacerbate the problem, as we are informed they tend to decline to obligate funds until they know exactly how much will be allocated to the program for the year. Because the GWOT supplemental appropriations have been enacted relatively late in the recent fiscal years, the delayed obligations that have resulted have required procurement officials to engage in a “mad scramble” to execute contracts at the end of the fiscal year.

¹⁶ President’s Blue Ribbon Commission On Defense Management (Packard Commission), *A Quest for Excellence*, at 22 (1986) (available at www.ndu.edu/library/pbrc/36ex2.pdf).

¹⁷ Indeed, the January 2006 *Defense Acquisition Performance Assessment Report* explained (at p.74) that when interview respondents (from government and industry) “were asked to identify areas” of concern that were not addressed by that Panel’s initial study areas, “the area most identified, by a factor of three to one, was ‘budget and funding instability.’”

¹⁸ See OMB Circular A-11, § 123. When the final appropriation is executed, spending under the continuing resolution ultimately has to be reconciled with the spending permitted by the final appropriation.

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Third, there is a general understanding among procurement officials that the compression of the amount of time during which procurement decisions can be made is resulting in less than optimal procurement decisions ultimately being made. Although one would likely assume that attempting to effect a significant percentage of a program office's contract execution in a relatively short amount of time at the end of the year would result in inefficient decisions, the Government Accountability Office has noted that it previously "conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year."¹⁹ However, it must be noted that the most recent GAO study was performed in 1998,²⁰ before the substantial delays in appropriations legislation described above, and before the substantial supplemental appropriations being used for a substantial percentage of DoD's total funding. In light of these recent developments, the Panel believes that the large volume of procurement execution being effected late in the year is having a negative effect on the contracting process and is a significant motivator for many of the issues we have noted with respect to, among other things, lack of competition and poor management of interagency contracts.

¹⁹ III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-17 (citing, among others, *Federal Year-End Spending: Symptom of a Larger Problem*, GAO/PAD-81-18 (Oct. 23, 1980)).

²⁰ See *id.* (citing *Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed*, GAO/AIMD-98-185 (July 31, 1998)).

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CHAPTER 2

IMPROVING IMPLEMENTATION OF PERFORMANCE-BASED SERVICE ACQUISITION (PBSA) IN THE FEDERAL GOVERNMENT

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

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I. Introduction and Background

In keeping with the statutory charter of the Panel to review Federal 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.”

- o the Panel has conducted an in-depth exploration of PBSA with an aim of discerning why the methodology has fallen short of expectations, and to make constructive recommendations for enhancing PBSA in the future.

FINDINGS	RECOMMENDATIONS
<p>1: Despite OMB Target, Agencies Remain Unsure When to Use PBSA</p>	<p>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</p> <p>2: Modify FAR Parts 7 and 37 to Include Two Levels of Performance-based acquisition: 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</p>
<p>2: PBSA Solicitations and Contracts Continue to Focus on Activities and Processes, Rather than Performance and Results</p> <p>3: PBSA’s Potential for Generating Transformational Solutions to Agency Challenges Remains Largely Untapped</p> <p>4: Within Federal Acquisition Functions, There Still Exists a Cultural Emphasis on “Getting to Award.”</p> <p>5: Post-Award Contract Performance Monitoring and Management Needs to Be Improved</p>	<p>3: Publish a Best Practice Guide on Development of Measurable Performance Standards for Contracts</p> <p>4: Modify FAR Parts 7 and 37 to Include an Identification of the Government’s Need/Requirements by Defining “Baseline Performance Case” in the PWS or SOO. OFPP should Issue Guidance as to the Content of Baseline Performance Cases</p> <p>5: Improve Post-Award Contract Performance Monitoring and Management, Including Methods for Continuous Improvement and Communication through the Creation of a Contract-Specific “Performance Improvement Plan” that would be Appropriately Tailored to the Specific Acquisition</p> <p>6: OFPP Should Provide Improved Guidance on Types of Incentives Appropriate for Various Contract Vehicles</p> <p>7: OFPP Should Revise the Seven Step Process to Reflect the Panel’s new PBSA Recommendations</p> <p>8: Contracting Officer Technical Representatives (COTR’s) should Receive Additional Training and be Re-designated as Contracting Officer Performance Representatives (COPR’s)</p>
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A. Introduction To Performance-Based Service Acquisition

Performance-based Service Acquisition (PBSA), formerly called Performance-based Contracting,¹ is an approach to acquisition that focuses on describing end results (rather than dictating the manner in which the contracted work is to be done) and measuring and compensating vendors on the basis of whether or not those results were obtained.

PBSA employs a number of techniques, strategies and frameworks for the definition of program requirements, acquisition planning, competition management, performance measurement, contract structure, payment structure, and post-award contract monitoring and management. PBSA was developed as part of an overall movement in government management toward commercial business practices. PBSA is also reflective of the government-wide movement toward performance-based program management as reflected in the passage of the landmark Government Performance and Results Act (Pub. L. No. 103-64)

Proponents of PBSA believed the government's acquisition system was characterized by a lack of opportunity for innovation, a focus on process not results, and, higher than anticipated costs. Those failings, it was asserted, could be addressed through a more commercial approach to services acquisition; one that focused on mission outcomes to be achieved, rather than day-to-day management of contractors.

History offers a myriad of attempts by the Federal Government to exploit performance-based contracting approaches to acquire services. The first attempts to implement performance-based approaches can be documented as far back as 1969 with an outcomes-based approach to contracting developed by the then-Department of Health, Education and Welfare. Several other government agencies (particularly in the Department of Defense) issued internal policies to encourage the use of performance standards in certain kinds of contracts.

Government-wide PBSA policy was first contained in Office of Federal Procurement Policy (OFPP) Letter 91-2 on service contracting that was issued on April 9, 1991—instructing federal agencies to use PBSA “to the maximum extent practicable.”² This document stated that the new policy was prompted by internal agency investigations, Government Accountability Office (GAO) reports and OFPP studies that documented numerous instances of unsatisfactory performance and contract administration problems that coincided with an increase in the Government's acquisition of services.

¹ “Performance-based service acquisition (PBSA)” has generally replaced “performance-based contracting (PBC)” as the current terminology to be applied to this acquisition approach. The two terms can be used interchangeably for purposes of this discussion.

² OFPP Letter 91-2 __ (Apr. 9, 1991)

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To reinforce its policy encouraging the use of PBSA, the OFPP has developed a PBSA support website that identifies several purported benefits when contracts are structured to focus on the desired business outcomes. These possible benefits include:

- Increased likelihood of meeting mission needs
- Focus on intended results, not process
- Better value and enhanced performance
- Less performance risk
- No detailed specification or process description needed
- Contractor flexibility in proposing solution
- Better competition: not just contractors, but solutions
- Contractor buy-in and shared interests
- Shared incentives permit innovation and cost effectiveness
- Surveillance: less frequent, more meaningful
- Variety of solutions from which to choose³

In 2001, the current Administration elevated performance-based acquisition to a Presidential initiative and assigned specific implementation goals. OMB directed that agencies use performance-based techniques on a specific percentage of the total eligible service contracting dollars each fiscal year as follows:

<u>Fiscal Year</u>	<u>Percent</u>
2002	20
2003	30
2004	40
2005	40 (changed from original 50% by OFPP ⁴)

In 2003, the Congress weighed in with its strong support for performance-based acquisition when it passed the Service Acquisition Reform Act.

B. Current Federal Implementation of Performance-Based Acquisition

Over the past year and a half, the Panel received a wide range of testimony, and reviewed a number of studies, reports and audits regarding performance-based contracting methodologies and their implementation. Several private sector and Federal agency witnesses gave a strong endorsement for the methodology, and were able to cite acquisitions where it had been used effectively to both enhance performance and achieve cost savings. Others paint a less rosy picture. Various review organizations, including the GAO, have raised concerns about PBSA

³ See OFPP, *Seven Steps to Performance-based service acquisition* [year], http://www.acquisition.gov/comp/seven_steps/index.html

⁴ Memorandum from _____ to Chief Acquisition Officers and Senior Procurement Executives, *Increasing the Use of Performance-Based Service Acquisition* (Sept. 7, 2004) (on file with _____).

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implementation, calling into question whether there is adequate understanding among agencies on when and how to successfully carry out performance-based service acquisition. Additionally, there is a concern that insufficient data exists on the impact of PBSA on the government-wide acquisition process, cost and performance.

Indeed, one of the issues the Panel seeks to address is the dichotomy between the relatively positive information on performance-based practices the Panel received from private sector experts - particularly those involved in transformational business process change - and the skepticism expressed by a number of government practitioners on how well senior leadership, and acquisition and program staff understand and apply PBSA methods.

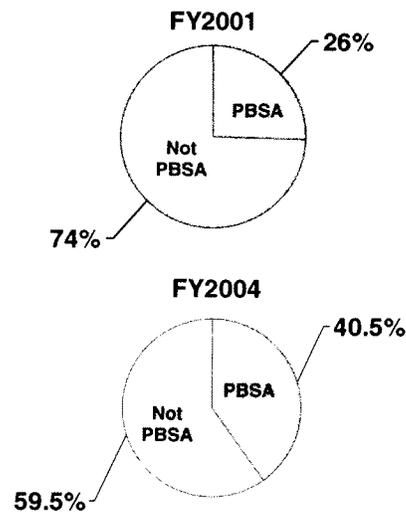
Progress on Meeting PBSA Targets, But Data Seems Suspect

As Federal agencies responded to the initial 1991 OFPP PBSA policy as well as the 2001 PBSA targets, the federal acquisition landscape changed. The result – whether through erudite PBSA application or brute force – has been a steady increase in spending on contract vehicles that agencies identify as performance-based.

Data from the Federal Procurement Data System shows federal agencies are meeting the Administration's goals. According to agency reporting, in 2001, 25.5% of eligible contract dollars were identified as performance-based contracts (percentage in accompanying chart does not track due to rounding). In 2004, that number moved up to 40.5% - exceeding the goal by .5%.

For goaling purposes, determining whether a contract qualifies as a PBSA is a three-step process. First, agencies must determine that the sum of the ultimate contract value or sum of the dollars obligated will be over \$25,000. Next, agencies must establish whether the contract is eligible for PBSA methodologies.

For this determination, OFPP excludes services exempted by the FAR: Architect-engineer services acquired in accordance with 40 U.S.C. 541-544 (FAR Part 36); Construction (FAR Part 36); Utility services (FAR Part 41); or Services that are incidental to supply purchases.⁵

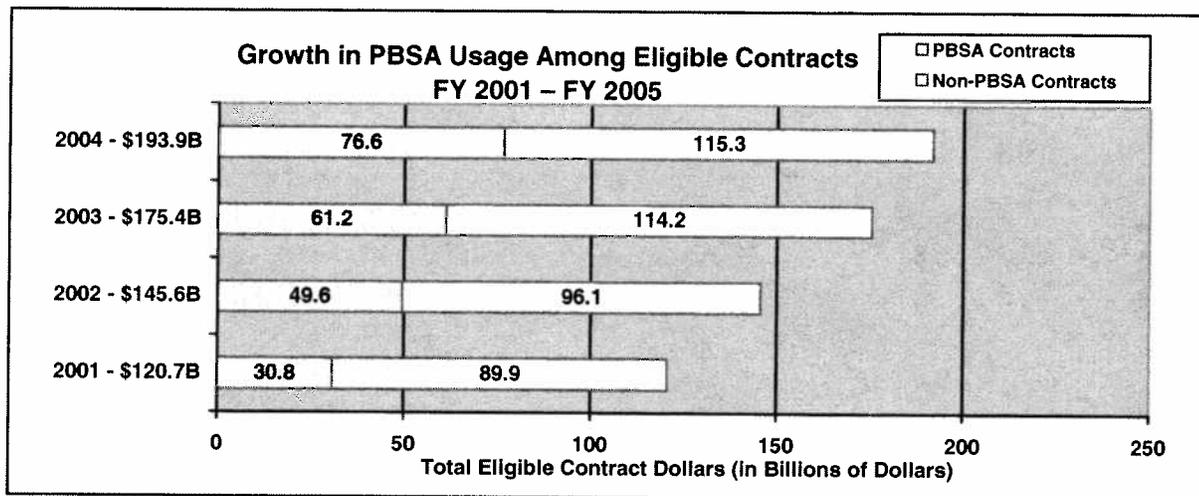


Growth in PBSA contracts between 2001 & 2004, shown as a percentage of contract dollars considered to qualify as eligible for performance-based methods.

⁵ FAR 37.102 In addition to FAR exemptions, OFPP excludes the following services: Research and development, to include Basic Research, Applied Research, Advanced Technology Development, Demonstration and Validation, and Engineering and Manufacturing Development (FPDS codes A**1-A**5); Professional Medical Services (not facility-related, Codes Q501-Q527); and Tuition, Registration and Membership Fees (Code U005).

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Once a contract is determined to be PBSA-eligible, FPDS requires that more than 50 percent of the requirement, as measured in dollars, be performance-based in order to receive the PBSA designation. The table below depicts, from Fiscal Years 2001 to 2005, the total number of contract dollars found to be eligible for PBSA methodologies as reported by Federal agencies. That number is then divided into to categories: 1) PBSA-eligible contracts implemented as performance-based and, 2) PBSA-eligible contracts that were *not* implemented with PBSA methodologies.⁶



The Panel notes there is significant discussion about the nature of the PBSA data being reported to FPDS. A number of commenters have expressed concern that some contracts reported as PBSAs may not, in fact, meet the letter or spirit of performance-based contracting. In one example, when testifying before the panel, Ms. Jan Menker of the Concurrent Technologies Corporation remarked, “There are any number of solicitations coming out that say, we’re performance based. But when you read them, there’s no outcomes; there’s no real objectives identified. Statements of work are still fairly specific. It’s an area that needs additional investigation....”⁷

In light of these concerns, the Panel initiated a study to examine the kinds of contracts that are being reported as PBSA’s in FPDS. Results of the Panel’s survey of contracts are outlined in Finding #7—but demonstrated significant miscoding of contracts as PBSA’s when in fact more than half of the contracts originally coded in FPDS as PBSA were deemed to not be PBSA by either the agency or the Panel in its review.

Types of services procured through PBSA methods

⁶ Data drawn from the FPDS database. Actions reported individually by agency on SF279.

⁷ AAP Pub. Meeting (May 17, 2005) Tr. at 45.

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At one time, PBSA was confined to basic, non-technical and support services such as security, laundry, grounds maintenance, and facility maintenance. Today, use has expanded considerably, particularly in the information technology (IT) arena. The Department of Health and Human Services website, for example, outlines a broad range of services as suitable for performance-based contracting methodologies:⁸

U.S. Department of Health and Human Services – Services Suitable for PBSA		
Facility support services e.g., security, laundry, grounds maintenance, facility maintenance, equipment repair, other than IT		
Administrative and clerical support, e.g., data entry, court reporting, typing, editing, distribution		
Aircraft maintenance and test range support		Transportation, travel and relocation services
Logistics/conference support	Medical services	Research and Development
Research support services	Telephone call center operations	Training
Environmental remediation	Technical assistance	Management support
IT and telecommunications services to include maintenance and support services		
Studies and analyses		Surveys

Growing experience with performance-based contracts has also helped agencies to identify services that are not well suited to PBSA. In August 2003, for example, the U.S. Department of Agriculture added to FAR and OFPP lists the following services as offering limited opportunity for PBSA:

- Hazardous Substance Cleanup;
- Education and Training Services; and
- Lease or Rental of Equipment/Facilities.⁹

Government officials anticipate continued refinement in their understanding of what services are suitable for PBSA's. In testifying before the panel, David Sutfin, Chief, GovWorks Division of the Department of Interior noted, "...the proper application of performance based contracting is an area where I think we're all weak, and we need help. Not every service contract lends itself to a performance based contract, and there is, I think, a rush now to use this contracting technique without fully understanding when it works and when it doesn't work: what are the risks inherent in using performance based contracting and what are the advantages?"¹⁰

⁸ KNOWnet, the Acquisition SuperSite,
<http://www.knownet.hhs.gov/acquisition/performdr/LAI/UnitOne/program.htm>

⁹ Memorandum from _____ to _____, *USDA Transports & Logistics*, (Aug. 19, 2003).

¹⁰ AAP Pub. Meeting (June 14, 2005) Tr. at 327

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Training and Support on PBSA Implementation

Since the 1991 OMB policy endorsing PBSA and the creation of PBSA targets in 2001, a loose knit PBSA support infrastructure has developed—albeit with widely varying levels of sophistication both across government and within agencies. Best practices have begun to appear in the form of performance-based centers of excellence (e.g. the U.S. Coast Guard), and the institutionalization of highly developed, team-oriented PBSA processes (e.g. the U.S. Air Force). In addition, training and support resources available to performance-based acquisition practitioners have also grown in number and accessibility.

OFPP's official PBSA guide, '*Seven Steps to Performance-Based Service Acquisition*' provides an organized methodology, breaking the PBSA acquisition process down into a logical sequence. OFPP's Seven Step support website¹¹ features an ever-growing body

of information, including detailed discussions of each of the seven steps, sample materials, best practice examples, links to relevant articles and agency guidelines, and an 'Ask the Expert' link. The ACE for Services website maintained by OMB also provides PBSA support. A significant virtual community has developed in recent years providing guidance and technical support to both agencies and private contractors seeking to take advantage of PBSA.

The Defense Acquisition University continues to deploy courses in areas important to PBSA, from general introductory classes to detailed case studies of PWS/SOO challenges in a 'mission-focused' contracting environment. An upcoming class will focus on planning, executing and assessing mission-focused service acquisitions in a team-oriented environment.

A number of private sector firms offer in-depth PBSA workshops. These firms offer training in PBSA methods to both government staff as well as private entities seeking to successfully engage with the government in a performance-based environment.

While current training and support resources are not insignificant, those who testified before the panel unanimously expressed support for more training – particularly cross-functional training where acquisition teams are expanded to include not only the contracting staff, but senior management, program management, the user community, quality assurance teams, and subject matter experts. For example, Barbara Kinosky from Centre Consulting pointed out to the Panel during her testimony, "When individuals without the proper training and experience attempt to implement a performance-based contract, the results are understandably and expectedly poor. The issue here is not that performance-based contracting doesn't work or is

Seven Steps to Performance-based service acquisition

1. Establish an integrated solutions team
2. Describe the problem that needs solving
3. Examine private sector and public sector solutions
4. Develop a performance work statement (PWS) or statement of objectives (SOO)
5. Decide how to measure and manage performance
6. Select the right contractor
7. Manage performance

¹¹ See http://www.acquisition.gov/comp/seven_steps/home.html. Additional information on the *Seven Steps to Performance-Based Contracting* is provided in Appendix One of this document.

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flawed as a concept, but rather there is trouble consistently implementing it by an inconsistently trained workforce.”¹²

Studies on PBSA Implementation

The panel sought out and reviewed reports and studies of PBSA implementation, with the goal of assessing implementation status and any data on benefits from the use of PBSA.

In a May 1998 study entitled *A Report on the Performance-Based Service Contracting Pilot Project*, OFPP cited specific cost and program gains. OFPP reviewed 26 different contracts from 15 agencies with a combined award value of \$585 million. The contracts ranged in value from \$100,000 to \$325 million. On average, as a result of the shift to PBC, contract price decreased by 15 percent. In addition, customer satisfaction improved over 18 percent, from 3.3 to 3.9 on a scale of 1 to 5. The report cited other benefits as well. For example, the number of offers increased from 5.3 to 7.3 when PBC was introduced and the total number of contract audits decreased 93 percent.

It is important to note, however, that the OFPP study found the average total procurement lead time increased by 38 days, from 237 to 275. Since agencies had significant leeway in identifying which contracts to include, the study cannot be considered definitive. However, it is the best systematic evaluation of this issue available. Unfortunately there is no more recent analysis that attempts to examine and document this type of information from a cross agency perspective. And other reviews have called into question the likely savings purported to be achieved through PBSA.

In September 2002, the GAO released a study of a small sample of contracts that were identified by the agencies involved as performance-based service contracts. Notwithstanding the agency identification of the contracts as embodying PBC, GAO concluded that there was a wide range in the degree to which these contracts in fact exhibited the characteristics of PBSA. For this reason, GAO concluded that the study “raise[s] concern as to whether agencies have a good understanding of performance-based contracting and how to take full advantage of it.”¹³

The GAO in its analysis reviewed 25 contracts designated as performance-based by the Department of Defense, the Department of Treasury, Department of Energy, the National Aeronautics and Space Administration (NASA) and the General Services Administration (GSA). Although most contracts exhibited at least one performance-based attribute, only nine possessed all of the required elements. Moreover, the GAO found that many of the contracts contained extremely restrictive work specifications. The problem is not as simple as agency resistance to a clear mandate. In roughly half the cases with incomplete adherence to the elements of PBSA, GAO identified a recurring pattern; the contracts entailed “unique and complex services” which

¹² AAP Pub. Meeting (July 12, 2005) Tr. at 140.

¹³ U.S. GAO, *Contract Management: Guidance Needed for Using Performance-Based Service Contracting*, GAO-02-1049, 2 (2002).

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entailed such significant “safety, cost and/or technical risks” that the agencies “*appropriately*” concluded that they needed to be more “prescriptive” as to how the work was to be done, and exercise more oversight as to methods for achievement of objectives.¹⁴

This raises questions as to both the proper definition of performance-based service acquisition, and the proper scope of contracting that is subject to the mandate to employ performance-based acquisition. And, it raises a specific question about the use of performance-based methods to the greatest extent appropriate in cases where there may be legitimate constraints on complete adherence to the performance-based model.

The GAO’s findings were echoed by a 2002 study of the U.S. Air Force Air Logistics and Product Centers experiences with PBSA conducted by the Rand Corporation.¹⁵ The review found that many service contracts do, in fact, incorporate performance-based practices currently being promoted in government. However, the study identified uncertainty over which services are suitable for purchase via PBSA, confusion with SOW/SOO semantics, and reservations about what constitutes measurable performance standards.¹⁶

Of the studies available, the most recent is a September 2005 GAO review of Performance-Based Logistics Contracting¹⁷ In the review, GAO found that the Defense Department failed to verify that actual cost savings were achieved in fourteen out of fifteen of performance-based logistic contracts. Moreover, in the one contract where actual cost results were assessed, there proved to be no savings from employing performance-based techniques.

Testimony Taken by the Panel on PBSA Implementation

The Panel scheduled numerous witnesses on PBSA implementation throughout its public hearing process. Several issues related to the implementation of PBSA were raised in testimony, including the following:

Requirements Definition: Tim Beyland, U.S. Air Force Director, Plans and Integration, Deputy Chief of Staff, Personnel, commented in testimony to the Panel that, “. . .The problem with performance based services acquisition is our inability to write good requirements documents.”¹⁸ In response to questions, Director Beyland discussed his organization’s current practices for addressing the difficulty in capturing requirements: “[We] build our own acquisition team and all the people that will be affected by this services acquisition, pre-award and post-award, and we start building it. We do a lot of stuff by the internet. [We] now have several people on the team that we consider as close as we’ve got to experts on how to write

¹⁴ *Id.* at 2, 7.

¹⁵ John Ausink *et al*, *Implementing Performance-based service acquisition: Perspectives from an Air Logistics Center and a Product Center*, (The Rand Corp..2002).

¹⁶ *Id.* at 43-44.

¹⁷ U.S. GAO, *Defense Management: DOD Needs to Demonstrate That Performance-Based Logistics Contracts Are Achieving Expected Benefits*, GAO-05-966 (2005).

¹⁸ AAP Pub. Meeting (Oct. 27, 2005) Tr. at 82.

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performance based requirements documents, and sometimes, we'll just keep rewriting them and rewriting them until we think we've got them right. We post them. We have industry days. We send them out to industry and say tell us what you think."¹⁹

Market Research: Panel witness Ronne Rogin, of Acquisition Solutions, Inc. attributed the problem in part to contracting agencies' failure to conduct sufficient market research. "[B]efore they write their statement of objectives or performance work statement, they're not really going out to industry and talking to the practitioners to find out what is the market doing, where is the market going.... [O]nce agencies start to do that, first of all, that opens up the line of communications with the vendor community, which is excellent, but it also helps the agency shape their requirement so that it's not slanted towards what the agency has always done in the past or slant it in any other direction."²⁰

Performance Measurement: With regard to measuring outcomes, in the September 2005 issue of *Contract Management*, Jeffrey A. Renshaw discussed Quality Assurance Surveillance Plans, in his article "Quality Assurance versus Quality Control." The article points out that, even when attempting to complete the QASP, there can be confusion between the government's role in monitoring the contractor's performance and the need for an internal contractor quality assurance program to ensure the integrity of the contractor's processes. Mr. Renshaw's sentiments were echoed in comments made by many government and private sector individuals speaking to the panel. His insights regarding QASP confusion are also relevant to the questions of what performance measures to use, and what incentives to adopt.

The U.S. Air Force's Tim Beyland testified that it isn't just knowing how to write metrics and measures, but also having the skill sets to assess and measure them. "The contracting officer or the procurement specialist or the acquisition specialist is not your quality assurance specialist.... I can't tell you how many times I've had a quality assurance person come to me and say I do not know how to measure performance based. He says, when I had a firm requirement that said you will go out and cut the grass every Thursday, and it will be 2.5 inches tall to 3.5 inches tall, and it will be nicely trimmed and there will be no clippings left, I could go out and measure that. When you tell me to go out and measure whether the grass looks nice, I don't know what to do.There is a big gap between the acquisition community and the people who use these services."²¹

Contract Monitoring and Management: Panel witness Linda Dearing, Chief of General Contracts Division for the U.S. Coast Guard, agreed that there is a disconnect between pre- and post-award activities. "With the workload that we have right now, with all the requirements that we have, the focus is primarily on the pre-award and so that always takes

¹⁹ *Id.* at 108.

²⁰ AAP Pub. Meeting (July 12, 2005) Tr. at 137.

²¹ AAP Pub. Meeting (Oct. 27, 2005) Tr. at 78.

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precedence over getting the money obligated versus the performance side of it. It's always a challenge."²²

Another performance monitoring issue Chief Dearing highlighted is the lack of funding to support incentives for contractors delivering exceptional performance. Lack of funding can lead to a reliance on disincentives and penalties, with little or no financial recognition for reaching desired outcomes. During her testimony, Chief Dearing pointed out that a lack of funding frequently drives organizations to rely solely on penalties in a manner that is "inconsistent with what we're trying to achieve." One outcome for contractors facing disincentives, she noted, is that they increase their costs to cover the potential losses, "and it's difficult to negotiate those."²³

Selecting a Limited Set of Measures: Barbara Kinosky of Centre Consulting Group and Centre Law Group believes Federal agencies measure too many things. In testimony before the panel, Ms. Kinosky reported, "The government needs to learn not to create overly burdensome surveillance plans that will ultimately create a bureaucracy of contractors, monitoring contractors, monitoring contractors for compliance, only evaluate what is necessary to accurately measure success."²⁴

Robert Zahler, a partner at Pillsbury, Winthrop, Shaw, and Pittman told the Panel the problem of identifying the right number and level of measures is not just a problem for Federal agencies. His private sector clients also grapple with performance metrics. "People tend to measure too many things at too low a level. It serves no purpose. Our clients universally tell us – universally the suppliers meet every service level, yet my end-users say the service stinks. And the reason is because they're not measuring what the end-user sees as the relationship: the end-to-end result. To be able to measure the end-to-end result – not easy. ...But to be able to do it, you have to give the [contractor] some end-to-end responsibility."²⁵

Impact of the Agency Centers of Excellence: This does not mean that all agencies are stumbling with regard to either requirements or performance monitoring. In fact, centers of excellence exist throughout government. The United States Coast Guard, for example, has established a Customer Advocacy and Assistance Team to assist other Coast Guard contracting offices in crafting PWS/SOOs. This centralized office sustains a high degree of expertise and, according to Brian Jones, the team's Chief, has created more than 400 performance work statements. While the Coast Guard has not tracked the organization's impact on overall effectiveness or efficiency, they do conduct customer satisfaction and employee satisfaction surveys. The surveys report strong satisfaction, Mr. Jones reports, "They've been pretty

²² AAP Pub. Meeting (July 12, 2005) Tr. at 197.

²³ *Id.* at 153-54.

²⁴ *Id.* at 144.

²⁵ AAP Pub. Meeting (Apr. 19, 2005) Tr. at 25..

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consistently in the eighties. That's an indicator that our programs are much happier with the job that contracting is doing in getting them what they require."²⁶

Another example is found at NASA. As early as the fall of 2000, an internal review assessing PBSA implementation reported that, "all NASA centers were found to have the ability to clearly articulate performance requirements, and have made great improvements in developing performance standards. Clear linkages between contractor performance, NASA surveillance, and contractor awards were also observed in multiple contracts."²⁷ The team also noted that best practices in PBSA were observed at every NASA center.

Cultural Change and Resistance: At the same time, the NASA report raises the issue of cultural impediments to PBSA implementation, including an uncertainty as to how risk is managed in a performance-based environment. This was evidenced by reluctance throughout the organization to adopt PBSA and a hesitance to abandon models where NASA maintains a significant amount of management control over contractor activities and personnel.

Cultural impediments were reported by multiple sources. In some cases it appears to be a result of internal pressures to quickly achieve contract award combined with the expectation that PBSAs will take longer and require more resources than other contracts. Written testimony received by the Panel from a multi-association industry group acknowledged this struggle. "While culture encourages the "Get to Award" mentality, the process is also constrained by time and people resources to do the upfront work. To lead a cultural change, senior leadership needs to support the efforts and show commitment by providing additional staffing and scheduling time in procurement planning for market research."²⁸

Linda Dearing testified regarding the importance the Coast Guard's strong top-down management direction to its success with performance-based initiatives. "Until that was actually directed by our top management, it wasn't going to happen. There was resistance by the contracting officer and there was resistance by the program people because they didn't want to relinquish control of the work statement, even though someone was going to write it for them and the [contracting officer] was somewhat threatened by it. Not to mention the contracting staff had to give up billets to support the technical writers, and there was still some resistance there for that."²⁹

Witnesses reported a disconnect among the functional organizations of the larger acquisition workforce. Ronnie Rogan discussed her experience in classrooms: "I've taught many classes where it's all contracting people and they say, oh man, we'd love to do this, but our program people will never go for it. Now I teach a class of all program people and they say,

²⁶ AAP Pub. Meeting (July 12, 2005) Tr. at 203-06..

²⁷ Office of Procurement, NASA Headquarters, *NASA-wide Performance Based Contracting (PBC) Assessment: Final Report* (2002).

²⁸ Test. of Multi-Association, AAP Pub. Meeting (Jan. 31, 2006) Tr. at 4..

²⁹ AAP Pub. Meeting (July 12, 2005).Tr. at 152.

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well, this sounds fabulous, but my contracting officer will never do this. Then thirdly, boy, great ideas, but our general counsel will never let this happen. We need to get those people together in a room and make sure everybody's on the same page. Until that happens, we're not going to see a lot of changes."³⁰

Private sector experience and transformational change

The Panel received compelling testimony on current contracting practices in the private sector, where PBSA is being used to achieve transformational business process change. Private sector practitioners chiefly discussed functional outsourcing (e.g. an entire corporate Human Resources function). Several witnesses emphasized the importance of an organization identifying and understanding its high-level strategic objectives. Those objectives support the definition of program outcomes. Witnesses stressed that, in order to be successful in achieving strategic goals, entities must let go of current and past practices to make room for fundamental change.

Mr Robert Zahler, testified that, "Too much time is spent focusing on the inputs to these processes, and not enough time on the outputs: what do you want from the result? ...Classic RFPs in my industry – and I think probably in the Federal side, also – spend enormously too much time documenting historical facts: what did we do, how did we do it, what did it cost. They have some high-level stuff of maybe what they want in the future, but all too little of that. Rather, the RFP should say, "Here are my objectives. Here are my requirements. Here's how I want to interrelate with you. Come back and give me a solution."³¹

Mr. Michael Bridges, an attorney with General Motors (GM), said they even go as far as trying to keep current practitioners out of the procurement process. The purpose is two fold: 1) to give competitors freedom to suggest a broad range of end-to-end solutions and, 2) to ensure the selected supplier has authority in the day-to-day management of new systems and processes. "We have attempted to avoid the *how* of contracting. Very much back to our model: we are not the experts. We expect the integrators who come into GM and want to bid on major services projects to bring that expertise. You know, with the 2,000 egos ... we try to keep them out of that process and let our suppliers provide that expertise. So to the point that was made a moment ago, the *how* is left to the suppliers as much as possible, and we feel that the best way to do that is to stay out of the day-to-day management. Bid at a high level in terms of high level, firm fixed price requirements and turn the suppliers loose to deliver the value that they feel they need to deliver to get that done and innovate to add to margin."³²

Todd Furniss, Chief Operating Officer of the Everest Group, also emphasized the need to move beyond current practices. "So you can see that if you're focused on the myopic, you can actually do something quite counterproductive to corporate objectives. In fact, one of the terms

³⁰ *Id.* at 178.

³¹ AAP Pub. Meeting (Apr. 19, 2005) Tr. at 28..

³² AAP Pub. Meeting (Aug. 15, 2005) Tr. at 158. .

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that's frequently used...is your mess for less, okay? You're not focused on changing much; you're just talking about doing it less expensively."³³ The opposite of which, he explains, is transformational change. Instead of duplicating functions previously performed by corporate resources, suppliers focus on "changing more and offering more feature function benefit with a different set of economic alignments in the interest of driving the business forward at the organizational level."³⁴

Commercial practitioners also emphasized the need to avoid prescriptive behaviors on the part of both buyers and suppliers that could limit the opportunity to achieve value. Todd Furniss noted that in his firm's experience, "...we do find that all buyers and all suppliers are, in fact, different. Now, if all buyers and all suppliers are different, then, it begs the question why, in fact, would you have a standard approach to a buyer's problem, and second, why would you dictate the solution to the suppliers who are bidding on it? Inevitably, someone is going to have to do something unnatural. And it seems to follow to us to be something that is decidedly overlooked in the procurement process generally across the industry. So what that means is there necessarily may be a number of optimal, quote, optimal solutions for a particular problem."³⁵

C. PBSA Regulatory Guidance and Recent Efforts to Improve the FAR's PBSA Provisions

Reflecting many of the implementation challenges described in Section C, in July 2003 an Interagency Task Force on Performance-Based Service Acquisition established by OFPP issued a report designed to make recommendations for amendments to the FAR to address observed problems in implementing the mandate for performance-based service acquisition.³⁶

The following table summarizes the recommendations developed by the Interagency Group and highlights their status while the narrative below addresses the proposed FAR changes in further detail.

³³ AAP Pub. Meeting (Mar. 30, 2005) Tr. at 132..

³⁴ *Id.*

³⁵ Test. of Todd Furniss, Everest Group, AAP Pub. Meeting (DATE) Tr. at ___.

³⁶ Interagency Task Force on Performance-Based Service Acquisition, OFPP, *Performance-Based Service Acquisition: Contracting for the Future* (2003).

Status of OFPP Implementation Recommendations

Recommendation	Implementation Status
1. Modify the FAR Part 2 to include definitions for: 1) performance work statement, 2) quality assurance surveillance plan, 3) statement of objectives, and 4) statement of work to support changes to Part 37. Modify FAR Parts 11 and 37 to broaden the scope of PBSA and give agencies more flexibility in applying PBSA to contracts and orders of varying complexity.	Partially Addressed in February 2, 2006 Final Rule
2. Modify the list of eligible service codes for PBSA, as articulated in the Federal Procurement Data System (FPDS) or FPDS B Next Generation (FPDS-NG) manual, to more accurately reflect services to which PBSA can be applied.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
3. Revise FPDS instructions to ensure agencies code contracts and orders as PBSA if more than 50 percent of the requirement is performance based, as opposed to the current 80 percent requirement.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
4. Allow agencies that do not input data to FPDS to submit supplemental reports in order to accurately reflect their progress toward meeting goals.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
5. Consider allowing agencies to establish interim goals but expect agencies to apply PBSA to 50 percent of their eligible service contracts (see recommendation 2 above) by 2005, in line with DOD policy.	Original target of 50% changed to 40% by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
6. OFPP should rescind its 1998 Best Practices Guide and consider developing web-based guidance to assist agencies in implementing PBSA. This guidance should be kept current and should include practical information, such as samples and templates that agencies would find useful. The website should include "The Seven-Steps to Performance-Based Service Acquisition Guide" and may include elements of existing guidance. The working group will explore the development of a web-based PBSA site for guidance, samples, and templates.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."

On July 21, 2004, the Civilian and Defense FAR Councils proposed amendments to the FAR to implement many, but not all of the Interagency Task Force recommendations.³⁷ The general thrust of the proposed FAR amendments was to give federal agencies more flexibility so as to encourage its consistent use where appropriate.

³⁷ 69 Fed. Reg. 43712 (July 21, 2004).

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In the definitional provisions, the proposed FAR changes would recast the definition of performance-based contracting presently found in FAR 2.101 to a definition of performance-based acquisition.

The Federal Acquisition Regulation includes a general definition of performance-based contracting (FAR 2.101), a conditional mandate for use of performance-based contracting (FAR 37.102), and more concrete guidance as to the mechanics of performance-based acquisition (FAR 37.601). As published in the January 3, 2006 edition of the Federal Register, FAR 37.6 was revised to reflect a Final Rule prescribing policies and procedures for acquiring services using performance-based acquisition methods. This new rule went into effect on February 2, 2006.

FAR 2.101 defines the category of performance-based acquisition as follows:

"Performance-based acquisition (PBA)' means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed."

The final rule implementing FAR 37.602 further elaborates on how PBSA is to be applied, as follows:

Agencies shall, to the maximum extent practicable— (1) Describe the work in terms of the required results rather than either "how" the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101); (2) Enable assessment of work performance against measurable performance standards; (3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

The definitional provisions of the FAR would also be supplemented by introducing definitions of "Performance Work Statement" (PWS) and "Statement of Objectives" (SOO) as follows:

Performance Work Statement (PWS) means a statement that identifies the agency's requirements in clear, specific and objective terms that describe technical, functional and performance characteristics.

Statement of Objectives (SOO) means a statement that identifies the agency's high-level requirements by summarizing key agency objectives, desired outcomes, or both.

- The relationship contemplated appears to be that the Performance Work Statement is considered to be the more detailed and

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objective statement of agency requirements, while the Statement of Objectives may be drawn at a higher level of generality. The major distinction made in the Final rule is that if the agency drafts a statement of objectives then the contractor will prepare the performance work statement to respond to the agency request. The Final Rule also makes it clear that the SOO does not become part of the contract.

- As defined, the Statement of Objectives does not insist on complete specification in objective terms of the results desired from contract performance.

Although the Interagency Task Force had recommended an amendment to FAR 37.102 to add term type contracts to the list of exclusions from the mandate for use of performance-based contracting techniques where practicable, that recommendation did not appear in the proposed FAR revisions nor in the Final Rule.³⁸

The proposal to amend the FAR provisions applicable to performance-based service acquisition also addressed performance standards and quality assurance surveillance plans. The proposed revisions would have provided the following:

(2) Measurable performance standards. These standards may be objective (e.g., response time) or subjective (e.g., customer satisfaction), but shall reflect the level of service required by the Government to meet mission objectives. Standards shall enable assessment of contractor performance to determine whether performance objectives and/or desired outcomes are being met.

(d) PBSA contracts or orders may include performance incentives to promote contractor achievement of the desired outcomes and/or performance objectives articulated in the contract or order. Performance incentives may be of any type, including positive, negative, monetary, or non-monetary. Performance incentives, if used, shall correspond to the performance standards set forth in the contract or order.

The provisions in the final rule however failed to provide the same level of detail as that offered above. The February 2, 2006 provisions read as follows:

37.603 Performance standards. (a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable

³⁸ Compare 69 Fed. Reg. at 43712, with Interagency Task Force on Performance-Based Service Acquisition at 3.

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and structured to permit an assessment of the contractor's performance. (b) When offerors propose performance standards in response to a SOO, agencies shall evaluate the proposed standards to determine if they meet agency needs.³⁹

One additional feature of the proposed FAR revisions that should be mentioned here is the proposed revisions to FAR 37.602-2, governing quality assurance. The proposed language would:

- First, make clear the commonsense proposition that the level of quality assurance surveillance should be appropriate to the dollar value risk and complexity of the particular acquisition.
- Second, the proposed language would expressly introduce the philosophy of adherence to commercial practices, which would have to be followed, "to the maximum extent practicable" in framing quality assurance mechanisms
- Third, the proposal would make explicit that, in the case of some simplified acquisitions, no special quality assurance surveillance plan, beyond that inherent in the inspection provisions of the contract, is required.

The final rule basically deletes all of these provisions, referring only to the general provisions of FAR Subpart 46.4 as follows:

37.604 Quality assurance surveillance plans. Requirements for quality assurance and quality assurance surveillance plans are in Subpart 46.4. The Government may either prepare the quality assurance surveillance plan or require the offerors to submit a proposed quality assurance surveillance plan for the Government's consideration in development of the Government's plan.⁴⁰

Finally, the proposed language of FAR 37.601 appears to make clear that the use of incentive payment provisions, whether positive or negative, is a discretionary, rather than a mandatory element of PBSA and this approach was adopted in the final rule. As such, this offers a significant degree of clarification of the existing language of the FAR.

Appendix Two provides both the basic provisions on how PBSA is to be applied as well as a comparison between the new language and the previously existing FAR Language.

³⁹ [INSERT CITE]

⁴⁰ [INSERT CITE]

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Most recently, in a July 21, 2006 memorandum to Chief Acquisition Officers and Senior Procurement Executives, Associate OFPP Administrator Robert A. Burton updated agencies on actions being taken regarding performance-based acquisitions and requested that agencies submit a performance-based acquisition plan back to OFPP by October 1, 2006. This plan should “describe the agency’s current and future PBA activities that will result in an annual increase in the number of PBA’s.”⁴¹

II. Statement of the Issue and Findings: Why has Performance based Services Acquisition not been Fully Implemented in the Federal Government?

The Panel has selected this question as its overall statement of issue. From prior reviews of PBSA’s implementation as well as testimony taken by the Panel, it is clear that implementation challenges hamper the full and effective implementation of PBSA and the complete realization of PBSA’s benefits to the taxpayer.

In April 2003, GAO reported, “According to our reviews, agencies may have missed opportunities to take advantage of the benefits offered by...performance based service contracting, because of inadequate guidance and training, a weak internal control environment, limited performance measures, and data that agencies can use to make informed decisions.”⁴² The more recent September 2005 GAO report on performance-based logistics raises additional questions about the savings potential associated with this contracting technique. It is the Panel’s general impression that little has changed since GAO published its 2003 report.

As described earlier in this report, there are various suppositions as to why PBSA has not been fully implemented. For instance, some suggest that the requirement is ill-conceived. Others have suggested that there has been a lack of commitment to implementing the requirement in the agencies. Still others suggest the problem is a lack of training and resources on when and how appropriately to use PBSA. In scheduling testimony and analyzing evidence the panel has looked at this issue bearing in mind each of these perspectives.

The following sections describe in detail the Panel’s findings on these and other factors that continue to hamper effective implementation of PBC acquisition techniques.

Finding 1: Despite OMB Target, Agencies Remain Unsure When to Use PBSA

As noted above, the FAR requires that agencies use PBSA “to the maximum extent practicable” with the exception of certain contracts dealing with architect and engineer services, construction, utility services, services incidental to supply purchases and then some additional

⁴¹ Burton Mem. at ___

⁴² U.S. GAO, *Federal Procurement: Spending and Workforce Trends*, GAO-03-443, 3 (2003). “According to our reviews, agencies may have missed opportunities to take advantage of the benefits offered by **these methods and other contracting approaches, such as** performance based service contracting, because of inadequate guidance and training, a weak internal control environment, limited performance measures, and data that agencies can use to make informed decisions.” *Id.*

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services identified by OFPP. While initially the focus was on relatively low level support services with straightforward metrics, PBSA techniques today are applied to a wide variety of contracts including professional support and information technology services. IT services in particular constitute a large portion of the federal government's services funding today and require sophisticated measures to account for contractor success in achieving agency business outcomes. The HHS website described above gives a sample of the breadth of coverage.

In spite of both the breadth of service offerings eligible to use performance-based techniques and OMB's requirement to pursue the approach, the Panel has heard from a number of commenters that there remains uncertainty on when and how to use performance-based contracting methods to acquire services. Ronne Rogin, points out that there is an issue in determining where performance-based contracting has the best fit. She states that in spite of the regulatory definition, not everyone understands the best application of it. Her comments are very similar to those cited earlier in various Government Accountability Office reports.

The Panel heard similar issues raised by government staff of various agencies attempting to put performance-based contracts in place as well as from various industry associations citing the same complaint. The Multi-Association Task Force's testimony to the panel noted that "agencies do not seem to understand how to define requirements, write SOW/SOO's, identify meaningful quality baselines and measures, identify effective incentives, and manage the contract and outcomes post-award."⁴³ The Procurement Round Table (PRT) in its Position Paper, "A Proposal for a New Approach to Performance-based service acquisition" raises a similar concern about the practicality of employing "clear, specific, objective and measurable terms "when future needs are not fully known or understood, requirements and priorities are expected to change during performance and the circumstances and conditions of performance are not reliably foreseeable."⁴⁴ The PRT proposes to limit PBSA usage to "common, routine, and relatively simple services."⁴⁵ They propose a quality based selection process similar to that followed by the Brooks Architecture and Engineer Act for acquiring "long-term and complex" services.⁴⁶

As noted above, the Final Rule on Performance-Based Acquisition published in the January 3, 2006 Federal Register and effective on February 2, 2006 makes a number of improvements to both the definition and to the implementation of PBSA to address some of these concerns. For example, the new rule stresses that the technique is not only a contracting effort, but also an agency management approach that requires the assistance of program officials as well as contracting staff for successful implementation. In that regard, the rule adopts the name "Performance-Based Acquisition," eliminating the word "Contracting" to buttress that point. In addition, it makes it clear that task orders as well as contracts may be performance-based and

⁴³ Multi-Ass'n Test. at ____.

⁴⁴ Procurement Round Table, *A Proposal for a New Approach to Performance-based service acquisition* ____ (DATE).

⁴⁵ *Id.* at ____.

⁴⁶ *Id.* at ____.

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suggests the use of either a Performance Work Statement (PWS) or a Statement of Objectives (SOO) approach for implementation. Under a SOO, the government identifies the performance objectives while the contractor rather than the government develops the PWS for government review and acceptance.

However, based on our findings and testimony, considerably more guidance is needed to assist agencies in determining when and how to apply PBSA techniques than is provided in the new rule. In July 2003 an Interagency Task Force on Performance-based service acquisition established by OFPP recommended a number of modifications to the FAR to address problems they observed in implementing this acquisition approach. They stressed one area in particular that the Panel believes requires further treatment than that offered in the new rule. Providing agencies more insight as to when to apply PBSA techniques and offering agencies more flexibility on usage would directly address the criticism that a one size fits all approach is not appropriate for this acquisition technique.

The GAO in particular in a number of its reviews has questioned both the capability of federal staff to effectively use PBSA techniques as well as the appropriateness of applying PBSA to some of the contracts they reviewed. The panel has heard a number of commenters who have similarly expressed reservations about the use of PBSA techniques. There is a lack of a systematic, rigorous effort by the government to document both how PBSA techniques are being used across the federal government as well as the benefits to be achieved through their use. While there are many indicators that suggest that real gains can be achieved in focusing on performance and business outcomes, better information on these results would certainly add more credibility to the strong management focus on PBSA.

Along these lines, the panel finds that current PBSA targets (40 percent of all services acquisitions must be performance-based, as noted previously) fail to acknowledge that performance-based contracting is not suitable for all service acquisitions. An unintended outcome of applying these targets may be that the number of PBSA designations increase when an agency is behind on targets (with little regard to the type of service being procured, or the applicability of performance-based techniques). While the panel recognizes that targets have value, they should be tailored to avoid unintended effects. The following table offers one way to address the question of how best to tailor PBSA methods to meet differing agency needs.

Degree of PBSA Implementation Difficulty by Contract Type

Type of Service	Current Contract Type	PBSA Implementation Difficulty Low/Moderate/High	Specific Challenges
Basic logistical and support services	Firm fixed price	Low	➤ None.
	CPIF or CPAF	Low	➤ None.
	CPFF or Time and Materials	Moderate	<ul style="list-style-type: none"> ➤ Overcoming reliance on buying hours in favor of developing performance standards. ➤ Linking performance to meaningful incentives/disincentives.
	Indefinite Quantity Contract (IQC)	Moderate	<ul style="list-style-type: none"> ➤ Developing relevant performance standards in advance of specific requirements.
Complex professional and technical services	Firm fixed price	Moderate	<ul style="list-style-type: none"> ➤ Establishing outcomes and performance standards attributable to the contractor's efforts.
	CPIF or CPAF	Moderate	<ul style="list-style-type: none"> ➤ Establishing outcomes and performance standards attributable to the contractor's efforts.
	CPFF or Time and Materials	High	<ul style="list-style-type: none"> ➤ Establishing outcomes and performance standards attributable to the contractor's efforts. ➤ Overcoming reliance on buying hours in favor of developing performance standards. ➤ Linking performance to meaningful incentives/disincentives.
	IQC	High	<ul style="list-style-type: none"> ➤ Establishing outcomes and performance standards attributable to the contractor's efforts. ➤ Developing relevant performance standards in advance of specific requirements.

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Finding 2: PBSA Solicitations and Contracts Continue to Focus on Activities and Processes, Rather than Performance and Results

By definition, Performance-based contracting should focus on results achieved, and not the effort or activities undertaken to deliver those results. Unfortunately, as noted previously the GAO's PBSA report⁴⁷ found that contracts billed as PBSAs tend to add a veneer of "performance measures" on top of lengthy, detailed statements of work.

There are three major drivers behind the focus on activity rather than performance in current PBSA contracts: 1) poor "needs" definition by government in acquisitions; 2) cultural preference in federal acquisition to dictate work activity; and 3) a difficulty with developing performance measures.

First, the federal government has done a poor job in defining its "needs" in clear and results-oriented terms in its solicitations. Clearly defining government's needs up front is not something the procurement community can do alone – program and financial elements within the government must also participate and contribute to clearly define outcomes of an acquisition. Creating high-level business objectives demands multiple stakeholder involvement and a joint and strategic understanding of where the agency wants to be, as well as where industry and technology are going. Agency users at all levels (procurement, administration, financial programs, audit) need to be educated to understand how PBSAs work and what they can and cannot do.

Second, from a cultural perspective, it has proved very difficult for agencies (not just procurement organizations but their client organizations as well) to let go of simpler traditional ways of writing contract specifications – telling vendors exactly what to do. Even when performance goals are used, detailed requirements can still slip in – if not in the PWS/SOO during the pre-award phase, then in performance measurement during contract performance. The buyer must be willing release control over the vendor's day-to-day performance. To successfully manage an organization into an objective-driven performance approach requires a daunting cultural shift away from business as usual.

In some cases, a "risk adverse" culture limits the level of results-oriented focus in a PBSA contract. In roughly half the cases in which GAO found incomplete adherence to the elements of PBSA, GAO identified a recurring pattern: the contracts entailed "unique and complex services" which entailed such significant "safety, cost and/or technical risks" that the agencies "*appropriately*" concluded that they needed to be more "prescriptive" as to how the work was to be done, and exercise more oversight as to methods for achievement of objectives.⁴⁸

Third, determining clear, results-oriented performance measures to include in contracts is also a challenge. Some contracts contain performance measures focused on activities and work

⁴⁷ GAO-02-1049.

⁴⁸ *Id.* at 2, 7.

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processes, rather than results or impact to the agency from the work performed. In other cases, contracts have too many performance measures attached to them—imposing a significant data collection and reporting burden.

In his testimony to the Panel, Brian Jones of the United States Coast Guard discussed his experience with developing measures, “People have a hard time doing that. I’ve been working in measurement and analysis for 15 years and the thing I find is people will sit there and they’ll try to measure everything. They’ll come up with 25 measures, which is, I think, is the wrong approach. We take a very simple approach, as few measures as possible, the ones that are really critical to your success.”

Finding 3: PBSA’s Potential for Generating Transformational Solutions to Agency Challenges Remains Largely Untapped

While in theory PBSA offers great potential for allowing for transformational solutions to the federal government’s needs, current implementation of PBSA has not fully delivered on this promised benefit. This is largely driven by the focus on activities and work processes outlined in Finding #2. However, it is also grounded in a lack of market research and understanding by government of what innovative solutions are available to their needs.

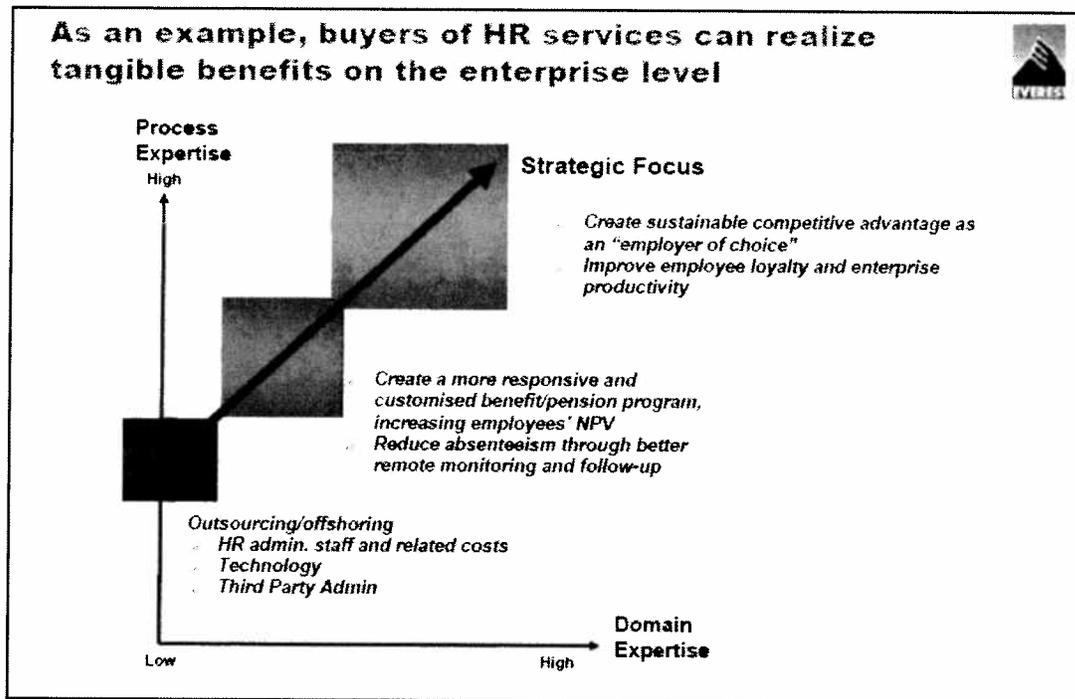
The Panel notes that enhanced examination of public- and private-sector solutions is part of the PBSA “Seven Steps” implementation approach. PBSA has resulted in increased market research in federal acquisitions. Witnesses before the Panel reinforced this point.⁴⁹

Todd Furniss of the Everest Group illustrated with a graphic, the consequences of focusing on existing work processes rather than clearly defining agency’s needs/performance outcomes. In discussing the graphic below, Furniss noted: “So you can see that if you’re focused on the myopic, you can actually do something quite counterproductive to corporate objectives. In fact, one of the terms that’s frequently used in... the lower left [red square] is your mess for less. Here you’re not focused on changing much; you’re just talking about doing it less expensively. And the term that tends to be used in the upper right hand corner [green square] tends to be transformational in nature, meaning that the suppliers are focused on changing more and offering more feature function benefit with a different set of economic alignments in the interest of driving the business forward at the organizational level.”⁵⁰

⁴⁹ “[O]ne thing that agencies are not doing well is market research, as intended in FAR Part 10. ...[B]efore they write their statement of objectives or performance work statement, they’re not really going out to industry and talking to the practitioners to find out what is the market doing, where is the market going, where is the technology going, if you were us, how would you do that, that just very basic question. [O]nce agencies start to do that, first of all, that opens up the line of communications with the vendor community, which is excellent, but it also helps the agency shape their requirement so that it’s not slanted towards what the agency has always done in the past or slant it in any other direction.”

Rogin Test. at 137.

⁵⁰ Furniss Test. at 132.



The Panel is concerned that there may be a tendency of contractors to not be open to a broader set of responses outside the government’s original statement of work. Contractors are fearful of losing the bid if they do not mimic the statement of work closely 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.

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.

Finding 4: Within Federal Acquisition Functions, There Still Exists a Cultural Emphasis on “Getting to Award.”

Many witnesses reinforced the notion that PBSA is a process that requires a significant preliminary effort to clarify agency needs, engage in innovative solutions development, and craft the right measures and incentives. This increased up-front investment of time, training and resources flies in contrast to the traditional culture of most acquisition shops under significant pressure from internal clients to get contracts awarded quickly. Client demand is exacerbated by

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an under-resourcing in today's Federal acquisition workforce. In many organizations, the personnel and skill sets required to undertake the up-front research and planning simply do not exist. Chip Mather, from Acquisition Solutions met with the PBC working group. In our discussion, Mr. Mather expressed his experience that the focus of most federal contracting shops is on "getting to award, over the process of due diligence."

The upfront investments required to produce a successful PBSA make it an impractical technique for certain contracts. For example, a lengthy RFI-RFP process is not suitable for a contract with a duration of only twenty-four months. A certain degree of flexibility is required for Federal program and acquisition teams to determine whether PBSA is appropriate.

Finding 5: Post-Award Contract Performance Monitoring and Management Needs to Be Improved

Performance-based contracting does not end with the award of the contract; it is an ongoing process of monitoring and managing existing contracts for improved performance. Multiple witnesses expressed concern that the government does not adequately collect performance information for individual contracts, let alone review and provide ongoing feedback and corrective action on vendor performance. Moreover, as we have seen from various GAO reviews previously cited, there is not a systematic effort to identify the real cost savings that can result from adopting performance-based procedures. It is difficult to put the time and effort into developing these kinds of acquisition approaches when the benefits can be so easily questioned.

Reviews of selected contracts conducted by the Panel have revealed that contracts asserted to be performance-based often lack one or more of the key elements included in the Federal Acquisition Guidelines for determining whether or not a contract meets the FAR requirements. This finding is very much in line with the GAO criticisms noted earlier. For example, while contracts may contain useful measures by which to assess successful performance, they often lack a Quality Assurance Surveillance Plan (QASP) that is integral to qualifying the effort as performance-based.

Furthermore, neither the metadata nor the processes exist to track lessons learned, or capture successes. As another witness noted, "there's no means to track whether we're successful in [our measuring] or whether we're getting the objectives that we're putting on paper, so we need to get better in that area."⁵¹

It is important to note that this challenge is not limited to the Federal contracting environment. It is also also evident in the private-sector's use of performance contracting. Robert Miller from Procter and Gamble testified that "In reality, over a five to seven year term, or as people start to put a contract in place, what you sometimes find out is that the folks actually on the front line managing the interface don't often check the contract as they go through; sometimes, the deal is put on the shelf and largely forgotten, and actually, the vendors like to

⁵¹ Test. Of Linda Dearing, U.S. Coast Guard, AAP Pub. Meeting (July 12, 2005) Tr. at 154.

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encourage this. That gives them more flexibility. Often, some of the people who are involved in managing the project were not involved in the negotiation of the transaction. They may not have a full knowledge of the contract. As events unfold, where there are departures from the agreement, sometimes, those aren't recognized by the people in the front line. Life being what it is, not everything is anticipated; even the best lawyers and people who work in the area substantively are not going to be able to anticipate everything, and so, there are going to be modifications, and sometimes, those just get executed. They're not in the agreements. There are often tools for monitoring the agreements that sometimes are not really utilized to the fullest by the people managing the arrangement."⁵²

Vernon Edwards and the late John Cibinic point out in an April 2005 report entitled "Procurement Management, A Chance to Fix Performance-Based Contracting" the difficulties in specifying the level of services that might be required from a contractor, particularly if a long term contract is at issue. It is hard to specify objectives in "clear, specific and objectively measurable terms at the outset, ex ante."⁵³ They recommend more flexibility be afforded to the project team on setting measures while continuing to hold the contractor accountable for results. Under any circumstances, it is critical that the government and the contractor be clear on the outcomes to be achieved and the means by which the government will monitor and evaluate the contractor's level of success in achieving its business objectives. As noted above there appears to be some confusion on exactly what the role of the Quality Assurance Surveillance Plan or QASP should play. It is not the contractor's internal quality control system. This distinction needs to be made clear.

In addition, this confusion can lead to a failure of the government to emphasize how it will measure performance as it is developing its Statement of Objectives or Performance Work Statement. This issue comes to play both in the early stages of developing the measurement approach as well as the later requirements for the government to actually follow through on its contract management/contract administration responsibilities. A number of reviewers have commented on the intense pressures on contracting staff to focus on getting contracts out, as noted in Finding 4. If the government fails to follow through on assessing the contractor's level of success, then clearly there is little benefit from taking the extra up front time to lay out a strong performance-based contracting approach. Having adequate staff to perform the contract administration role and ensuring they are adequately trained to effectively assess performance are two measures that would seem to be important in ensuring successful results.

Finding 6: Available Data Suggest that Contract Incentives Are Still Not Aligned to Maximize Performance and Continuous Improvement

An important element of PBSA is the use of incentives, both financial and non-financial, to promote improved results both agencies and the taxpayer expect. Many PBSA vehicles rely

⁵² Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (DATE) Tr. at ___.

⁵³ Vernon Edwards & John Cibinic, *Procurement Management, A Chance to Fix Performance-Based Contracting* (2005).

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on fixed price approaches to provide contractors incentives to improve efficiency. Nevertheless, many other avenues to provide incentives exist. In many cases, incentives are not fully aligned to encourage continuous improvement or innovation by the contractors for the government.

Barbara Kinosky of the Centre Consulting and the Federal Consulting Institute, commented to the panel, “[W]hen acquisition professionals are working from limited templates, and using only financial penalties and disincentives to enforce the quality assurance surveillance plan, then that risk is understandably going to be priced by the contractor and included in the contract price. An adequate library and resource center will enable the acquisition team to think in terms of alternative approaches, such as the exercise of an option year as an incentive, rather than just disincentives. This approach will ultimately save the government money because it reduces the risk to the contractor.”⁵⁴

Brian Jones of the United States Coast Guard testified, “[O]ne of the challenges that we face is the incentives and the disincentives, and when we get to that part of it, it’s very challenging because we don’t have any additional funding for incentives, so it ends up being, you know, putting those disincentives out there and sometimes they’re just--they are inconsistent with what it is that we’re trying to achieve. For instance, ...we just had a failure on a contract, almost a failure. We almost went into termination. It was an IT contract. It was so ridiculous. [T]here was \$500 per hour [fine for] downtime and it’s down for weeks. It just didn’t make sense.”⁵⁵

The Panel recognizes the difficulties agencies face in getting ‘extra’ money allotted to reward contractor performance. A number of agencies have used “award term” contracts as a way to deal with this issue. This innovative approach allows superior contractor performance to be rewarded through contract term extensions as opposed to extra money. As the government and vendor community gain PBSA experience, the panel anticipates other pioneering incentive methodologies will be put in to practice. Performance incentives must be simple, clearly articulated, understood by all parties, and encourage overall program success. No one benefits from reward systems that result in burdensome processes or encourage the wrong things, or worse, perverse incentives that work to save the government money by promoting contractor failure.

Initially many agencies relied basically on “deduction schedules” as ways to tie incentives – really disincentives – to contractor performance. Rather than focusing on rewarding contractors for achieving business outcomes, deduction schedules emphasize the negative consequences of failure to perform. The panel believes that positive incentives can be effectively used to promote superior results. It is important however that the project team explicitly acknowledge the business benefits to be achieved through use of the incentives. And then, if the results are obtained, the incentives should be willingly paid.

⁵⁴ Test. of Barbara Kinosky, Centre Consulting & Federal Consulting Institute, AAP Pub. Meeting (DATE) Tr. at _____.

⁵⁵ Test. of Brian Jones, U.S. Coast Guard, AAP Pub. Meeting (DATE) Tr. at ____.

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Finding 7: FPDS Data Are Insufficient and Perhaps Misleading Regarding Use and Success of PBSA

As noted previously there have been few efforts to document the use and benefits of performance-based contracting methods in a systematic fashion. The 1998 OFPP study cited earlier offers some information on PBSA benefits but that is now considerably out of date. In addition, reviews of contracts described as performance-based have raised questions about whether all performance-based elements as noted in the FAR definition were in fact being used. A number of GAO studies moreover have called into question the cost and performance benefits purportedly achieved through performance-based techniques. Clear data on both usage and effects are needed to address fully the benefits and provide agencies and OFPP a stronger basis for continuing to promote its use.

Panel-Initiated Review of Selected Federal Contracts

To further test the conclusions on usage provided by the ad hoc studies available, the Panel initiated its own review of agency PBSA contracts with a goal of making its own determination of how effectively the PBSA methodology has been applied.

Based on a Federal Procurement Data System –Next Generation (FPDS-NG) report on fiscal year 2004 transactions coded as performance-based, the Panel selected orders and contracts from the top ten contracting agencies. A total of 80 orders or contracts were selected randomly using the following general guidelines:

1. Actions reported in excess of \$20 Million, where possible
2. Actions falling generally within the service codes of management and professional or Information Technology (IT) to allow for comparisons

The Office of Federal Procurement Policy (OFPP) requested the pertinent documentation for a total of 80 orders and contracts in a memo dated March 17, 2006 to the following agencies:

- Department of Defense
- Department of Agriculture
- Department of Energy
- General Services Administration
- Health and Human Services
- Department of Homeland Security
- Department of Interior
- Department of Justice
- National Aeronautics and Space Administration
- Department of Veteran's Affairs

Due to various circumstances and mutual agreement to remove several contracts from the request, an actual total of 76 orders and contracts were requested. The Panel received and reviewed 64 of the 76 requested transactions. Nine of the 64 were missing documentation

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necessary to complete the assessment, and although the Panel staff had initiated a follow up request for information, none was received. Therefore, the following analysis is based on a total of 55 reviewed orders and contracts submitted by 10 agencies or 72% of the sample.⁵⁶ All agencies responded.

The review evaluated requirements, metrics and standards, surveillance plans, and the inclusion of any incentives. Similar to the findings in the September 2002 GAO study, the Panel-initiated review found a range in the degree to which the contracts exhibited PBSA characteristics. A total of 36%⁵⁷ of the contracts reviewed to date contain the elements of a PBSA. Another 22% required significant improvement in one or more of the elements characteristic of a PBSA.

Of the orders and contracts coded as performance-based in FPDS-NG and reviewed, 42% were clearly not performance-based. This assessment often came directly from the agency in responding to the request. One agency response noted “You may include all contracts referenced under Paragraph B and C as NOT PBSA (4 Total).” Another agency stated “Reviewed: determined not to be performance based.” And yet another agency said they had researched a particular contract finding that “It is not a PBSA contract. The 279 was erroneously coded in the FPDS-NG system at the time of initial award. I have corrected all of the 279s⁵⁸ to avoid any further misinformation.”⁵⁹

The largest weakness found, in those that required significant improvement in one or more elements of a PBSA, was in the metrics and standards. Although requirements were often stated as outcomes appropriately, some more prescriptive than others, the measures were not adequately linked to the specific outcome, and/or the quality attribute being measured was inadequate or insufficient (e.g. timeliness). Although timeliness is a valid attribute, it is insufficient as a stand alone performance measure, as any contract expectation is on-time delivery. It was clear throughout these orders and contracts that a performance-based approach was intended but the execution was lacking to some degree. The greatest success appears to be within the Information Technology (IT) Service Contracts where service level agreements (SLAs) define performance levels and objective measurements and standards.

Another repeating shortfall was in the Quality Assurance Surveillance Plan (QASP) area. There appears to be some confusion with respect to the difference between a QASP and a contractor submitted Quality Control Plan (QCP). In some cases, where a QCP was submitted by the contractor as a requirement of the contract, there was no correlating translation, QASP or otherwise, for government surveillance. It was often unclear as to how the performance data would be collected or monitored.

⁵⁶ Contracts other than requested or agreed to for substitution were not included herein.

⁵⁷ Percentages rounded.

⁵⁸ Refers to the Standard Form 279 used for reporting transactions to FPDS-NG.

⁵⁹ Information provided to Panel staff.

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Other observations include the interchangeable use of the terms Statement of Work (SOW), Statement of Objectives (SOO), and Performance Work Statement (PWS). In several instances, all three were used within the context of the contract.

There were very few instances of any quality incentive clauses. Award fee criteria appear to be the norm, with some attempt at weighted formulas. They were often tied to criteria other than that specific to the contracted service. The review did not seek to determine or make conclusions as to the actual effectiveness of incentives, only that when used, the incentives were related to the outcomes described in the requirements.

The OFPP letter included a request from the agencies for any recommendations for improving the regulations, policies, training or reporting of performance-based acquisitions. One response stated: "It would be helpful if it was emphasized that more training of technical personnel on writing, implementing, and monitoring PBSA-related requirements is needed."⁶⁰

An additional 6 contracts above those requested were received from 4 agencies and were also reviewed, but not included in the statistics above. Five of the 6, contained PBSA characteristics, and one required improvement.

III. Recommendations: Improving Implementation of Performance-Based Acquisition in the Federal Government

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

Initial implementation of PBSA has been driven by OMB's establishing and enforcing a quota that 40% of major contract dollars be covered under PBSA contracts. While a government-wide quota has been helpful in jump-starting implementation of PBSA, a universal, one-size-fits-all quota should be abandoned in favor of a more strategic and pro-active approach for establishing PBSA targets.

While the Panel firmly believes in the accountability created by PBSA targets, the Panel recommends that OMB establish PBSA targets on an agency-by-agency basis. In establishing these agency-specific PBSA targets, OMB should review each agency's analysis of its unique acquisition portfolio based on clearer OFPP PBSA guidance (see Recommendation 2) as reflected in the agency's Acquisition Performance Plan (see Recommendation 3).

Notwithstanding this modification in how targets are set, the Panel strongly endorses the notion that OMB should continue to establish and enforce "stretch" goals for individual agency implementation of PBSA.

⁶⁰ [INSERT CITE]

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Recommendation 2:

FAR Parts 7 and 37 should be modified to include two levels of Performance-Based Acquisition: 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

The Panel recommends that OFPP issue clear and illustrative guidance to agencies on when to use PBSAs. This recommendation responds to agency confusion over which contracts should use PBSA techniques as well as some concerns over agencies applying PBSA to contracts where its use provides little benefit.

In issuing guidance on when to use PBSA, OFPP should address the following:

- **Define Two Categories of Performance-based service acquisition:** The Panel recommends the guidance create two categories of PBSAs, one reflecting an aggressive application of the tool and another reflecting a streamlined and targeted application of the tool. This guidance reflects the notion that not all PBSA’s are equal in terms of complexity faced and investment required to implement the model. By creating two categories, agencies can calibrate their investment in PBSA to fit the level of benefit they seek.

To reinforce the OFPP guidance, the Panel further recommends that FAR Parts 7 and 37 be formally modified to reflect these two categories.

Option 1: Transformational Performance-Based Acquisitions

Definition: Transformational Performance-Based Acquisitions typically use a Statement of Objectives approach for acquiring services. Under this model the agency identifies a baseline need/problem, but is not in a position to specify the work that will be done. In this case, the agency should establish outcomes and allow vendors to offer unique (and potentially adjust post-award) solutions proposing the specific approach to solving the baseline need/problem. The agency thus places the risk that the work being done may not solve the baseline need/problem squarely with the vendor.

Under this approach, measurable performance standards would relate to the impact of the acquisition on the agency’s need/problem, but not the work actually done by the vendor in solving the agency’s need/problem.

Option 2: Transactional Performance-Based Acquisitions

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Definition: Transactional Performance-Based Acquisitions typically use a Performance Work Statement approach for acquiring services. Under this model, the agency identifies a baseline need/problem, and has already substantially determined what work is to be done. In this case, the agency is more concerned with ensuring that work being done meets certain cost, quality or timeliness attributes. The agency is willing to assume the risk that the work being done may not solve the baseline need/problem.

Under this approach measurable performance standards would relate to the quality and attributes of the work actually done, with limited or no measurement on impact of work on agency's need/problem.

The guidance should provide explicit examples of cases where Transformational vs. Transactional PBSA models would be used, as well as examples of cases of acquisitions that would not be ripe candidates for PBSA. In compiling these examples, OFPP should depict actual agency experiences in using PBSA in different service areas. Ideally the complete implementation of Recommendation 10 will help create an evolving database of PBSA examples.

- **Provide an Agency PBSA “Opportunity Assessment” Tool:** The Panel recommends the guidance include a self-assessment tool that would include standardized questions an agency should consider when evaluating its acquisition portfolio for PBSA opportunities. Among other factors pertinent to PBSA, the self-assessment tool included in the guidance should help an agency analyze a service to determine:
 - a) whether a performance-related baseline problem exists (cost, quality, timeliness, impact to agency mission)
 - b) the level of risk associated with the service not being optimally provided (importance to mission of the service being provided optimally);
 - c) the level of confidence the agency has in its own “work statement” to solve the baseline problem;
 - d) the amount of risk the agency wants to assume for managing the service impact on its own vs. shifting to a vendor;
 - e) the readiness of the Program to measure the impact of the service on its program performance goals/mission, as well as the readiness of Program staff to participate in a PBSA process

The creation of a PBSA Opportunity Assessment Tool reflects the Panel's view that implementing this new approach to acquisition in government will take time—requiring a more prioritized and strategic approach to when to use PBSA models. By focusing on “low hanging fruit” agencies can build competency and experience in PBSA and achieve early “wins” for the taxpayer.

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In devising this guidance, OFPP should seek the input of the OFPP PBSA Inter-Agency Working Group that it has already established.

Recommendation 3:

Publish a Best Practice Guide on Development of Measurable Performance Standards for Contracts

OFPP should issue a “Best Practice Measures Guide” on the development and selection of performance measures for PBSA contracts. This recommendation is driven by testimony taken by the Panel, as well as numerous reviews of individual PBSAs, that has underscored the difficulty agencies face in devising and selecting good performance measures to include in both PBSA solicitations as well as inclusion in contract awards.

As part of OMB Circular A-11, OMB has already issued general guidance on the development of performance measures. However, this guidance relates to programmatic performance, rather than performance standards for individual contracts. The Panel believes that a Best Practice Measures Guide is critical to providing instruction and illustration in the use of measures as part of PBSA.

In developing a Best Practice Measures Guide, the following criteria should be as a minimum addressed to guide agency selection of PBSA performance measures:

- **Measurement “Chain” or “Logic Model”** Performance measures should be defined using a structured framework (such as a Value Chain or Logic Model) that define expected performance from an acquisition: starting first with the outcomes the agency seeks to achieve with the acquisition and then proceeding to demonstrate alignment between the specific outputs and/or activities conducted under a PBSA contract and those outcomes.
- **Baseline & Outcome Measure(s)**: PBSA’s should be grounded in at least one or more measures that directly assess the agency’s baseline need/problem relating to the service being acquired. Baseline measures will not only help provide a “starting point” of current performance from which vendors can analyze and propose innovative solutions, but also can be used during and after an acquisition to indicate whether a service has had the desired outcome on the agency. Common baseline measures will largely assess how an acquisition has resulted in the program being able to:
 - Achieve improved performance toward program goals, including improved service levels or impact to agency customers, and/or
 - Address a major cost management issue facing the program, resulting in cost savings or enhanced ability by the program to operate in a more economical or efficient manner.

For Transactional PBSAs, baseline measures might not be included in the final contract awarded, but would be helpful to include in a Performance Work Statement to improve the

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quality of vendor responses as well as serve to assist in agency own internal review of a contract's impact to the agency.

- **Contract Management and Monitoring Measures:** Other performance measures used in a PBSA should relate to the work actually being done by the vendor—with particular focus not on effort or activities conducted, but actual service “attributes” such as:
 - **Timeliness:** the services are provided in a timely manner
 - **Accessibility:** the service is available to users in a user-friendly manner
 - **Quality:** the service is provided in a manner free of flaws or errors
 - **Workload levels:** the quantity of services provided or clients served meets the demand
 - **Economy:** For contracts that are not fixed price, an agency may consider some cost-related performance measures. (For example, some agencies not using fixed price contract vehicles have measured actual costs against original cost estimates)
- **Limiting Measures:** Particularly when using contract management measures, agencies should be highly selective in the measures they use, limiting the number of core performance measures to a handful. Agencies have been tempted to measure everything to ensure everything gets done by the vendor. Instead of using this approach, agencies should “sample” measures across the spectrum of their measurement chain or logic model to create a basket of indicators that balance the need to assess service outcomes (impact on the baseline) with measures for contract management and monitoring. The Panel strongly endorses the use of sampling and “representative indices” to measure large service areas rather than measures for each service area.
- **Subjective vs. Objective Measures:** Reflecting recent revisions in the FAR, the guidance should address when and how to use subjective performance measures, including customer satisfaction scores.
- **Measurement Selection Process:** The guidance should provide helpful practices to guide the process by which measures are developed—ensuring that program and subject matter expertise are used to select measures. The guidance should also encourage agencies to survey users of the service to identify and rank core service “attributes” they expect. In addition, the guidance should encourage agencies to allow the supplier to propose the measures as part of the technical proposal in a PBSA response.
- **Evolution of Measures:** The guidance should address a process by which measures WILL and MUST change over time. There can be adjustments of expectations during performance that were not anticipated during the acquisition planning phase, as well as a need to provide for continuous improvement and refinement of the measures over time. Agencies should be explicitly encouraged to evolve their measures, provided that a justification is provided. It is

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likely that contract management and monitoring measures will evolve over time, while the baseline outcome measures will remain the same.

Recommendation 4:

Modify FAR Parts 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.

The Panel received consistent testimony indicating that the private-sector considers the definition of client needs/requirements upfront in an acquisition is one of the most important aspects of PBSA. There are questions whether the federal government has been consistent in clearly defining its needs/requirements up front—a deficiency that some believe may have led to poorly executed contracts and in some cases contract failures. In addition, the importance of conducting extensive market research before proceeding with a PBSA was underscored by numerous private sector experts.

The Panel recommends that the FAR be revised to require that agencies publish a formal "Baseline Performance Case" as part of its use of a PBSA. As part of the OFPP guidance, the Baseline Performance Case would include:

- **Outcome Performance Measures:** Identifying and explaining performance measures that capture the outcome sought by an agency in a particular service area (as defined in the guidance required in Recommendation #4)
- **Baseline Performance State:** Using the outcome performance measures, the agency would assess the current level of performance in a particular service area. In addition to measuring the baseline, some qualitative description of the performance problems/needs would be provided.
- **State-of-Practice:** The agency would describe the current "state-of-practice" in the service area as determined from its market research. Stating the assumptions of the agency in this regard would allow outside bidders to identify areas of innovation that the agency might have missed in reviewing potential private and public-sector solutions to its need/requirement.
- **PBSA Approach:** Based on the analysis described above, the agency would then select and justify either the use of a Transformational PBSA or a Transactional PBSA.
- **SOO or PWS:** The agency would include the SOO or PWS as part of the "Baseline Performance Case" and solicit proposals from vendors.

The creation of a Baseline Performance Case (to include the SOO and PWS) would provide the much-needed structure and discipline to ensure that the federal government improves its definition of performance needs/requirements up front in an acquisition.

Recommendation 5:

Improve Post-Award Contract Performance Monitoring and Management, Including Methods for Continuous Improvement and Communication through the Creation of a “Performance Improvement Plan” that would be Appropriately Tailored to the Specific Acquisition

One of the challenges of long-term complex service contracts is the fact that needs change over time and that as a result performance priorities may also need to be adjusted to reflect these changing circumstances. In addition, as some have noted, relationships play a key role in the assessment of contractor performance. Responsiveness and customer satisfaction are as important in many cases as technical achievement. Many practitioners have stressed the need for effective ongoing communications between the government and the contractor to ensure that contractor performance remains on target in meeting the mission needs of the agency.

To reflect that need for addressing shifting priorities and again to respond to Finding Five regarding the need for improved post-award contract management, the Panel recommends that contractors be required to develop and submit at pre-determined milestones a Performance Improvement Plan (PIP) that agency staff would assess and approve. This plan would serve as a means for ensuring that both the agency and the contractor are regularly communicating and assessing the need, both for continuous improvement and responsiveness to shifting priorities. The PIP should, at a minimum, do the following:

- Include reporting of required performance standards under the QASP,
- Identify gaps in performance along with an explanation for them,
- Suggest changes in work product to achieve improved performance and reflect changing circumstances, and
- Identify eligibility for contract incentives, if any.

Recommendation 6:

OFPP Should Provide Improved Guidance on Types of Incentives Appropriate for Various Contract Vehicles

As the Panel noted in Finding Six, the use of incentives remains troublesome, with confusion existing about what types of incentives are appropriate and with some expressing difficulties in being able to acquire the additional up front funding to meet these requirements. A number of agency PBSA guides including that of the Office of the Secretary of Defense address the types of incentives available and offer tips on how best to use them.

However there is no useful database for identifying the level of use of various types of incentives in PBSA efforts, nor does there exist in-depth guidance for practitioners on how best to apply them. A continuing theme of many of the witnesses who have appeared before the panel is that more guidance and more training are needed for the basic elements of PBSA to be

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effectively applied. Therefore, the Panel recommends that OFPP take the leadership initiative and use the existing PBSA inter-agency working group, if appropriate, to prepare the following:

- A catalog of the various types of incentives appropriate for use in PBSA efforts (both financial and non-financial),
- A critique of how such incentives are currently being applied in selected performance-based awards, and,
- An assessment of the applicability of award fee and award term approaches to performance based acquisitions (making it clear that while subjective, these techniques offer perfectly acceptable means for measuring performance)
- Discussion of challenges posed in managing PBSAs under existing budget and appropriation rules that limit multi-year financial commitments and incentive-based budget projections.

Recommendation 7:

OFPP Should Revise the Seven Step Process to Reflect the Panel’s New PBSA Recommendations

The Panel believes that the Seven Steps Guide to Performance-Base Services Acquisition continues to offer useful templates and information for agency staff to use in developing performance-based awards. However, in light of the changes proposed above, as well as based on testimony from the private-sector witnesses on their use of PBSA models, the Panel recommends that the Guide be modified to reflect the various suggestions for improvement. The following re-characterizes the seven steps in light of these recommendations:

- 1. Designate COPR and Form the Team (see Recommendation 8)**
The modification of this step is meant to place more responsibility on the Contracting Officer Performance Representative (“COPR”) to assist the Contracting Officer in coordinating program and technical input for performance management throughout the life cycle of the acquisition, as well as take responsibility for performance management.
- 2. Assess Baseline Performance and Desired Outcomes**
The modification of this step is meant to reinforce the practice of selecting outcome measures and assessing the existing baseline at the beginning of an acquisition—all with an eye toward improving the performance need/requirements definition.
- 3. Examine Private Sector and Public Sector Solutions**
This step remains the same, with the results of market research conducted included in the “Baseline Performance Case” to ensure the agency has its finger on the pulse of market innovation in a particular service area.

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4. **Select Transformational or Transactional PBSA Model**
This step reflects the two categories of PBSA suggested by the Panel—as part of an effort to move beyond a one-size-fits-all use of PBSA and provide clarification on when to use a SOO vs. PWS.
5. **Focus on Key Performance Indicators**
This refinement reflects the Panel’s desire to limit the number of performance measures included in a PBSA contract to a “sampling” or representative index of measures.
6. **Select the Right Contractor**
This step remains the same.
7. **Manage, Monitor and Improve Performance**
This step would be modified to include the establishment of milestones for the vendor to prepare “Performance Improvement Plans” as well as the agency’s review and use of those plans to monitor and improve performance.

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).

Both Findings Four and Five point to deficiencies in post-award contract performance monitoring and management, with contracting staff in particular continually being pressured to focus on getting to contract award. For a performance-based contract to be successful, both elements of the process must be pursued: identifying desired business results up front and then being able to monitor performance.

The Panel believes that improvements in workforce capacity and capability regarding contract oversight in particular may make a significant difference in seeing that performance-based acquisitions are successfully carried out. One way to recognize the importance of this performance monitoring role and to shift the culture is, in circumstances where that individual is overseeing PBSAs, to re-designate the COTR as a COPR. Making this change highlights the distinctive nature of the position while affording those filling it with sufficient education and training to meet demanding oversight requirements. In addition to the traditional contract management and monitoring responsibilities of a COTR, the COPR would also assist the Integrated Project Team and CO in

- Soliciting input from program and technical staff regarding the approach to be used for acquisition performance management,
- Creating a baseline performance case,
- Developing the SOO or PWS and,

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- Selecting key performance measures.

In addition, the Panel recommends that program staff and line contracting officers associated with performance-based acquisitions be given advanced training in performance management—particularly in the development of performance measures and post-award contract performance monitoring and management. Specifically for the creation of the COPR, the Defense Acquisition University and the Federal Acquisition Institute should jointly develop a formal educational certification program for those occupying this new position. For Transformational PBSA's, every effort should be made to see that key staff receive appropriate training and skill sets.

Recommendation 9:

Improved Data on PBSA Usage and Enhanced Oversight by OFPP on Proper PBSA Implementation Using an “Acquisition Performance Assessment Rating Tool” A-PART.

Under Finding Seven, the Panel noted the lack of good data on the use and success of PBSA across the government. In addition, where agencies have purported to have conducted performance-based acquisitions, the Government Accountability Office in a number of cases has questioned whether the procurement would actually meet the criteria included in the Federal Acquisition Regulation. As one way to regularize and make more consistent the Administration's ability to oversee and assess the performance of PBSA's, the Panel recommends that OFPP see that a tool similar to the Office of Management and Budget's (OMB) Program Assessment Rating Tool (PART) is developed.

OMB uses the PART as a systematic method for measuring program performance across the Federal government. It essentially includes a series of questions that help the evaluator to see whether the program is in fact meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act (GPRA) as well as engaged OMB more aggressively in reviewing its implementation.

In a similar vein, the Panel is recommending that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of the seven steps guide. Using this methodological and accountable approach to PBSA implementation not only provides better data, but also helps agencies learn how to implement PBSA in a more structured and accountable manner. The Panel feels this rigor is needed in the early stages of PBSA's implementation until agencies are comfortable and competent in the use of the tool. This requirement would sunset after three years, unless OMB and agencies felt the use of the A-PART process should continue.

Using the A-PART, agencies should then fill out the questions upon award of a performance-based contract and maintain the information on file. Each year OFPP should sample the A-PART documents to see if PBSA implementation is in fact being handled properly

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in each agency, with revised guidance provided to the agencies based on the results of these annual assessments.

In addition, OMB guidance on FPDS reporting should be revised to reflect the distinction between Transformational and Transactional performance-based acquisitions (including both contracts and task orders) as described in Recommendation One.

Recommendation 10:

OFPP should undertake a systematic study on the challenges, costs and benefits of using performance-based acquisition techniques five years from the date of the Panel's delivery of its final report.

While the Panel has heard many witnesses point to either the benefits or shortfalls of adopting performance-based techniques for acquiring services, there has been no systematic government-wide effort to assess fully the merits of the process. As noted previously by the Panel, the last such study was conducted by OFPP in 1998 and while the results were positive, some questioned the validity of its findings. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBSA. Rather the Panel aims are directed at improving current implementation and at providing a solid fact-based record for a more thorough assessment of its value.

In light of the concerns raised by so many witnesses on the lack of training and guidance for carrying out performance-based acquisitions, the Panel believes that a concerted effort to address these deficiencies should help to make performance-based acquisitions more effective. However, a systematic review would offer a much more solid basis for concluding whether significant cost and programmatic benefits are in fact achieved through the adoption of performance-based acquisition methods.

As part of this review, OFPP should use the FPDS to identify the various types of performance-based acquisitions in use across the agencies, and examine selected A-PARTS assessments and agency Performance Improvement Plans to assess their contributions to improving the effectiveness of performance-based acquisition awards.

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APPENDIX ONE: Bibliography of PBSA Reports and Studies

APPENDIX ONE

PERFORMANCE-BASED CONTRACTING WORKING GROUP PBC CHRONOLOGY

1. OFPP Policy Letter 91-2, "Service Contracting" April 9, 1991– rescinded in March 2000 FR, http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL91-2_4-9-91.html
2. "On March 15, 1993, the Office of Management and Budget (OMB) Director Leon Panetta requested that 17 major Executive Departments and agencies review their service contracting programs. The purpose of the review was to determine (1) if the service contracts were accomplishing what was intended; (2) whether the contracts were cost effective; and (3) whether inherently governmental functions were being performed by contractors. The results of the reviews indicated that service contracting practices and capabilities are uneven across the Executive branch and that various common management problems need to be addressed." (see intro to OFPP Policy Letter 93-1)
3. OFPP Policy Letter 93-1 "Management Oversight of Service contracting" <http://www.acqnet.gov/Library/OFPP/PolicyLetters/Letters/PL93-1.html>
4. Former VP Gore designated PBC as an integral aspect of the National Performance Review (http://govinfo.library.unt.edu/npr/library_and_then/nprprt/annrpt/sysrpt93/reinven.html) for the "Reinventing Federal Procurement" report. Pilot launched October 1994. Director Rivlin led the kick-off ceremony where executive official of the participating agencies signed a governmentwide pledge to participate in the project (Exhibit 5 of OFPP "A Report on the Performance-Based Service Contracting Pilot Project available at www.acqnet.gov under Virtual Library-Policy Documents). www.acqnet.gov/Library/OFPP/PolicyDocs/pbsepilpro.html
5. OFPP Policy Letter "Performance-Based Service Contracting Solicitation/Contract/Task Order Review Checklist" August 9, 1997 www.acqnet.gov/Library/OFPP/PolicyDocs/pbsckls.html
6. FAC 97-01 (Item VII) – FAR Case 95-311, implementing OFPP Policy Letter 91-2 (see 1 above), by revising FAR Parts 7, 37, 42, 46, and 52. All FACs available at <http://www.acqnet.gov/far>
7. "A Report on the Performance-Based Service Contracting Pilot Project" OFPP May 1998. www.acqnet.gov/Library/OFPP/PolicyDocs/pbsepilpro.html

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14. Contract management: Trends and Challenges in Acquiring Services, May 22, 2001 -GAO Testimony before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives. <http://www.gao.gov/new.items/d01753t.pdf>
15. GAO-02-179t Contract management: Improving Services Acquisitions, October 30, 2001 <http://www.gao.gov/new.items/d02179t.pdf>
16. “Guidance Needed for Using Performance-Based Service Contracting” GAO, September 20, 2002 <http://www.gao.gov/new.items/d021049.pdf>
17. President’s Management Agenda <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>
18. GAO Report 03-443 Federal Procurement: Spending and Workforce Trends, April 30, 2003. <http://www.gao.gov/new.items/d03443.pdf>
19. “Performance-Based Service Acquisition – Contracting for the Future” Interagency Task Force on Performance-Based Service Acquisition, July 2003 <http://www.whitehouse.gov/omb/procurement/0703pbsat.pdf>
20. Section 1431 of the Services Acquisition Reform Act of 2003, Additional Incentive for use of Performance-based Contracting for Services and Section 1433, Clarification of Commercial Services Definition (Title XIV of the National Defense Authorization Act for Fiscal Year 2004). <http://reform.house.gov/UploadedFiles/Title%20XIV%20of%20H.R.%201588%20Conference%20Report.pdf>
21. FAR Case 2004-004, Incentives for the Use of Performance-Based Contracting for Services. This case implements Section 1431 and 1433 of the Services Acquisition Reform Act of

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2003 in 18 above. Go to the link and select FAC -05-04. The case is 2004-004, Item III.:
<http://205.130.237.11/far/facsframe.html>

22. FAR Case 2003-018, Implementing the Task Force Report is, as of 9/7/05, still at OIRA (OMB).
23. GAO-04-715, Defense Management: Opportunities to Enhance the Implementation of Performance-Based Logistics, August 9, 2004 <http://www.gao.gov/new.items/d04715.pdf>
24. OFPP Memo, "Increasing the Use of Performance-Based Service Acquisitions," September 7, 2004 (see <http://www.acqnet.gov> and the memo is on the home page)
25. U.S. Air Force Instruction 63-124, Performance-based service acquisition. August 1, 2005. This publication is available at <http://www.e-publishing.af.mil>
26. GAO-05-966, Defense Management: DOD Needs to Demonstrate That Performance-Based Logistics Contracts Are Achieving Expected Benefits, September 9, 2005
<http://www.gao.gov/cgi-bin/getrpt?GAO-05-966>
27. "Seven Steps to Performance-based service acquisition Guide" linked to the OFPP site at <http://www.acqnet.gov>
28. Acquisition Center of Excellence (ACE) for Services linked to the OFPP site at <http://www.acqnet.gov>
29. OFPP Policy Letter 05-01 "Developing and Managing the Acquisition Workforce" linked to the OFPP site at <http://www.acqnet.gov>

<p style="text-align: center;">APPENDIX TWO: FINAL PBSA Rule and Side-by-Side Comparison</p>
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FEBRUARY 2, 2006 EFFECTIVE PBSA FAR REGULATION

SUBPART 37.6—PERFORMANCE-BASED ACQUISITION 37.604

Subpart 37.6—Performance-Based Acquisition

37.600 Scope of subpart. This subpart prescribes policies and procedures for acquiring services using performance-based acquisition methods.

37.601 General. (a) Solicitations may use either a performance work statement or a statement of objectives (see 37.602). (b) Performance-based contracts for services shall include— (1) A performance work statement (PWS); (2) Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards; and (3) Performance incentives where appropriate. When used, the performance incentives shall correspond to the performance standards set forth in the contract (see 16.402-2). (c) See 12.102(g) for the use of Part 12 procedures for performance-based acquisitions.

37.602 Performance work statement. (a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the Government where the offeror proposes the PWS. (b) Agencies shall, to the maximum extent practicable— (1) Describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101); (2) Enable assessment of work performance against measurable performance standards; (3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work. (c) Offerors use the SOO to develop the PWS; however, the SOO does not become part of the contract. The SOO shall, at a minimum, include— (1) Purpose; (2) Scope or mission; (3) Period and place of performance; (4) Background; (5) Performance objectives, i.e., required results; and (6) Any operating constraints.

37.603 Performance standards. (a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor’s performance. (b) When offerors propose performance standards in response to a SOO, agencies shall evaluate the proposed standards to determine if they meet agency needs.

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37.604 Quality assurance surveillance plans. Requirements for quality assurance and quality assurance surveillance plans are in Subpart 46.4. The Government may either prepare the quality assurance surveillance plan or require the offerors to submit a proposed quality assurance surveillance plan for the Government’s consideration in development of the Government’s plan.

Interim Rule	Final Rule: February 2, 2006
<p>FAR 2.101 Definitions: “Performance-based contracting” means structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirements set forth, in clear, specific, and objective terms with measurable outcomes as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.</p>	<p>FAR 2.101 Definitions: “Performance-based acquisition (PBA)” means an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed.</p>
<p>FAR 7.103(r): (r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-price contracts (see 37.602-5) should occur for follow-on acquisitions.</p>	<p>FAR 7.103(r): (r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods (see 37.602-5) should occur for follow-on acquisitions.</p> <p>FAR 7.103(r): “and, therefore, fixed-price contracts” from the statement “For services, greater use of performance-based acquisition methods and, therefore fixed-price contracts*** should occur for follow-on acquisitions” because the Councils believe the appropriate contract type is based on the level of risk and not the acquisition method.</p>
<p>FAR 11.101(a)(2) and (a)(3): (a) Agencies may select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence: (1) Documents mandated for use by law. (2) Performance-oriented documents or function. (3) Detailed design-oriented documents.</p>	<p>FAR 11.101(a)(2) and (a)(3): (a) Agencies may select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:...</p> <p>(2) Performance-oriented documents...</p> <p>FAR 11.101(a)(2): “or function” because the Councils concluded that the term “function” could be confused with “detailed design-oriented documents” at 11.101(a)(3) thus confusing the order of precedence for requirements documents.</p>

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<p>FAR 16.505(a)(3): (3) Performance-based work statements must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a)).</p>	<p>FAR 16.505(a)(3): (3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a)).</p> <p>FAR 16.505(a)(3): CHANGED “performance work statements must be used to the maximum extent practicable” to “Performance-based acquisition methods must be used to the maximum extent practicable” since either a SOO or PWS can be used in the solicitation.</p>
<p>FAR 37.000:</p> <p>This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see subpart 37.6). Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39; and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).</p>	<p>FAR 37.000:</p> <p><i>This part prescribes policy and procedures that are specific to the acquisition and management of services by contract or orders. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based acquisition to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods (see subpart 37.6). Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39; and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).</i></p> <p><u>FAR 37.000</u></p> <p>ADDED “or orders” after “contracts” to clarify the Subpart applies to contracts and orders</p> <p>Various Subparts in Part 37: CHANGED the terminology from “performance-based service acquisitions” to “performance-based service acquisitions” to “performance-based acquisitions” since Part 37 only relates to service acquisitions.</p>
<p>FAR 37.102(e): Did not exist.</p>	<p>FAR 37.102(e): (e) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.</p>

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	<p>FAR 37.102(e) ADDED a requirement that the agency program officials describe the need to be filled using performance-based acquisition methods to the maximum extent practicable to facilitate performance-based acquisitions.</p>
<p><u>FAR 37.601</u></p> <p>(a) Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed or outcomes achieved meet contract standards. Performance-based contracts or task orders--</p> <p>(1) Describe the requirements in terms of results required rather than the methods of performance of the work;</p> <p><u>(2) Use measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));</u></p> <p>(3) Specify procedures for reductions46.103(a) and 46.401(a);</p> <p>(3) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and</p> <p>(4) Include performance incentives where appropriate.</p> <p>(b) See 12.102(g) for the use of Part 12 procedures for performance-based contracting</p>	<p><u>FAR 37.601</u></p> <p>(Deleted and moved to a new FAR section, 37.603)</p> <p><i>FAR 37.601(a):</i></p> <p>DELETED 37.601(a) of the proposed rule which stated the principal objectives of PBSAs since the principal objectives are addressed in the definition. RELOCATED and revised the detailed provisions for performance standards to a new FAR section, 37.603, to permit expanded coverage. The Councils clarified the language to indicate that performance standards must be measurable and ADDED “method of assessing contractor performance” to the required elements of a PBSA since the quality assurance surveillance plan is not a mandatory element and contractors should know how they will be assessed during contract performance.</p> <p>REVISED the performance incentives coverage to simply refer to the provisions at 16.402-2 since the only unique requirement for PBSAs is the requirement that performance incentives correspond to the performance standards.</p>
<p><u>FAR 37.602(b):</u></p> <p>(b) When preparing statements of work, agencies shall, to the maximum extent practicable --</p> <p>(1) Describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101);</p> <p>(2) Enable assessment of work performance against measurable performance standards;</p> <p>(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work; and</p>	<p><i>FAR 37.602(b):</i></p> <p>In paragraph (b) REVERTED back to the existing FAR coverage with minor modifications because the Councils believe the prior coverage correctly detailed the requirements.</p>

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(4) Avoid combining requirements into a single acquisition that is too broad for the agency or a prospective contractor to manage effectively.	
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CHAPTER 3

INTERAGENCY CONTRACTING

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

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Interagency Contracting

I. Introduction and Background

A. Introduction

Among the specific requirements for the Acquisition Advisory Panel outlined in Section 1423 is the review of the performance of acquisition functions across agency lines of responsibility and the use of Governmentwide contracts.

The performance of acquisition functions across agency lines is almost exclusively accomplished through the use of interagency contract vehicles described in detail in the next section. The significant increase in the use of these vehicles by agencies over the last ten years has raised a number of complex policy issues and has been the subject of extensive oversight by Congress, the Government Accountability Office (GAO), the inspectors general (IGs) of various federal agencies, outside organizations and the media. This attention has highlighted significant benefits in award efficiencies these vehicles provide to the federal Government and the taxpayer. It has also uncovered past deficiencies in their creation, administration and continuing risks associated with their use.

Several critical observations have been made regarding the creation and use of interagency contract vehicles. In its January 2005 High Risk Update, GAO observed that a number of factors contribute to making these vehicles high risk in certain circumstances: 1) they are attracting rapid growth of taxpayer dollars; 2) they are being used and administered by some agencies with limited expertise in this contracting method; and 3) they contribute to a significantly more complex environment in which accountability has not always been clearly established (GAO-05-207).

In light of these recent studies, it is interesting to note that most of the management challenges in these recent studies were identified over eight years ago in “the Multiagency/GWAC Program Managers Compact” signed by the major federal program managers in September 1997. In this document entitled, “a Consensus on Principles Applicable to the Acquisition of Services under Multiagency Contracts and Governmentwide Acquisitions,” federal program managers set forth and agreed to a series of principles that would guide their business conduct (“The Multiagency/GWAC Program Managers Compact,” Sept. 9, 1997- see Appendix A). The “Compact” recognized that federal agencies, in the interest of economy and efficiency, are placing increased emphasis on the use of multiagency contracts and that “[w]hen *properly* developed and used,” these vehicles may enable agencies to fulfill their missions.

The Panel has identified all of the relevant laws, regulations and policies applicable to interagency vehicles and assembled relevant GAO and IG audits. It also identified other studies, reviews, hearing testimony, data, and information available on interagency contracts and similar enterprisewide vehicles as well as their use by interagency assisting entities. In addition, the Panel conducted over 80 meetings and, among other things, the Working Group interviewed key

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federal managers involved with these vehicles and entities. The document identifying the relevant laws, regulations, and policies is posted on the Acquisition Advisory Panel website (<http://acquisition.gov/comp/aap/index.html>). The matrix of issues is located in Appendix B.

After receiving stakeholder input and reviewing the relevant source material, the Panel concluded that interagency contract vehicles have played an important role in streamlining the federal Government's acquisition process. The 2005 GAO High Risk Update mentioned above concluded that when managed properly these vehicles serve an important purpose. The report stated that, "these contracts are designed to leverage the Government's aggregate buying power and provide a much-needed simplified method for procuring commonly used goods and services"¹ The report went on to say that "these contract vehicles offer the benefits of improved efficiency and timeliness; however, they need to be effectively managed." The Panel agrees with the GAO's view that interagency contract vehicles are of significant value when managed properly.

Based on the growing challenges being faced by the acquisition community (e.g., growing workload, aging workforce), the Panel determined that interagency contract vehicles play a critical role in allowing agencies to accomplish their missions. The Panel focused its recommendations on maintaining the value and efficiencies created by interagency contracts while responding to key management challenges that have arisen from their increased use.

As the Panel conducted its work, there was a great deal of activity concerning interagency contract vehicles in Congress and the Executive Branch. In response to internal reviews and congressional oversight, the General Services Administration (GSA) embarked on a major reorganization of its schedules and assisted purchasing programs. The reorganization was intended to address some of the issues raised in the audit and oversight reports considered by the working group. Concurrently, individual federal agencies, such as the Department of Homeland Security and elements within the Department of Defense, began the establishment of internal, enterprisewide purchasing programs for specific types of services that are offered under the GSA schedules program and through other interagency vehicles and programs. These programs, such as the Navy's SeaPort-e program for engineering support services, are touted as offering similar support to buying activities as the schedules, but with more effective administration, reduced overhead cost, and improved spend analysis insight. Due to their similarities to interagency vehicles and as a result of the growing number being established within agencies, these enterprisewide vehicles may have adverse impacts on the overall administrative efficiencies and cost savings associated with interagency vehicles. Consequently, the Panel expanded its review and recommendations to cover these enterprisewide vehicles.

Congress has also passed legislation that could significantly impact the use of interagency vehicles in the future. Section 811 of the National Defense Authorization Act for Fiscal Year 2006 expands the scope of the current Defense Department Inspector General compliance review

¹ U.S. GAO, *2005 GAO High Risk Update*, GAO-05-207, ___ (2005).

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to include DOD's use of the GSA Client Support Centers to include DOD's use of interagency vehicles in the Department of Treasury, the Department of Interior and the National Aeronautics and Space Administration. Section 812 of the same bill requires the establishment of a management structure within the Department of Defense for the management of services acquisition, including those services procured through interagency contract vehicles. Section 817 of the John Warner National Defense Authorization Act for Fiscal Year 2007 further expands the scope of the DOD IG review of agency governmentwide acquisition contracts to include the National Institutes of Health and the Department of Veterans Affairs. The Panel noted these developments in formulating its recommendations, but at this time has refrained from drawing any conclusions about the specific proposals and actions.

Finally, criticism of the Federal response to the Hurricane Katrina disaster has led to discussions about the degree to which interagency contract vehicles may be among the most useful tools for allowing Federal agencies to acquire goods and services for national emergencies. Interagency contract vehicles, such as the General Services Administration Schedules program, can potentially offer a broad range of goods and services to assist with disaster preparation and recovery. In response, section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007 allowed that the GSA may authorize state and local governments to use Federal Supply Schedules for goods or services that are to be used to facilitate recovery from a major disaster declared by the president or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.² Beginning with sound agency advance planning, interagency vehicles could provide pre-negotiated line items, special terms and conditions that would allow for rapid deployment of assistance to affected communities.

Although the identification of sources and issues continued to the end of the review process, the Panel focused on identifying the scope of the issues it would consider in making its recommendations. Four basic questions concerning interagency contract vehicles were identified:

What are they?

Why do agencies use them?

How do agencies use them?

How should agencies use them?

As in other areas, the Panel believes that there is no privileged perspective from which to answer these four questions. There are a number of valid stakeholders with disparate points of view that must be considered. These stakeholders are identified in the next section.

² Public Law 109-364, § 833,

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In sorting through the various audits, studies, reviews, presentations and commentaries, the Panel strove to avoid duplicating the audit work of the GAO or the agency inspectors general. It attempted to look at higher level policy issues of a systemic nature appropriate for review by such an independent panel. In following the Section 1423 charter, the Panel has developed recommendations for changes to laws, regulations, and policies to:

- Establish overarching goals and acquisition planning mechanisms to balance competing policy mandates;
- Address systemic issues identified in GAO, IG and other reports;
- Foster restructuring and consolidation of programs and vehicles where appropriate;
- Import applicable best practices from both Government and private sector experience;
- Increase the scope of competitive forces in interagency vehicle transactions;
- Address acquisition workforce issues related to the use of interagency vehicles; and
- Establish reliable and meaningful data collection to allow for effective management and oversight.

As will be seen below, the Panel's recommendations fall into two broad categories. The first set of issues is clustered around the creation and continuation of interagency vehicles and the organizations that use them to provide acquisition assistance across the federal Government. The Panel concluded that some of the most fundamental issues associated with interagency and enterprisewide vehicles could be best addressed by establishing more formal procedural requirements for initially establishing such vehicles and subsequently for authorizing their continued use. The second related set of issues is associated with the use of such vehicles by federal agencies. This category includes issues associated with competition, pricing, acquisition workforce requirements, and the methodology of choosing the most appropriate vehicle for a specific procurement action.

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FINDINGS	RECOMMENDATIONS
B1. Lack of Transparency	1: Increased transparency through identification of vehicles (e.g. GWACs, MACs, enterprisewide) and Assisting Entities. 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.
B1. Lack of Transparency B2. Little Systematic Coordination Among Vehicles B5. No Central Database or Consistent Methodology to Help Agency Select D. Some Diversity is Desirable	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. i. Improved granularity in fee calculations ii. Standard FPDS-NG reports (c) Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.
B1. Lack of Transparency	3: OMB institutionalize collection and public accessibility of the information, for example through a stand alone database or module within transactions-based FPDS-NG.
B4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles C. Incentives for Creation Don’t Always Translate Into Benefits for the Taxpayer	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 governmentwide 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.
B4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power	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) Enterprisewide vehicles (c) Assisting entities

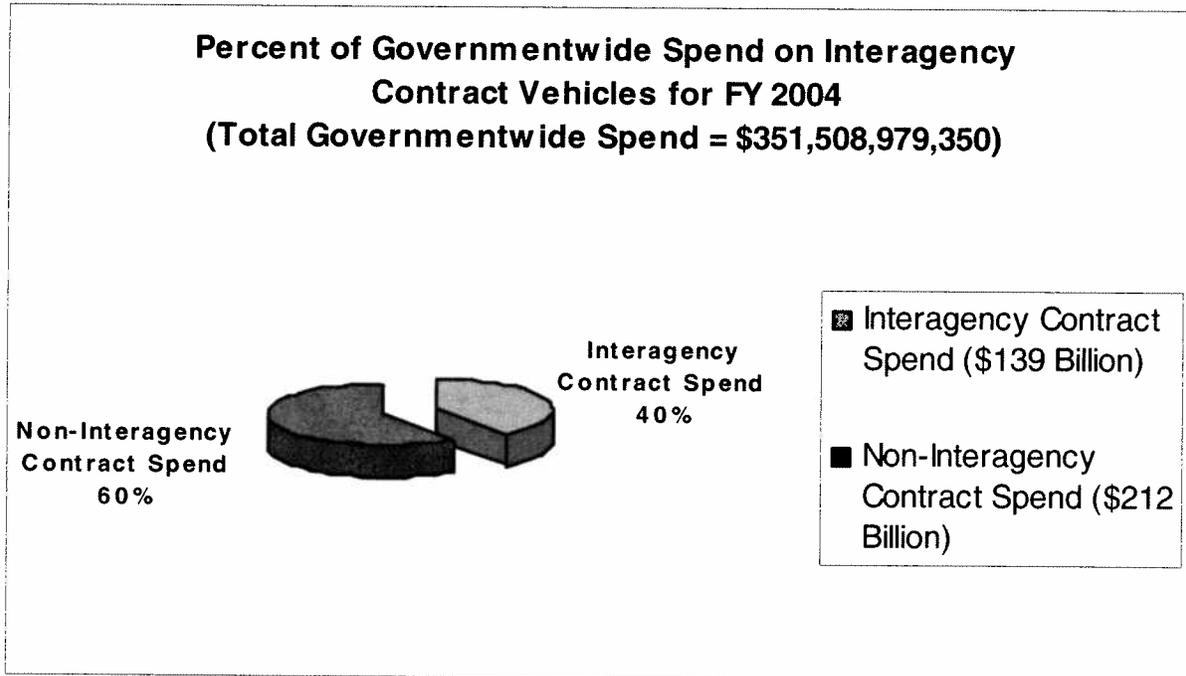
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<p>B3. No Consistent Standards for Creation and Continuation C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer</p>	<p>6: Institute a requirement that the cognizant agency, under guidance issued by OMB, formally authorize the continuation/reauthorization of the vehicles and entities addressed in #5 on an appropriate recurring basis consistent with the nature or 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.</p>
<p>B3. No Consistent Standards for Creation and Continuation</p>	<p>7: Have the OMB interagency task force define the process and the mechanisms anticipated by recommendations #5 and #6.</p>
<p>A. Proliferation B2. Little Systematic Coordination Among Vehicles B3. No Consistent Standards for Creation and Continuation B4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer D. Some Diversity is Desirable E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles</p>	<p>8: OMB promulgation of detailed policies, procedures, and requirements should include:</p> <ul style="list-style-type: none"> (a) Business case justification analysis (GWACs as model). (b) Projected scope of use (products and services, customers, and dollar value). (c) Explicit coordination with other vehicles/entities. (d) Ability of agency to apply resources to manage vehicle. (e) Projected life of vehicle including the establishment of a sunset, unless use of a sunset would be inappropriate given the acquisitions made under the vehicle. (f) Structuring the contract to accommodate market changes associated with the offered supplies and services (e.g. market research, technology refreshment, and other innovations). (g) Ground rules for use of support contractors in the creation and administration of the vehicle. (h) Criteria for upfront requirements planning by ordering agencies before access to vehicles is granted. (i) Defining post-award responsibilities of the vehicle holders and ordering activities before use of the vehicle 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. (j) 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. (k) Procedures to preserve the integrity of the appropriation process, including guidelines for establishing bona fide need and obligating funds within the authorized period. (l) Require training for ordering agencies' personnel before access to the vehicle is granted. (m) Use of interagency vehicles for contracting during emergency response situations (e.g. natural disasters). (n) Competition process and requirements. (o) Agency performance standards and metrics. (p) Performance monitoring system. (q) Process for ensuring transparency of vehicle features and use. <ul style="list-style-type: none"> (i) Defined point of contact for public – Ombudsman. (r) 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)
<p>E. Focus on Process of Creation and Continuation will Improve</p>	<p>9: OMB conduct a comprehensive, detailed analysis of the effectiveness of Panel recommendations and agency actions in addressing the findings and deficiencies</p>

Use of the Vehicles	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.
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B. Background

Interagency contracting has been recognized as one of the fastest growing fields in federal acquisition. In Fiscal Year 2006, the two leading programs, the Federal Supply Schedules Program and the GSA's Governmentwide Acquisition Contracts (GWAC) provided over \$46 billion of supplies and services to federal agencies (GSA-managed Schedules: \$35.1 billion; VA-managed Schedules: projected to be well over \$8 billion (FY 2005 sales was \$7.9 billion); GSA GWACs \$3.0 billion).³ These and other interagency contract vehicles, offered by other federal agencies under GWAC or multi-agency contract authorities, have been gaining increasing popularity due to the ease of use associated with streamlined ordering and the apparent value afforded by volume purchasing. Federal Procurement Data System – Next Generation (FPDS-NG), in its first year of reporting the spending under interagency contract vehicles shows that 40% of total Fiscal Year 2004 obligations, or \$139 Billion was spent on these vehicles:



Source: Ad-Hoc Report prepared for Panel by the Federal Procurement Data Center (FPDC), Nov. 2005

³ Source: GSA Data, "Contractors Report of Sales - Schedule Sales FY 2006 Final" dated 10/24/2006.

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In addition to these interagency contract vehicles, GSA and other agencies, referred to as “interagency assisting entities” were authorized to provide interagency acquisition support services based on enactment of the Government Management Reform Act (GMRA) of 1994 or other intragovernmental revolving (IR) fund authority. According to the 2003 GAO study, thirty-four IR funds were created to provide common support services to meet federal agency requirements (GAO-03-1069). Twelve of these IR funds, including five franchise fund pilots specifically authorized by GMRA, have “explicit authority” to charge and retain fees for an operating reserve (GAO-03-1069). To fulfill customer requirements, these interagency assisting entities either utilize existing interagency contract vehicles such as GSA’s Schedules Program or other multi-agency contracts, or establish their own contracts utilizing Federal Acquisition Regulation (FAR) procedures. Recently, several of these IR funds have come under scrutiny because of improper use of the GSA Schedules Program and for questionable retention of expired customer funds (*See e.g.*, Shane Harris, *Bad to Worse*, Government Executive (Sept. 15, 2004), <http://www.govexec.com/features/0904-15/0904-15newsanalysis2.htm>; U.S. DOD IG, *DOD Purchases Made through the General Services Administration*, D-2005-096 (2005); U.S. GAO, *Franchise Funds Provide Convenience, but Value to DOD is Not Demonstrated*, GAO-05-456,(2005). From a customer agency’s perspective, the availability of numerous direct and indirect interagency contract vehicles, along with their multi-layered usage schemes, provides an array of useful tools to better meet agency requirements, but at the same time creates accountability challenges associated with effectively managing contracts and tracking funds.

Due to their heavy usage of interagency contract vehicles, several agencies including the Department of Defense (DOD), have become increasingly cognizant of the aggregate amount of the fees charged by GSA and IR funds for use of their vehicles and services. There has also been a growing recognition, driven in part by congressional oversight, of the challenges of tracking the funding transferred to other agencies under such vehicles and ensuring compliance with the Antideficiency Act and other fiscal laws.⁴ These are among the major concerns driving agencies to bring contracting for requirements in-house by establishing their own enterprisewide contracting vehicles. The U.S. Navy’s SeaPort and SeaPort-e are recent examples of this enterprisewide acquisition strategy.

When examining federal interagency transactions, the Economy Act provides important insight in classifying the type and authority associated with the transactions. Certain interagency transactions are governed exclusively by the Economy Act and its controls, which most notably involve restrictions on funds transfer and usage. In addition, the Economy Act currently serves as an overarching interagency transactional authority that applies when more specific authority for the transaction does not exist. Increasingly a greater number of transactions are falling outside the control of the Economy Act. Today, most of the widely used interagency contract

⁴ For example: U.S. DOD IG, *FY2005 DOD Purchases Made Through the General Services Administration*, D-2007-007 (year); Memorandum from the Under Secretary of Defense (Comptroller) on Proper Use of Interagency Agreements with Non-Department of Defense Entities Under Authorities Other Than the Economy Act (Mar. 27, 2006).

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vehicles such as the GSA Schedules program and GWACs are not governed by the Economy Act, but by specific statutes and regulations. To address this, DoD issued series of guidance on financial management policy for non-Economy Act transactions utilizing non-DoD contracts.⁵

Described below are brief overviews of these vehicles and entities.

1. Types of Interagency Contract Vehicles

a. Multi-Agency Contract

The authority for interagency acquisitions comes from specific statutory authority (e.g., Government Employees Training Act) or, when specific statutory authority does not exist, the Economy Act. The Economy Act of 1932, as amended (31 USC 1535), authorizes an agency to place orders for goods and services with another Government agency when the head of the requesting agency determines that it is in the best interest of the Government and decides ordered goods or services cannot be provided as conveniently or cheaply by contract with a commercial enterprise. Congress amended the Act in 1942 to allow military servicing agencies the authority to contract and extended the authority to the civilian agencies in 1982. Congress further amended the Act under the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub.L. 103-355, Title I, § 1074, Oct. 13, 1994, 108 Stat. 3271) to require advance approval by a requesting agency's Contracting Officer (or, as implemented in FAR 17.503(c), an official designated by the agency head) as a condition for using Economy Act authorities, as well as establishment of a system to monitor procurements awarded under the Act. FASA provided additional specific conditions that must be met before making Economy Act transactions. Namely, unless the servicing agency is specifically authorized by law or regulations, in order to utilize a servicing agency's contract, the requesting agency must document (verify or demonstrate or certify) that the servicing agency has either an appropriate pre-existing contract available for use or that it has specialized expertise that is not resident within the requesting agency. (§ 1074(b)(2))

According to the FAR, multi-agency contract means "a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act."⁶ As stated in the 1932 House Report of the 72d Congress, the legislative intent behind the creation of multi-agency contracts was the administrative efficiency and cost savings associated with the utilization of an existing contract by other agencies with similar needs.

Out of this broad interagency contracting authority evolved several more targeted initiatives such as statutory authorities providing for the GWACs. GWACs were established pursuant to the Clinger-Cohen Act, 40 U.S.C. 11314(a)(2) (formerly cited as 40 U.S.C. 1424(a)(2)), for information technology. GWAC's, although a subset of multi-agency contracts,

⁵ See DoD Policy Guidance at: <http://www.acq.osd.mil/dpap/specificpolicy/>

⁶ FAR 2.101.

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are distinguished from non-GWAC multi- agency contracts in terms of the governing statute. For this reason, GWACs are often referred to as separate interagency contract vehicles throughout this report. In addition, executive agencies may enter into Indefinite Delivery/Indefinite Quantity (“IDIQ”) contracts under which delivery orders (for supplies) or task orders (for services) may be issued.⁷ FASA clarified the authority for use of IDIQ task and delivery order contracts. IDIQ contracts may be single award or multiple award, in either instance, the contract may permit orders to be placed by agencies other than the contract holder. The GSA Schedules are another form of interagency contract. Although the Schedules were in use prior to 1984, the Competition in Contracting Act provided express authority for the Schedules.⁸ Today, the Economy Act remains the overarching interagency contracting authority and applies only when more specific statutory authority does not exist (FAR 17.500(b)).

When using those multi-agency contracts that are governed by the Economy Act, the ordering agency (i.e., requirement agency) is required to support its action through a written Determination and Finding (D&F) approved by its contracting officer or by another official specifically designated by the agency head. FAR 17.503(c). A D&F is a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions.⁹ Once this D&F is in place, typical ordering procedures established by the multi-agency contract’s host agency include: a) customer agency submits a requirements package, including necessary funding and fees, to the host agency contracting officer; b) the host agency contracting officer requests price/cost and technical proposals from contractors in the program; c) customer and contracting officer evaluate proposals and make a best value determination; d) the host agency contracting officer awards a task/delivery order to the winning vendor; e) the order is jointly administered by the host agency contracting officer and the customer agency’s technical managers (see e.g. DISA ENCORE multi-agency contract ordering process at <http://www.ditco.disa.mil/hq/contracts/encorchar.asp>). The solicitation and evaluation of proposals for task/delivery order must be consistent with the fair opportunity requirement of FAR 16.505(b)(1).

Due to a lack of Governmentwide coordination and relative ease of creation, it is not known how many non-GWAC multi-agency contracts (IDIQ contracts) are currently in place or how many purchases have been made through these contracts (although FPDS-NG gathers such information, the reliability of the data has yet to be verified). Several of the relatively well known multi-agency contracts are managed by the Defense Information Systems Agency (DISA), which features thirteen multiple award IDIQ contracts available for both internal and external agency customers (see <http://www.disa.mil/main/support/contracts/idiq.html>). Its “ENCORE” contracts provide Information Technology (IT) solutions to the Department of Defense (DOD) and other federal agencies. The multiple award IDIQ contracts have a seven-

⁷ 10 U.S.C. §§ 2304a-2304d; 41 U.S.C. § 253(h).

⁸ 41 U.S.C. § 259.

⁹ Federal Acquisition Regulation (FAR); Subpart 1.7 – Determination and Findings, 1.701 Definition

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year, two billion dollar ceiling, and the orders are placed by the DISA contracting officers at one percent fees.

b. Governmentwide Acquisition Contract (GWAC)

Governmentwide Acquisition Contracts (“GWACs”) are a subset of multi-agency contracts. However, unlike non-GWAC multi-agency contracts, they are not subject to the requirements and limitations of the Economy Act. The FAR defines a GWAC as --

A task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—

- (1) By an executive agent designated by the Office of Management and Budget pursuant to section 5112(e) of the Clinger-Cohen Act, 40 U.S.C. 1412(e) [later recodified under §11314(a)(2)]; or
- (2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by the Brooks Act, 40 U.S.C. 759 (repealed by Pub. L. 104-106). The Economy Act does not apply to orders under a Governmentwide acquisition contract.¹⁰

From 1965 until 1996, GSA was the sole authority for the acquisition of IT and telecommunications across the entire federal Government. The authority was set forth in Section 111 of the Federal Property and Administrative Services Act of 1949 and was referred to as the Brooks Act. The Brooks Act was repealed in 1996 by the Clinger Cohen Act which vested government wide responsibility for IT in Office of Management and Budget (OMB). Having been delegated IT procurement authority from GSA prior to the enactment of Clinger-Cohen Act, GSA’s Federal Technology Service (FTS) operated under the previously granted authority. Beginning in the year 2000, all agencies offering GWAC programs were required to report revenues and costs in accordance with OMB guidance and federal financial accounting standards.

As of September 2005, there were four executive agents with GWAC authority: the Department of Commerce (DOC), GSA’s newly created Federal Acquisition Service, the National Aeronautics and Space Administration (NASA), and the National Institutes of Health (NIH). (The ITOP GWAC program previously managed by the Department of Transportation (DOT) was relocated to GSA in June 2004). As part of its executive agent designation, OMB requires that these agents submit an initial business case, annual activity reports, and a quality assurance plan (QAP) covering, among other things, training of executive agent staff and

¹⁰ FAR 2.101

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customers, order development and placement, procedures for implementation of orders including contract administration responsibilities, and management review (OMB, "Executive Agent Designation Additional Provisions"). OMB stated that it intended the GWAC QAPs to "serve as models that may be adopted and tailored by other agencies that manage a significant amount of interagency acquisitions." (ibid.) Due to management controls by OMB over their creation and continuation, existing GWAC programs are well defined when compared to other IDIQ multi-agency contracts.

Accessing a GWAC is done in two different ways. In a usual situation, a customer agency (i.e., requesting agency) chooses an appropriate GWAC program to use and enter into a memorandum of understanding or an interagency agreement with the host agency (i.e., servicing agency). It then forwards a requirements package, including project funding and fees, to the host agency for assisted acquisition service. Typically, upon acceptance, the host agency contracting officer issues a solicitation among the contractors within the program and, with the assistance of the customer agency, evaluates the proposals received. A task or delivery order is then issued by the host agency's contracting officer and the resulting order is managed jointly by the technical representatives of the customer agency and the host agency's contracting officer. In contrast, when direct order and direct billing authority is available, the customer agency may choose to manage its own project and funding after receiving the delegation of authority from the host agency. In this scenario, a customer agency follows the ordering procedures set forth by the host agency to solicit proposals and make award directly to the contractor, and thus, no interagency transfer of funds is needed.

The legislation authorizing GWACs did not provide meaningful guidance with respect to how financial transactions should be accounted for and fees managed under these contracts. As a result, according to GAO, host agencies are left to choose on their own whether these transaction fees would be accounted for through existing revolving funds or in stand-alone accounts.¹¹ As of July 2002, GSA and NIH operated under revolving funds, while NASA and Department of Commerce operated their GWACs in stand-alone reimbursable accounts¹². This issue of fee management is discussed in more detail in a later section of this report.

A closer look into each of the GWACs follows:

¹¹ (GAO-02-734, p9).

¹² *Id.*

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Governmentwide Acquisition Contracts (GWACs)						
CONTRACT	DESCRIPTION	CEILING	# CONTRACTS	TERM (incl. options)	FEE	TOP CUSTOMERS
Department of Commerce (DOC)						
COMMITTS	Commerce Information Technology Solutions (COMMITTS) - Set-aside for SB	\$1.5B	N/A	8/2000-6/2009	N/A	DOC, EPA, DoD
COMMITTS NexGen	Commerce Information Technology Solutions (COMMITTS) NexGen - Set-aside for SB	\$8B	55	1/2005-1/2015	0.5%-1.75%	DOC
General Services Administration (GSA)						
ANSWER	Applications'N Support for Widely-diverse End-user Requirements (ANSWER)	\$25B	10	12/1998-4/2009	0.75%	HHS, Air Force, Army
Millennia	Provides Large System Integration and Development Projects	\$25B	9	4/1999-4/2009	0.75% (Capped at \$25,000)	EPA, Army, DHS
Millennia Lite	Provides IT Solutions in Four Functional Areas	\$20B	36	4/2000-4/2010	0.75%	Army, Air Force, HHS
HUBZone	Historically Underutilized Business Zone (HUBZone) - Set-aside for HUBZone SB	\$2.5B	61 (36 Awardees)	1/2003-1/2008	0.75%	DOJ, EPA, Navy
8(a) STARS	8(a) Streamlined Technology Acquisition Resources for Services (STARS) - Set-aside for 8(a); Replaced 8(a) FAST	\$15B	423	6/2004-6/2011	0.75%	Air Force, Army, DoD
(Alliant)	(Coming soon); Will replaces ANSWER, Millennia, & Millennia Lite	\$50B	25-30	10yrs	0.75%	N/A
(Alliant SB)	(Coming soon); Set-aside for SB	\$15B	20 est.	10yrs	0.75%	N/A
(VETS)	(Coming Soon); Veterans Technology Services (VETS) - Set-aside for Service-Disabled Veteran-Owned SB	\$5B	TBD	10yrs	0.75%	N/A
Department of Health and Human Services (HHS)						
CIO-SP2i	Chief Information Officer Solutions and Partners 2 Innovations	\$19.5B	45	12/2000-12/2010	0.5%-1%	HHS, DoD, DOT
IW2nd	Image World 2 New Dimensions	\$15B	24	12/2000-12/2010	0.25%-1%	DoD, Treasury, USDA
ECS III	Electronic Commodity Store (ECS) III	\$6B	65	11/2002-11/2012	1%	DoD, HHS, DOJ
National Aeronautics and Space Administration (NASA)						
SEWP	Scientific and Engineering Workstation Procurement (SEWP) - IT Products	\$5.6B	25 (16 Awardees)	Various (7/2001-9/2007)	0.65% with \$10,000 Order Cap	DoD, GSA, NASA, DOJ, HHS
SEWP IV	(Coming Soon); Scientific and Engineering Workstation Procurement(SEWP) IV - IT Products	\$5.6B	26-39 est.	7yrs	0.65% with \$10,000 Order Cap	N/A

c. GSA Schedules Program

Overview

The GSA Schedules Program is also known as the Federal Supply Schedule Program or the Multiple Award Schedules (MAS) Program. Pursuant to the authority granted to GSA as a centralized Federal procurement and property management agency, the GSA took over the management of the "General Schedule of Supplies" from the Department of the Treasury, and this evolved into what is now known as the GSA Schedules Program. The GSA Schedules have a separate authorizing statute.¹³

While the GSA's pricing policies and procedures have evolved over time, GSA's core objective has remained unchanged – "to use commercial terms and conditions and the leverage of the Government's volume buying to achieve the best possible prices and terms for both customers and taxpayers." (FSS Procurement Information Bulletin 04-2) To this end, GSA utilizes Most Favored Customer (MFC) pricing; an approach whereby GSA negotiates with its vendors for the best prices afforded their preferred customers for like requirements of similar scale. Accordingly, the essence of GSA Schedule contract price analysis is comparison of the offered prices to prices paid by others for the same or similar items (including services), under similar conditions. This pricing approach, combined with GSA's Price Reductions clause (GSAM 552.238-75), is intended to operate to ensure that a specific pricing relationship is maintained throughout the duration of the contract.

There has been, however, some criticism of MFC pricing, in that it may inflate prices by forcing contractors to set prices based on a minimum order quantity. It is argued that, without any firm commitment for a definite order quantity, and to avoid triggering the Price Reductions clause, contractors attempt to avoid risk by offering a ceiling price for a single unit rather than the most competitive price. In addition, witnesses to the panel suggested that the MFC price technique may not be suitable for pricing commercial services. They pointed out that the commercial market, in contrast to the MFC pricing technique, utilizes dynamic pricing for services based on the labor mix for a specific task rather than relying on prearranged standard labor rates.¹⁴

As of October 2006, GSA administers 42 Schedules providing more than 11.2 million different commercial services and products through its 17,862 contracts.¹⁵ Within each Schedule, supplies and services are categorized by what are referred to as Special Item Numbers (SINs). SIN 132-51 for "Information Technology Services" under Schedule 70 (General Purpose Commercial Information Technology Equipment, Software, and Services) is one of the most

¹³ 41 U.S.C. § 259.

¹⁴ Geraldine Watson, General Services Administration, Director of Management Services Center in Auburn Washington, presentation to the Panel, August 18, 2005 pp. 18-20; Bhavneet Bajaj, Director, Financial Practice, Global Practices, Technology Partners, Inc. presentation to Panel, March 17, 2006.

¹⁵ Source: GSA Data, "October FY 2007 MONTH END Sales and Contracts in Effect Reports" dated 11/30/2006.

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widely used SINs in the entire Schedules program. There are 1,278 SINs under the 42 Schedules.

The significance of the GSA Schedules Program in today's federal contracting landscape is easily seen by looking at the sales figures in recent years. In Fiscal Year 2006, sales under the program were \$35.1 billion,¹⁶ representing 3.8 percent annual growth (note: this is a significant drop from 8.9 percent during FY 2005 and 21.5 percent growth during the previous year). During the last ten years, GSA Schedule sales have experience over 20 percent average annual growth.¹⁷

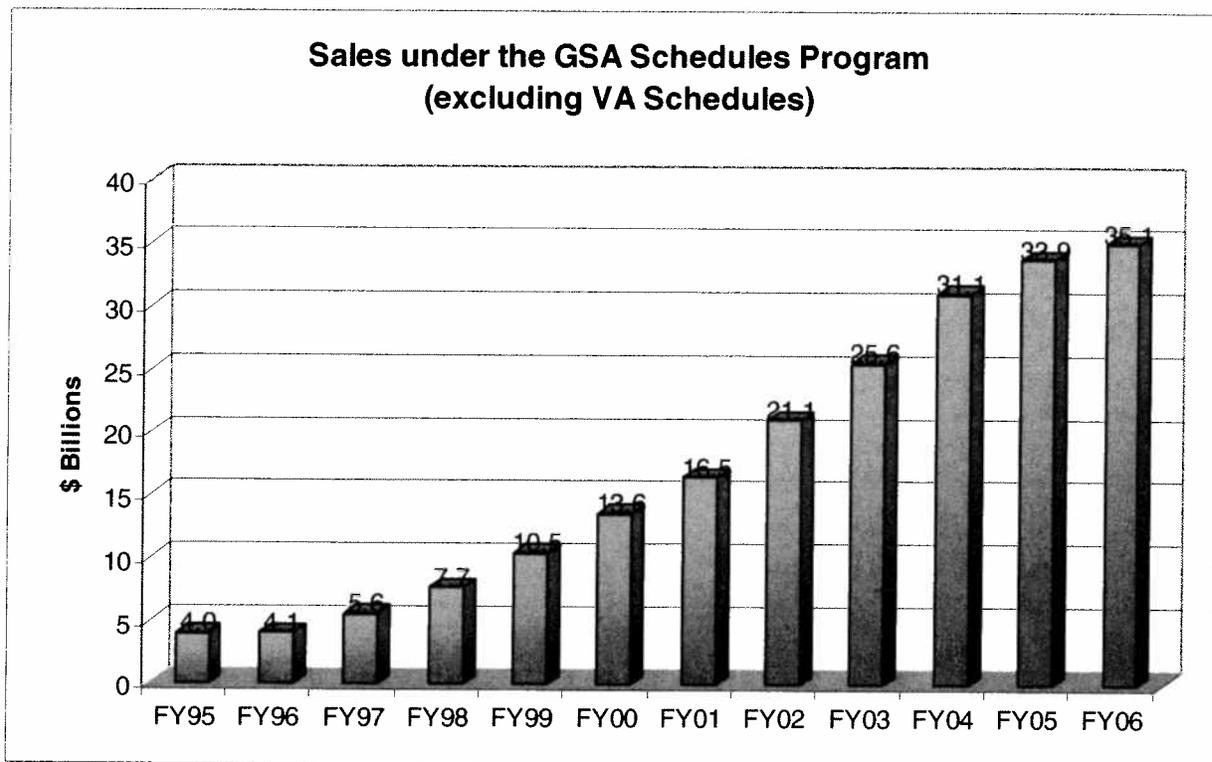
Within the GSA Schedules Program, the professional services offerings, such as the Mission Oriented Business Integrated Services (MOBIS), the Professional Engineering Services (PES), and the Financial and Business Solutions (FABS) Schedules, have shown a notable increase in sales in recent years. Combined, the sales under the three Schedules in Fiscal Year 2006 were \$6.5 billion.¹⁸ During the last three years, their combined sales have grown by 79 percent, indicating a growing demand for professional services. In comparison, after rapid growth in the late 1990's, the sales under the IT Schedule (Schedule 70), have shown signs of continued but less dramatic growth. Its sales grew by less than one percent during Fiscal Year 2006.¹⁹ Still, the IT Schedule sales in Fiscal Year 2006 were \$17.0 billion, accounting for approximately 48.3 percent of total Schedule sales.

¹⁶ In addition, sales under the medical Federal Supply Schedules program managed by the Department of Veterans Affairs are estimated to be well over \$8 billion in FY 2006. Its sales in FY 2005 was \$7.9 billion.

¹⁷ Source: GSA Data, "October FY 2007 MONTH END Sales and Contracts in Effect Reports" dated 11/30/2006.

¹⁸ Individually, FY 2006 sales under the three Schedules are as follows: 874 MOBIS (\$3.19 billion), 871 PES (\$2.57 billion), 520 FABS (\$749 million). Source: GSA Data, "October FY 2007 MONTH END Sales and Contracts in Effect Reports" dated 11/30/2006.

¹⁹ Sales under the 70 IT Schedule grew by 0.47 percent in FY 2006. Source: GSA Data, "October FY 2007 MONTH END Sales and Contracts in Effect Reports" dated 11/30/2006.



As of October 2006, approximately 17,900 Schedule contracts were in place. About 81 percent of those were awarded to small businesses. Small business received 37.6 percent or \$13.2 billion of the \$35.1 billion Schedule sales in Fiscal Year 2006. Compared to the previous three fiscal years, the small business participation in the Schedules Program has grown steadily greater.²⁰

The Program is intended to provide Federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. Using commercial item acquisition procedures in FAR Parts 12, 15, 16, and 38, GSA awards indefinite delivery contracts to commercial firms to provide supplies and services at stated prices for given periods of time. The operating assumption is that the price for such supplies and services has been tested in the market, and that a price can be established as fair and reasonable without an initial price competition among multiple offerors. Schedule contracts allow for orders to be issued on a firm-fixed-price, fixed-price with economic price adjustment, or on a time-and-materials basis. The contracts are known as “evergreen” and are typically awarded with a 5-year base period and three 5-year options. They include conditions under which a contractor may offer a price discount to authorized users without triggering mandatory across-the-board price reductions. Under the GSA Schedule Program’s continuous open

²⁰ Source: GSA Data, "Final FY 2006 Schedule Data - Contracts in Effect"; "Contractors Report of Sales - Schedule Sales FY 2006 Final" dated 10/24/2006.

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solicitation policy, offers for commercial supplies or services may be submitted at any time. Similarly, contractors may request to add supplies/services to their contracts at any time during the term of their contract.

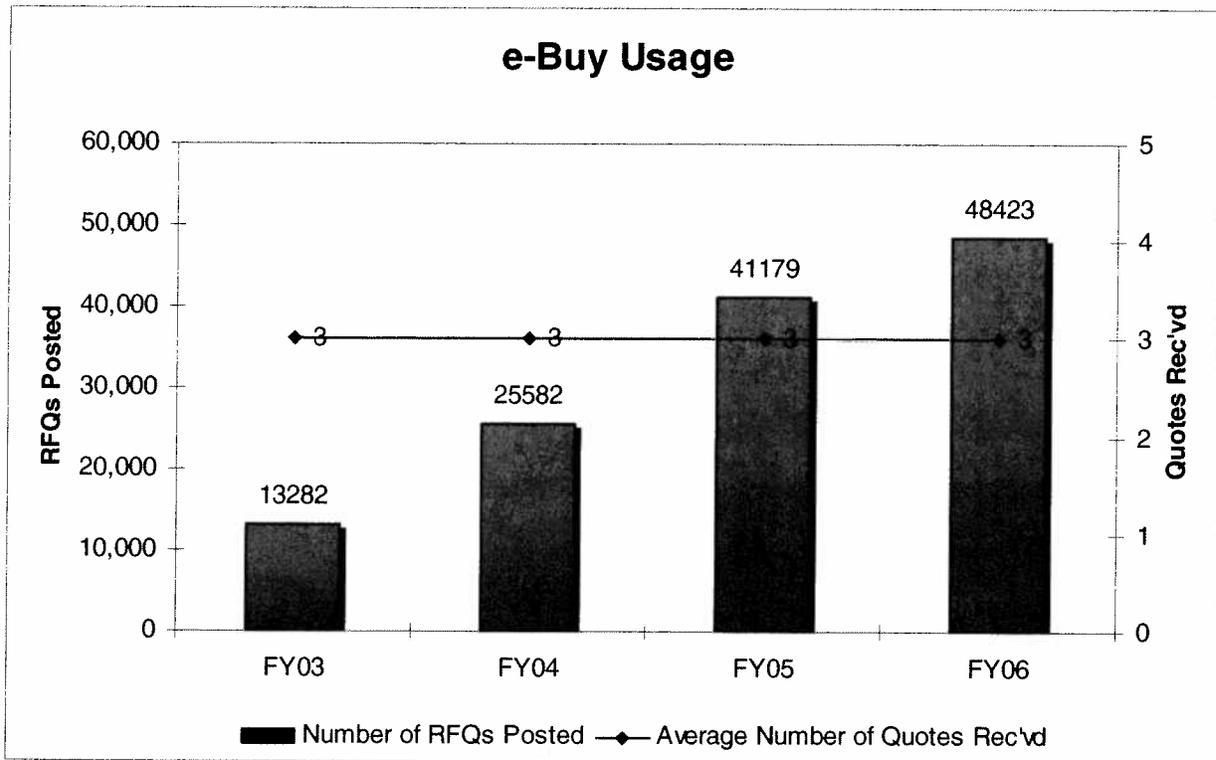
Prior to awarding a Schedule contract, GSA determines the contractor to be responsible in accordance with FAR Subpart 9.1, negotiates and approves an acceptable subcontracting plan for large businesses, and negotiates and awards fair and reasonable pricing based on the firm's Most Favored Customer rates. Because GSA performs much of the up-front work, agencies then benefit from a streamlined ordering process. A study conducted by the GSA indicates that, notwithstanding the difference in the items being acquired, it takes users an average of 15 days to issue an order under a Schedule contract compared to an average of 268 days to put a stand alone contract in place ("Impact of FAR 8.4 Comparison Analysis of Customer-Elapsed Time Savings" (1998) as quoted on p. 41, Chierichella & Arnie, Multiple Award Schedule contracting, 2002, Xlibris Corporation).

Competition and the Use of e-Tools

e-Buy is an online Request for Quotation (RFQ) tool designed to facilitate the request for and submission of quotations or proposals under the Schedules program. It is also available for GSA GWACs. When using the *e-Buy* system, ordering agencies first prepare a simple RFQ or a detailed RFQ including Statement of Work and evaluation criteria per FAR 8.405-2(c). The agencies then select one or more appropriate Special Item Numbers (SINs) under applicable Schedules. Among the list of vendors under the selected SINs, the agencies select the ones to send e-mail notifications. The rest of the vendors within the selected SINs can still view the RFQ under the bulletin board and submit quotations.

For example, an ordering agency with a requirement for an IT business improvement task may choose SIN 132-51, IT Services, under the Schedule 70-Information Technology and SIN 874-1, Consulting Services, under the Schedule 874- Mission Oriented Business Integrated Services (MOBIS). The *e-Buy* system will show the list of 3,966 vendors available under SIN 132-51 and 1,703 vendors under SIN 874-1 (numbers as of 1/13/2006). The agency will then select the vendors to whom to send e-mail notifications about the RFQ ("select all vendors" is also an available option). However, the rest of the vendors within the two SINs may still view the RFQ in the bulletin board and submit quotes. Under, FAR 8.405-2(d), the ordering agencies must evaluate all responses received. The agency can determine a reasonable response time.

Postings on *e-Buy* have been continually increasing since its inception in August 2002. In fiscal year ("FY") 2003, 13,282 notices were posted. Postings increased to 25,582 in FY 2004 and 41,179 in FY 2005. Finally, in FY 2006, there have been 48,423 postings representing an approximately 18 percent increase in usage over the previous year. On average, three quotes have been received per closed RFQ during FY 2005 and FY 2006.



d. Enterprisewide Contract Vehicles

An emerging contract vehicle that is modeled after interagency vehicles is the so-called enterprisewide contract. As these vehicles are intended to serve as an alternative to interagency contracts, they share certain features with those vehicles (IDIQ ordering vehicles), but their use is generally confined within the boundaries of a single agency. Because of their similarities to interagency vehicles and that fact that a growing number are being established within agencies as alternatives to existing interagency vehicles, the Panel has expanded its review and recommendations to cover these vehicles.

Enterprisewide contract vehicles are intra-agency IDIQ contracts established solely for use by an agency's major internal constituent sub-organizations. Such vehicles do not, however, operate under the more flexible statutory authority enjoyed by GSA for the Schedules program. The agency creates these vehicles for a variety of reasons to include: ability to tailor requirements for agency-unique purposes, improved consistency of processes and requirements across the enterprise, ability to establish and enforce inclusion of tailored terms and conditions, perception of reduced administrative overhead, availability of better spend analysis information, ability to aggregate requirements, and avoidance of incurring the fees that would otherwise be sent to the GSA or another outside agency.

An example of such a vehicle is the SeaPort-e program administered by Naval Sea Systems Command (NAVSEA). SeaPort-e is a program intended to improve the acquisition of

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services across 22 functional areas using IDIQ contracts awarded in seven regional zones covering the United States. NAVSEA claims that SeaPort-e offers many of the same advantages as interagency contract vehicles, such as streamlined acquisition of services, while also providing for improved collection of business intelligence data,²¹ additional competition, and the ability to measure performance in such areas as customer satisfaction. Other agencies, such as the Department of Homeland Security, and the United States Postal Service have established additional enterprisewide vehicles as alternatives to existing interagency contract vehicles.

As of December 2006, the SeaPort-e program awarded 935 prime contracts with a yearly rolling admissions process.²² SeaPort-e is described as the Virtual SYSCOM's²³ "mandatory acquisition vehicle of choice," meaning that SYSCOM customers must obtain Senior Executive Service (SES) or Flag Officer level approval to use an interagency assisting entity in place of SeaPort-e.²⁴ Even if a SYSCOM contracting officer executes an unassisted award, he must obtain business case approval to use a vehicle other than SeaPort-e, such as GSA's Federal Supply Schedules program.

The stated goal of SeaPort-e is to eventually ensure that all Virtual SYSCOM work within its scope falls under SeaPort-e unless it does not make business sense to do so. Existing NAVSEA contracts will be allowed to expire and the work under them will be migrated into SeaPort-e. The SeaPort-e program manager testified to the Panel, that the business intelligence data uniquely available under SeaPort-e should facilitate improved strategic purchasing in the Virtual SYSCOM. He also testified that no additional Navy personnel were added or needed to manage the SeaPort-e program representing a significant administrative savings to the Navy especially when compared to fees otherwise paid for the use of other interagency contracts.²⁵

e. Interagency Assisting Entities

Interagency assisting entities, such as the franchise funds, are not contracts, but are part of the interagency contracting landscape. The working group decided to include consideration of assisting entities in its review and recommendations for several reasons. An agency's use of an assisting entity involves relying on an outside organization for performance of contracting functions. Assisting entities also rely almost exclusively on interagency vehicles to meet customer agencies' needs. Use of an assisting entity also involves the transfer of funds from one agency to another.

²¹ Relevant business intelligence data include information on spending by individual activities under specific task orders for specific engineering services. Testimony of J. Punderson, SeaPort-e program manager, August 18, 2005, p 304.

²² See the List of Prime Vendors at: <https://auction.seaport.navy.mil/Bid/PPContractListing.aspx>

²³ The Virtual SYSCOM for purposes of SeaPort-e includes NAVAIR, NAVFAC, NAVSUP, SPAWAR, and NAVSEA. Punderson, pp. 296-297.

²⁴ Punderson, pp. 299-303.

²⁵ Punderson, p. 345. .

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While interagency funds transfer is generally prohibited by law, the Economy Act of 1932 provides a broad exception by allowing an agency to enter into an agreement to provide goods or services to another federal agency. Under the Economy Act, the payment from the client agency must be based on the “actual cost of goods or service” provided and the client agency is required to deobligate fiscal year funds at the end of the period of availability to the extent that these funds have not been obligated by the performing entity.²⁶ However, when an interagency agreement is based on specific statutory authority other than the Economy Act, funds availability and retention are governed by the specific legal authorities. These specific legal authorities creating intraovernmental revolving (IR) funds at the agency level describe the funds’ purpose and authorized uses, and detail the receipts or collections the agency may credit to the fund. In general, compared to the Economy Act, they provide “more flexibility by allowing client agency funds to remain obligated, even after the end of the fiscal year, to pay the performing IR fund.”²⁷

According to the study conducted by GAO in 2003,²⁸ there were 34 IR funds operated by various federal agencies providing common administrative support services on a reimbursable basis to other agencies.²⁹ While most of these funds operate under similar legal authorities providing “advances and reimbursements, as well as the carryover of unobligated balances to recover the costs of accrued leave and depreciation,” twelve of these IR funds, including five of the six franchise fund pilots, have explicit authority to charge for an operating reserve and/or to retain funds for the acquisition of capital equipment and financial management improvements³⁰.

The Government Management Reform Act of 1994³¹ authorized OMB to designate six franchise fund pilots, and OMB subsequently designated pilots at the Departments of Commerce, Veterans Affairs, Health and Human Services, Interior, and Treasury, and at the Environmental Protection Agency. As a subset of IR funds, these franchise funds were designed to be “self-supporting business-like entities providing common administrative services on a fully reimbursable basis.”³² With the exception of the Interior and HHS, these franchise funds have been granted permanent authorization.

Accordingly, most of the Interagency Assisting Entities provide contract support services under IR fund authorities rather than the Economy Act. In particular, franchise funds are provided in many cases with explicit or implicit authority to retain funds to maintain a current operating reserve (e.g. depreciation, accrued leave, and contingencies) and to retain up to an additional four percent of total annual income for the acquisition of capital equipment, and for the improvement and implementation of capital improvements in financial management, IT, and

²⁶ (GAO-03-1069, p 2).

²⁷ GAO-03-1069, p 15

²⁸ (GAO-03-1069),

²⁹ (GAO-03-1069, Appendix III).

³⁰ Ibid. p 19.

³¹ ___ U.S.C. § ____.

³² Ibid. p 3.

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other support systems. This authority to retain funds provides great operating flexibility to those six agencies that are granted franchise fund authority.

From a contract administration standpoint, this arrangement creates unique challenges. A typical transaction may involve multiple parties including -- the customer agency's program office, its contracting officer, its finance office, the assisting entity's contracting officer, the assisting entity's finance office, and the contractor. A recent GAO report pointed out that the customer agency and the franchise fund, who "share responsibility for ensuring value through sound contracting practices such as defining contract outcomes and overseeing contractor performance," had not adequately defined requirements and delineated responsibilities.³³ The GAO report concluded that the two franchise funds, GovWorks and FedSource, and the Department of Defense had failed to coordinate to adequately "define outcomes," "establish criteria for quality," and "specify necessary criteria for contract oversight" resulting in these entities not being able to demonstrate value.³⁴

Listed below are several well-known Interagency Assisting Entities:

AGENCY	PROGRAM NAME	FUND TYPE	AUTHORIZATION
DOI	GovWorks	Franchise Fund	31 U.S.C. 501 note (GMRA), Reauthorization Required
	National Business Center	Working Capital Fund	43 U.S.C. 1467; 31 U.S.C. 1535 (Economy Act)
GSA	Federal Systems Integration and Management Center (FEDSIM)	Acquisition Services Fund	40 U.S.C. 321, 40 USC 501; 40 USC 11302(e); Permanent
	FTS Client Support Center		
Treasury	FedSource	Franchise Fund	31 U.S.C. 322, note (GMRA); Permanent (PL 108-447 §219)
Veterans Affairs	BuyIT.gov	Franchise Fund	GMRA, Permanent (PL 109-114 §208)
HHS	Program Support Center	Service and Supply Fund, Franchise Fund	42 U.S.C. 231; GMRA, Reauthorization Required

³³ (GAO-05-456, "Franchise Funds Provide Convenience, but Value to DOD is Not Demonstrated" quote from section titled "What GAO Found.")

³⁴ Ibid, pgs 21-24.

2. Parties involved in Interagency Contracting

The Panel has identified four groups or stakeholders involved with interagency contract vehicles who have distinct and different sets of interests and perspectives. The first group includes the holders of the requirements within the agencies. The second includes the holders of the vehicles as well as the assisting entities who use the vehicles as a means of satisfying the acquisition needs of the holder of a requirement in another agency or activity. The third group consists of the contractors with the federal Government under the vehicles. The fourth group includes the oversight organization within the Executive Branch, as well as Congress, charged with protecting the interest of the ultimate stakeholder, the taxpayer.

3. Creation and Continuation in Interagency Contracting

Several types of interagency contract vehicles, as well as enterprisewide contracts, provide for varying levels of internal procedural uniformity and monitoring with respect to their creation. While these procedures and types of monitoring vary in their effectiveness, it is important to review the current landscape.

GSA's Schedules Program. GSA has established a formal written policy for both the establishment and continuation of schedules and Special Item Numbers (SINs). The policy, contained in "GSA Form 1649 - Notification of Federal Supply Schedule Improvement Process" requires business case approval for establishment of new schedules and SINs. This policy also requires that existing schedules and SINs must meet certain annual revenue criteria to continue in the program.

GWACs. OMB's Executive Agent Designation and Redesignation process requires GWAC holders, or Executive Agents, to submit business cases and yearly reports to OMB for review and approval or redesignation. Approved Executive Agents are required to submit a business case (Appendix *) that addresses the agency's continued suitability, the amount and source of demand, value to the Government including performance metrics, contracting practices (e.g., fair opportunity, small business participation, and performance-based contracting), management structure, and the division of roles and responsibilities between the Executive Agent and its customer agencies.

Franchise Funds. The initial application process, issued by the Office of Management and Budget (OMB) in 1996 required agencies to address criteria to help OMB determine agency suitability and capacity to manage a franchise fund (Appendix *). The franchise funds are required, through the budget process, to report on specific financial management elements but do not include reporting on contracting practices. Such funds are evaluated on the basis of revenue and customer satisfaction.

IDIQ Contracts. Any agency may award IDIQ contracts – single or multiple award – that permit orders to be placed by other agencies.

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Enterprisewide Contracts. There is no uniform policy for establishing or monitoring these IDIQ contracts. According to the SeaPort-e Program Manager's testimony to the Panel, the decision to make SeaPort-e an enterprisewide contract was driven among other considerations by the need for business intelligence data not readily available through the various interagency contracts that had previously been used to fulfill requirements. SeaPort-e reports a number of performance metrics to include cycle time to award, business volume, small business participation and workload.³⁵

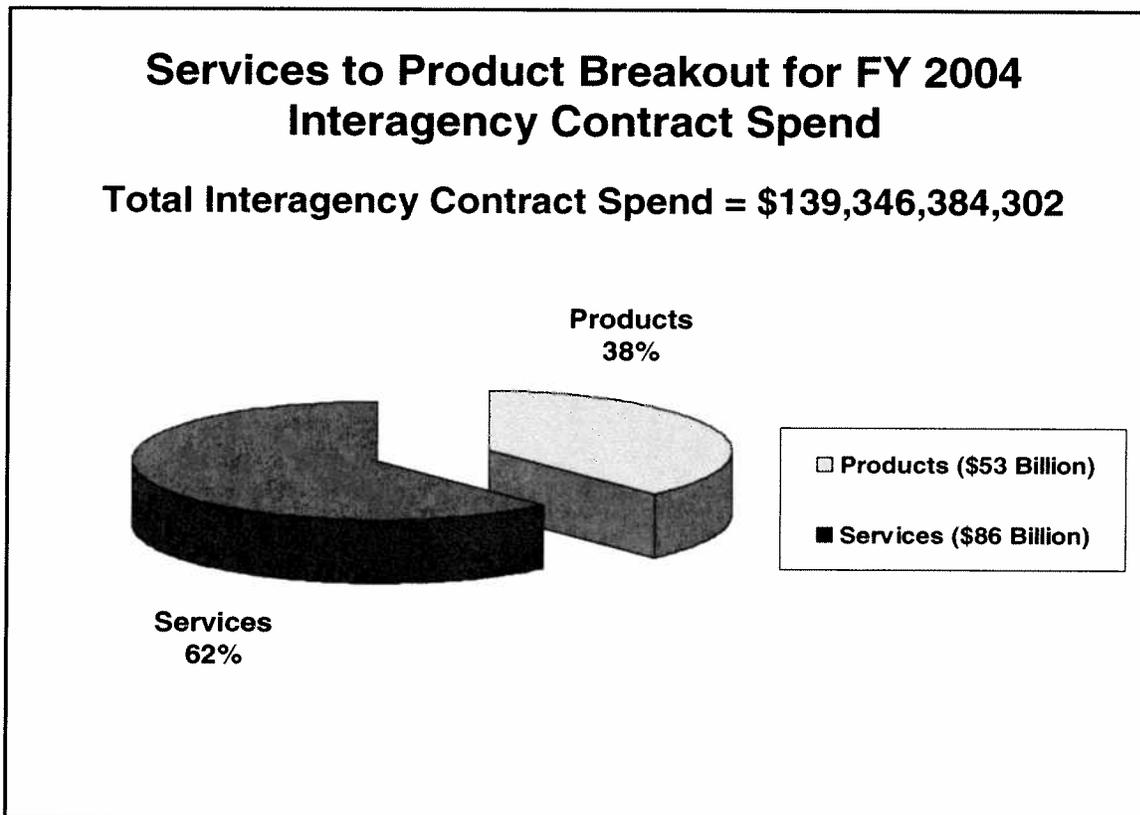
a. Incentives to Use Interagency Contract Vehicles

While acquisition reform streamlined the process for purchases under the simplified acquisition threshold, purchasing above that threshold remains complex and technical.³⁶ This is particularly true of services contracting which has become increasingly more sophisticated and complex especially in the areas of information technology and professional and management support. Services now account for 60% of the Government's yearly contract spending.³⁷ In response to a Panel request for data, FPDS-NG provided the following breakout of supplies and services purchased in Fiscal Year 2004 using interagency contracts:

³⁵ NAVSEA presentation slides for public testimony to Panel, August 18, 2005

³⁶ GAO-02-449T, March 7, 2002

³⁷ For FY 2004, services accounted for 60% of total spending or 80% if weapons systems are excluded from the base.



Source: Ad-Hoc Report prepared for Panel by the Federal Procurement Data Center (FPDC), Nov. 2005

A number of factors have led agencies to turn to interagency contract vehicles to meet demands for services. The major factors are summarized below.

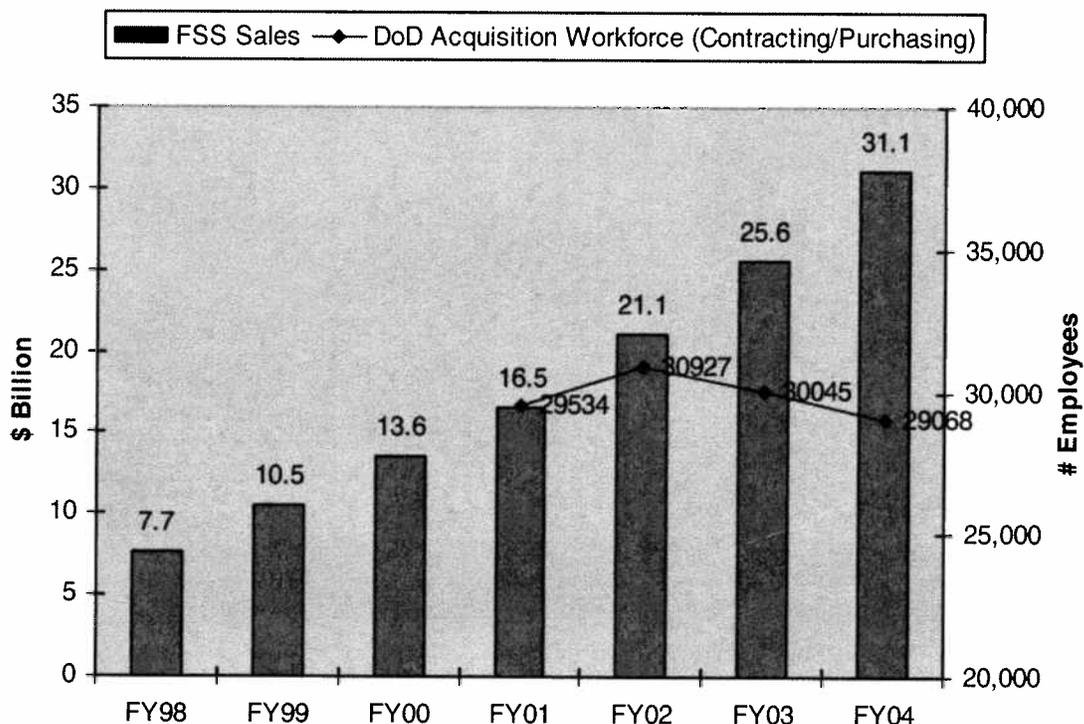
Workforce. The reliance on interagency contracts and their proliferation has been driven to a significant degree by reductions in the acquisition workforce accompanied by increased workloads and pressures to reduce procurement lead-times.³⁸ In its testimony on the High Risk Update in February 2005,³⁹ GAO stated that “These types of contracts have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for new skill sets.” Interagency contracts allow requiring agencies to meet mission needs while focusing human capital resources on core mission rather than procurement. For instance, the chart below shows the interrelationship of the DOD workforce reductions mapped against overall growth in GSA’s Federal Supply Schedules program. Although the Department of Defense and NASA have recently issued guidance or procedures for activities to follow for using interagency vehicles,

³⁸ GAO-02-179T, November 1, 2001

³⁹ GAO-05-350T, February 2005)

agencies have not issued general guidance or procedures for reviewing and determining the best vehicles for meeting agencies' mission needs.

 **Federal Schedules Use – DoD Workforce Comparison***



Funding Constraints. Workforce pressures alone have not fueled the increased use of interagency contracts. The Panel heard testimony from Government witnesses that the funding profiles have placed significant pressures on requiring agencies that can lead them to “park” one year money with holders of vehicles that can offer the benefit of extending the use of customer funds into a subsequent fiscal year.⁴⁰ Franchise funds, in particular, offer the ability to retain funds beyond an appropriations period to customers if they are able to demonstrate a bona fide need for the acquisition during the period in which the funds are available. In fact, at the Department of Interior (DOI) GovWorks franchise fund website (<http://www.govworks.gov>), until recently contained a slide presentation via a link called “The Right Choice” that emphasized this benefit in its marketing material.⁴¹

⁴⁰ Testimony of Lisa Akers (GSA) and Timothy Tweed (DoD) on 6/14/05.

⁴¹ GovWorks website contains an explicit statement (answer #13 under Client Questions at <http://www.govworks.gov/home/faqs.asp>) opposing the use of GovWorks to park funds.

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The Department of Defense, the largest user of interagency contract vehicles, has taken a series of actions to control the use of DOD funds under interagency agreements not governed by the Economy Act. The most recent guidance from the Under Secretary of Defense (Comptroller), dated October 16, 2006, requires all non-Economy Act orders greater than \$500,000 be reviewed by a DoD contracting officer prior to sending the order to the non-DoD activity.⁴² A memo issued on March 27 from the same source requires deobligation of expired funds and establishes an availability limit of one year from the date of obligation for funding for severable services. Funding for the acquisition of goods require a certification that the acquisition represents a specific, bona fide need of the fiscal year in which the funds are obligated.⁴³

Perceived Flexibilities. Agencies have also used interagency vehicles to avoid and waive competition in order to retain the services of incumbent contractors.⁴⁴ This is most likely due to the fact that public synopsis is not required on these vehicles. Also, multiple award contracts are viewed as desirable because they are perceived by some to provide for a reduced basis for oversight through the protest process. Current management and oversight systems enforce laws, regulations, and policies that clarify requirements regarding proper use of the flexibilities associated with these vehicles, but agencies have recognized the need for improvements in such systems.

According to a report by the GAO,⁴⁵ holders of the vehicles also added value to their offerings, attracting both contractors and consumers.

In August 1997, GSA revised its acquisition regulations to expand access to commercial products and services and to implement greater use of commercial buying practices and streamline purchasing for customers. GSA believed that these changes would lead to more participation in the MAS [multiple award schedules] program by both large and small businesses—procedures more consistent with commercial practice would increase competition and thereby provide federal agencies a wider range of goods and services at competitive prices. Beginning in the late 1990s, MAS program sales increased significantly.⁴⁶

⁴² Memorandum from the Under Secretary of Defense (Comptroller) entitled "Non-Economy Act Orders" (Oct. 16, 2006); Available at: <http://www.acq.osd.mil/dpap/specificpolicy/>

⁴³ Memorandum from the Under Secretary of Defense (Comptroller) on Proper Use of Interagency Agreements with Non-Department of Defense Entities Under Authorities Other Than the Economy Act (Mar. 27, 2006).

⁴⁴ (GAO-05-207).

⁴⁵ (GAO-05-229).

⁴⁶ GAO-05-229, February 2005, p. 5

b. Incentives to Create Interagency Contract Vehicles

Interagency contracts also provide significant benefits to those agencies that create and manage the vehicles. These contracts allow the holders of the vehicles to collect fees for both assisted and unassisted buying. The GAO found that most of the interagency contracts they reviewed reported excess revenues over costs for at least one year between 1999 and 2001.⁴⁷ The agencies collecting the fees not only use these revenues to support the operational costs of the interagency contract, but excess revenue from these vehicles has funded other agency programs. For instance, GAO found that those agencies operating GWACs under revolving funds used excess revenue to maintain fund operations or support other programs under the revolving fund. GSA's Federal Supply Schedules Program, also a revolving fund, realized revenue in excess of costs in the amount of \$210.8 million from 1997 to 2001.⁴⁸ GAO noted in 2005 that this "...fee-for-service arrangement creates an incentive to increase sales volume in order to support other programs of the agency that awards and administers an interagency contract. This may lead to an inordinate focus on meeting customer demands at the expense of complying with required ordering procedures."⁴⁹

c. Oversight Concerns

The lack of transparency and internal controls over the use and management of interagency contracts has been at the core of the recent GAO and IG findings on the misuse of these contracts in particular, and services contracts in general. Recent reports have been particularly critical of Interagency Assisting Entities, such as the Department of Treasury FedSource and DOI's GovWorks Franchise Funds, and GSA's Federal Technology Service's Customer Support Centers.(GAO-05-456, DODIG D-2007-007) In its High Risk Update Testimony in February 2005, GAO asserted that it is not always clear where the responsibility for oversight lies (GAO-05-350T). GAO's High Risk Series Update (GAO-05-207) notes that interagency contracts are increasingly being used for the purchase of services. Their concerns regarding services contracts were also highlighted in 2002 when GAO warned that millions of service contract dollars were at risk at both defense and civilian agencies because acquisitions were poorly planned, not adequately competed, or poorly managed (GAO-02-499T). And again, in 2003, GAO stated that the lack of internal controls and guidance not only increases the agency's procurement risk, but also leads to reduced public confidence. The DOD IG reported on October 30, 2006 that there were internal controls lapses in several areas with respect to DOD purchases made through GSA.⁵⁰ More recently, GAO has made similar findings with respect to the use of interagency contract vehicles by the Department of Homeland Security (GAO-06-996).

⁴⁷ GAO-02-734, July 2002

⁴⁸ GSA subsequently lowered the Industrial Funding Fee from 1 percent to 0.75 percent.

⁴⁹ GAO-05-229, February 2005.

⁵⁰ FY 2005 DOD purchases made through the General Services Administration, DOD Office of Inspector General (D-2007-007) (Oct. 30, 2006).

4. Transparency

a. Data on Use

In 2003, the FAR Council implemented a long-standing Office of Federal Procurement Policy (OFPP) request to identify the universe of interagency contracts, through a tool known as the Interagency Contract Directory (ICD). The Federal Register notice on the proposed rule identified the purpose for the directory as twofold: first, to provide a source for market research for Government program managers and contracting officers; and second, to provide OFPP with visibility into the Governmentwide coverage of requirements provided by the vehicles. The ICD was implemented through the Federal Acquisition Regulation (FAR) under Federal Acquisition Circular 2001-15. However, within a year's time of its launch, the Acquisition Committee for E-Gov (ACE) cut the project's funding due to funding constraints of the Integrated Acquisition Environment (IAE) under the E-Gov initiatives.

The next attempt to collect data on interagency contracts came in fiscal year 2004. While not designed to accomplish the same purpose as the ICD, the Federal Procurement Data System – Next Generation (FPDS-NG), began collecting data on the award and use of interagency contract vehicles. Beginning with Fiscal Year (FY) 2004, FPDS-NG required identification of these contracts and assigned delivery and task order obligations to the contracts by type (e.g., GWAC's, GSA Federal Supply Schedules, Blanket Purchase Agreements (BPA's), Basic Ordering Agreements (BOA's), and Indefinite Delivery Contracts (IDC's) that do not fall under any other category). However, the FPDS-NG data element was not implemented to specifically assign order obligations by type of interagency contract if the contract was awarded prior to FY 2004 but rather can assign such obligations as "Other." Along with this limitation, there is significant evidence that orders reported by agencies in FPDS-NG, may be incorrectly reported. This is most likely caused by the improper coding of orders which results from a lack of understanding of the differences between various types of interagency contracts. The working group bases this conclusion on OFPP's and IAE's discovery of obvious errors in agency classification of contracts during development of the now defunct ICD. For example, many non-GWAC contracts were improperly classified as GWAC's and there was a misunderstanding of when the Economy Act applied to multi-agency contracts. Additionally, traditional problems with incorrect coding will impact the accuracy of the information in FPDS-NG. For instance, data obtained from DoD indicates that from 2001-2005 nearly \$185 Million has been spent by the Department on soybean farming or establishments that produce soybean seeds. A DoD representative stated that they believe this large dollar value is attributable to those inputting the award data simply selecting the first NAICS code in the list, 111110 for soybean farming, rather than selecting the correct code. While inaccurate contract reporting is not unique to interagency contracts, the absence of reliable and timely data contributes to the problem of linking use and accountability. The Panel has adopted a number of recommendations to improve the reliability of FPDS-NG data as discussed in Chapter 7 of this Report.

b. Data on Management

Agencies that hold interagency contract vehicles also maintain differing levels and types of post award data. For instance, while GWAC holders report yearly to the Office of Management and Budget (OMB) using uniform reporting elements on performance and financial management and Franchise Funds report to the Chief Financial Officer's Council (CFOC), there is no consistent approach across the government for collecting and reporting performance data on interagency contracts. Additionally, the data that has been collected and reported has been identified by GAO as lacking or inaccurate. In 2002, GAO found that agencies were not accurately identifying or reporting the full cost of the GWAC programs they were managing. This precluded GAO from discerning if the fees collected were a reflection of costs incurred by the vehicle holder.⁵¹ In its High Risk Series Update testimony, GAO stated that the fee-for-service feature of these interagency contracts creates an incentive to increase volume to support other programs and leads to focusing on meeting customer demands at the expense of complying with regulations.⁵² In a report on DOD's use of franchise funds, GAO states that while the franchise funds business-operating principles require that they maintain and evaluate cost and performance benchmarks against their competitors,

...the franchise funds did not perform analyses that DOD could have used to assess whether the funds deliver good value. The funds' performance measures generally focus on customer satisfaction and generating revenues. These measures create an incentive to increase sales volume and meet customer demands at the expense of ensuring proper use of contracts and good value.⁵³

c. Data and Transparency

As we begin to think in more strategic terms, we also note that procurement data reporting through FPDS-NG and its predecessor dating back to the 1970s, has been exclusively transaction-based. But the system is capable, with enhancement, of providing data that can inform strategic decision-making both during the creation and continuation phase as well as at the point of use. OMB's Memorandum "Implementing Strategic Sourcing," dated May 20, 2005 states that strategic sourcing is a

...*collaborative* and *structured* process of critically analyzing an organization's spending and using this information to make business decisions about acquiring commodities and services more effectively and efficiently. This process helps agencies optimize performance, minimize price, increase achievement of socio-

⁵¹ (GAO-02-734).

⁵² (GAO-05-350T).

⁵³ (GAO-05-201, p 16)

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economic acquisition goals, evaluate total life cycle management costs, improve vendor access to business opportunities, and otherwise increase the value of each dollar spent.

Before an agency creates or continues an interagency or enterprisewide vehicle and applies the resources necessary to manage such a vehicle, data on similar vehicles would provide essential market research for informing a cost-benefit analysis. Data on the costs and performance measures of such vehicles would also inform rational decisions on their use, driving the market to more efficiently ‘cull’ the numbers of such vehicles to only the highest performing most cost-effective ones.

Part II -- Issues and Findings - Creation and Continuation

Given the increased amount of taxpayer dollars flowing through these vehicles for the fulfillment of mission-critical requirements, the lack of a consistent governmentwide policy on the creation and continuation of interagency contracts is notable. There are no uniform standards for their creation and no governmentwide measures to support their continuation based on desired performance. Certainly industry witnesses have told the Panel repeatedly that aligning incentives is essential for success.⁵⁴

There is little doubt that interagency contracts can and do provide significant benefit and efficiencies, but these efficiencies have been narrowly viewed primarily as transaction efficiencies such as reduced pre-award lead time and protest risk. Interagency contracts broadly defined are important to the operation of the federal acquisition process. Witnesses speaking on the subject before the Panel identified the benefits of interagency contracts and several remarked that they viewed them as essential for meeting mission needs.⁵⁵ However, the focus on transaction-based value hides the even greater efficiencies to be gained if employed toward the goal of creating strategic governmentwide efficiencies. Unfortunately, the lack of readily available, reliable and timely data on the use and management of interagency contracts has hampered the Government’s ability to realize the more strategic value of these contracts. This lack of data is a barrier to strategic planning as well as oversight, on both an enterprisewide and governmentwide basis.

The Panel believes that meaningful improvements to interagency contracting practices can be achieved by agencies focusing their efforts on a sound and consistent process that provides oversight during the creation and the continuation (or reauthorization) of these contracts. Many of the issues identified by the GAO and agency IGs dealing with the misuse of these vehicles are related to the internal controls, management and oversight, and division of

⁵⁴ Testimony from Todd Furniss, Everest Group, March 30, 2005; Peter Allen, TPI, April 19, 2005; Daniel Masur, Outsourcing Attorney, September 27, 2005.

⁵⁵ Testimony, Scott Amey for the Project on Government Oversight (POGO), May 17, 2005, Ashley Lewis for the Department of Homeland Security (DHS), June 14, 2005, David Sutfin for Department of the Interior, June 14, 2005, Martin Johnson for the Department of the Treasury, July 12, 2005, ****

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roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a Government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of an established process and limited transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, focusing attention on the short term, transaction-based benefits of reduced procurement lead time. The Panel and the working group received testimony from government witnesses who stated that interagency vehicles are often utilized when an agency does not have ample time to fully define its acquisition requirements. Establishing guidelines for the creation and continuation of these vehicles will help to ensure they are used as an effective tool for enterprisewide and Governmentwide strategic sourcing.

A. Proliferation

The pressures and incentives to create and use these vehicles, coupled with inconsistent or lacking oversight and little transparency has created an environment biased towards the uncoordinated proliferation of interagency contracts. GAO has noted that they are attracting rapid growth of taxpayer dollars (GAO-05-207) with Fiscal Year 2004 FPDS-NG data showing total obligations of \$139 Billion or 40% of the total Governmentwide spend for the year.⁵⁶ In addition, the Panel is concerned about the impact of using IDIQ contracts for enterprisewide programs such as the Navy's Seaport-e and the Department of Homeland Security's (DHS) Enterprise Acquisition Gateway for Leading Edge (Eagle) for IT Services and First Source for IT commodities replicating vehicles similar in purpose to interagency vehicles within the confines of a single agency.

An uncoordinated proliferation of these contracts has consequences on the stakeholders that include requiring agencies, holders of the vehicles, industry, and those agencies responsible for oversight. That is why the Panel has determined it necessary to include both interagency and enterprisewide contracts within the scope of its recommendations. Failing to do so could lead to the unintended consequence of fostering even greater uncoordinated enterprisewide contract creation, exacerbating negative consequences for stakeholders.

In addition, holders of interagency contracts and their customer agencies must have the necessary expertise to award and manage orders under these interagency contracts. The GAO and agency IGs have noted that curtailed investments in human capital have produced an acquisition workforce that often lacks the training and resources to function effectively⁵⁷ in an environment of more complex contracting vehicles and service requirements. GAO testimony stated that contracting personnel are expected to have greater knowledge of market conditions,

⁵⁶ Data was reported as of November 2005 in a report prepared in response to a Panel request.

⁵⁷ GAO-03-443, April 2003, GAO-01-1074R, August 22, 2001, GAO-05-350T, February 2005, GAO-02-179T, November 1, 2001, GAO-05-274, March 2005, GAO-03-556T, Testimony of Vic Avetissian, Committee on Government Reform, March 16, 2005, GAO-05-207, January 2005, IG reports/testimony (May 17, 2005 before the AAP)

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industry trends, and technical details of the commodities and services they procure.⁵⁸ They also note that the use of interagency contracts requires a higher degree of business acumen and flexibility. One of the risks GAO cited with respect to interagency contracts is that they are being administered and used by some agencies that have limited expertise with the contracting method.⁵⁹ Another concern that has been raised is that agencies, because of competing demands on acquisition organizations, have insufficient resources in existence or planned to systematically monitor and oversee the use and the outcomes associated with interagency contracts.⁶⁰ In its testimony for example, GAO noted that some of DOD's problems with the use of interagency contracts stems from increasing pressures on the acquisition workforce and insufficient and inadequate training.⁶¹ Insofar as holders of the vehicles are concerned, GAO noted that while the number of GSA's Federal Supply Schedule contracts increased, the contract specialist workforce remained relatively stable in terms of numbers.⁶²

Certainly, uncoordinated proliferation without adequate transparency into the establishment or use of these vehicles creates serious challenges for those organizations responsible for oversight. While GWACs, franchise funds, and schedules are readily identifiable, the significant number of other interagency vehicles such as non-GWAC multi-agency contracts and the emerging trend in the proliferation of enterprise-wide contracts presents an obstacle for oversight both in terms of sheer numbers and difficulty in identification. Lack of transparency in both the use and management of these vehicles severely hampers the government's ability to maximize their effectiveness.

Finally, the burden on industry, both large and small, has been clearly documented with respect to the increasing number of interagency vehicles. These burdens include increased bid and proposal costs in order to obtain contracts for similar work under numerous interagency and now, enterprise-wide contracts. This proliferation is especially burdensome to small business. In reaction to the preference for multiple award IDIQ contracts (the primary form of interagency contracts) and GSA's Federal Supply Schedule program, Washington Technology's James Fontana has stated that "The problem is you invest heavily in the right to hunt, only to find there isn't enough game for everyone to bring home."⁶³ Proliferation of interagency contracts and enterprise-wide contracts exacerbates this problem by increasing the number of "hunting reservations" that industry must seek out while the amount of potential business across the government remains unaffected. Vic Avetissian, Chairman of Public Policy Council for the Contract Services Association of America (CSA), in his testimony before the House Government Reform Committee on March 16, 2005 cited an inefficient overlapping of contracts for similar products and services responsible for increased costs to industry to prepare separate proposals.

⁵⁸ GAO-02-499T, March 7, 2002.

⁵⁹ (GAO-05-207).

⁶⁰ (GAO-06-996).

⁶¹ (GAO-05-350T).

⁶² (GAO-05-229).

⁶³ Washington Technology, "Multiple Awards: A Protest-Proof Process." James Fontana, 12/10/98.

B. Inconsistent Oversight

1. Lack of Transparency

Increased visibility into this creation and continuation process, on a government-wide basis, is an essential element in properly implementing interagency vehicles. It will provide for the eventual rationalization of the numbers of interagency and enterprisewide contracts with the outcome of ensuring these vehicles are meeting the goals of reduced administrative costs and efficient competition. This will benefit all stakeholders. Therefore, the Panel believes that a sound process for creation and continuation requires equally sound and transparent data. Such data would support effective decision-making for users and holders of the vehicles, effective oversight, and the eventual use of these vehicles for more strategic sourcing.

As discussed earlier in the *Data on Use* section of this report, FPDS-NG required the separate identification of indefinite delivery vehicles beginning in Fiscal Year 2004. The system was designed to accumulate cost by contract and is capable of identifying GWAC's, Federal Supply Schedules, Blanket Purchase Agreements (BPAs), Basic Ordering Agreements, and non-GWAC multi-agency contracts. The system is also able to separately identify contracts available for multi-agency use from those available for use by a single agency. The Panel has been unable to verify the data provided but intends to propose that individual agencies to verify their data once received from FPDS-NG. However, this data is contract specific and, therefore, transaction-based; there is no transparency into the creation of interagency or enterprise-wide contracts or information available to users sufficient to assist them in making well-informed decisions about which vehicles are most appropriate to their needs. Nor does this transaction-based collection system provide sufficient transparency to support a rational governmentwide decision process for the creation of these contracts or monitoring their performance and relevance.

2. Little Systematic Coordination among Vehicles

The Panel has found that, aside from the processes internal to a particular type of interagency vehicle such as the OMB Executive Agent designation process for GWACs, there is little or no coordination among the various types of products and services offered under different vehicles. The inefficiencies created by such a lack of coordination were, in part, the impetus for the recent GSA Federal Supply Service and Federal Technology Service restructuring. In GAO's testimony on the subject of GSA's restructuring, the impact of inefficient overlap of similar IT products and services is cited as increasing the costs to GSA to administer the programs as well as the marketing and bid and proposal costs to industry to compete (GAO-04-132T, GAO-02-560T). In an effort to harmonize various contract vehicles it offers, GSA created a Contract Vehicle Review Board with representatives from FSS, FTS, GSA's Office of Governmentwide Policy, and its regional offices to ensure its existing contracts are rationalized and to evaluate the need for new contracts. As a result of this review, GSA decided not to recompet the eight specialty GWAC vehicles because they overlap with other GWACs or

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schedule contracts.⁶⁴ In addition, the Board recommended that its three largest GWACs - Millennia, Millennia Lite and Applications 'N Support for Widely Diverse End-User Requirements (ANSWER) be merged into a single GWAC.

3. No Consistent Standards for Creation and Continuation

There are no consistent governmentwide standards applicable to the creation of interagency and enterprisewide vehicles and no performance standards to justify their continuation or relevance. As discussed earlier, the GWACs, schedules, and franchise funds have specific processes in place, but each focuses on different elements of a business case. There is no standard process at all for the creation and continuation of non-GWAC multi-agency IDIQ contracts and enterprisewide programs. The treatment of various types of funding within agencies may preclude the objective measurement of tradeoffs of costs versus the benefits associated with the creation of such vehicles. As noted above, some of the justifications advanced for the creation of the Navy's SeaPort-e program included the savings associated with fees that would no longer have to be paid to GSA and the fact that no additional contracting personnel would be required in the Navy to administer the vehicle. While this approach reflects well the financial incentives from an internal NAVSEA perspective, it is not clear that that this calculation accurately captures the overall costs to the government associated with the creation and operation of this or similar programs. Given the amount of taxpayer dollars spent on interagency contracting, it is notable that there is no governmentwide policy focusing on rational business cases for creation and performance measures that align incentives with desired behaviors and key management agenda initiatives. For instance, business cases should require the identification of the mission need to be fulfilled, management and governance structure, including the resources and tools that will be applied by a servicing agency to manage an interagency contract. Proper business planning requires management deliberation and accountability and identify the roles and responsibilities of the requiring and servicing agency and the means by which this is communicated. Currently, there are no consistent procedures or policies for allocating roles and responsibilities among the stakeholders in transactions using these vehicles. Measures that focus on competition, performance-based contracting and small business goals would drive desired behaviors. Clearly identifying those responsible for these measures would drive agencies to allocate responsibility. But key to having such standards and measures is a system for the governmentwide monitoring of vehicle performance and relevance. Again, while individual programs such as GWACs have such a system, interagency and enterprisewide contracts, on a governmentwide basis, have no such process.

⁶⁴ The eight specialty GWACs are: the Access Certificates for Electronic Services, Disaster Recovery, Outsourcing Desktop Initiative for NASA, Reverse Auctions, Safeguard, Seat Management, Smart Card and Virtual Data Centers.

4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power

The lack of oversight and governmentwide attention to these contracts precludes the ability to manage them to leverage the government's purchasing power. There is no process or procedure in place and no systematic data report on the vehicles and their use to allow for this to occur. The result is the dilution of buying power across the federal government. Even within agencies, this dilution of buying power has been noted. For instance, GSA's Federal Supply and Federal Technology Services were competing for the same work from the same customers and have only recently begun to address these inefficiencies through their restructuring. With the emergence of enterprisewide programs, such as SeaPort-e with 935 vendors, the impact goes even further. In addition to the increased costs to industry and taxpayers, proliferation and lack of vehicle alignment also ignores one of the fundamental purposes of interagency contracts, namely, to drive down the administrative and operational costs of procurement on a governmentwide basis. The Panel believes that the costs from not aligning the interagency contract vehicles must be more clearly identified and weighed to allow for responsible and efficient management of interagency contracts.

5. No Central Database or Consistent Methodology to Help Agencies Select Appropriate Contract Vehicles

Too many choices without transparency into the performance and management of these contracts make the cost-benefit analysis and market research needed to select an appropriate acquisition vehicle impossible. None of the witnesses to the Panel were able to clearly articulate an answer to Panel questions about how agencies select a particular vehicle over another for a given acquisition. In fact, there is no guidance or methodology for selection. Certainly, the GAO and IG reports as well as recent testimony to the House Government Reform Committee have asserted that the decisions are not well-reasoned and seem to be based largely on ease and convenience, with little thought into whether the vehicle is actually appropriate for requiring agency needs.⁶⁵ The proliferation of these vehicles with little data available to help requiring agencies make well-informed decisions on use clearly impacts the quality and value of the acquisition outcomes.

⁶⁵ DOD IG Report D-2002-189, Multiple Award Contracts for Services, September 30, 2001. GAO-05-350T, High Risk Series Update Testimony. GAO-04-874, Contract Management: Guidance Needed to Promote Competition for Defense Task Orders. GAO-06-936, Improved Guidance, Planning, and Oversight Would Enable the Department of Homeland Security to Address Risks. Testimony of Vic Avetissian, Northrop Grumman Corporation, Chairman of Public Policy Council for the Contract Services Association of America (CSA), testimony before Committee on Government Report, Hearing on General Services Administration Operations, March 16, 2005.

C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer

GAO noted in 2005 that the fee-for-service arrangement of interagency contracts "...creates an incentive to increase sales volume in order to support other programs of the agency that awards and administers an interagency contract. This may lead to an inordinate focus on meeting customer demands at the expense of complying with required ordering procedures." With the trend toward greater agency reliance on internal contracts and enterprisewide programs, the competition for customers may put greater pressure on holders of new and existing interagency contracts and the interagency assisting agencies to focus on meeting demands that are counter to the interests of taxpayers, such as waiving competition to retain incumbent contractors.⁶⁶

D. Some Diversity is Desirable

While the Panel believes that proliferation dampens the potential benefits of interagency contracts, it does not find that administrative monopolies are beneficial either. Some competition among vehicles is seen as desirable and even fundamental to maintaining the health of government contracting. Armed with the necessary information on how many interagency and enterprisewide vehicles exist, and institutionalizing standards for their creation and continuation, the government can make informed decisions on how many and what type of vehicles provide for appropriate leveraging and which vehicles are best and most responsibly managed to obtain maximum taxpayer value. Agency contracting officials should have reasonable alternative contracting vehicles available for meeting agency mission needs coupled with meaningful data and information about the different options for contracting within their own agencies and through other entities.

E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles

The Panel believes that maximum leverage for improving interagency contracting can be gained by focusing its efforts on a sound and consistent process for the creation of these vehicles along with a monitoring process for the continuation (or reauthorization) of them. Many of the issues related to the misuse of these vehicles identified by the GAO and IG reports relate to roles and responsibilities, internal controls, and management and oversight. These issues can best be addressed with a governmentwide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to fix these problems at the point of use. The current lack of process and visibility allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, focusing attention on the short term, transaction-based benefits of reduced procurement lead time instead of on their

⁶⁶ (GAO-05-207).

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ultimate benefit as a tool for effective enterprise wide and governmentwide strategic sourcing at reduced administrative costs.

Interagency Contracting Recommendations

- 1. Increased transparency through identification of vehicles (e.g. GWACs, MACs, enterprisewide) and Assisting Entities. 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.**

The Panel believes that the most important near-term task in the interagency contracting creation and continuation area is establishing a database identifying existing vehicles and assisting entities as well as their characteristics. It is the view of the Panel the most expeditious means of assembling such information is in the form of a survey as currently drafted by the Office of Federal Procurement Policy (OFPP) in support of the Office of Management and Budget task force examining Interagency and Agency-Wide Contracting.

The OFPP draft survey is intended to gain a clearer understanding of the following:

- The number of interagency contracts that are currently in operation; the scope of these vehicles; the primary users; and the main rationale for their establishment;
- The level of acquisition activity conducted by Intragovernmental Revolving Funds (including the Franchise Funds) on behalf of other agencies;
- The number of enterprisewide contracts currently in operation to address common needs that could be (or have been) satisfied through an existing interagency program, the scope of these vehicles; and the main rationale for their establishment.

The Panel recognizes that such a survey provides no more than a snapshot of agency activities associated with interagency contracting. Such a survey will provide an immensely greater degree of transparency for the stakeholders. The results of such a survey should serve as a bridge to the more institutionalized database recommended in #3 below. In order to better serve that end, the Panel also recommends that the OFPP and the interagency task force consider expanding the requirements of the draft survey to include vehicles currently in the planning stages.

- 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.**
 - i. Improved granularity in fee calculations**
 - ii. Standard FPDS-NG reports**

c. Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.

The Panel believes that the data gathered in the initial baseline survey should be structured in such a way as to allow for agency and public use. As noted above, the information should be viewed as a bridge to an institutionalized collection process. The Panel believes that three major purposes should guide the structuring of information consistent with the findings.

First, the data should provide a detailed overview of vehicles and services available from assisting entities to allow agency procurement officials and managers to weigh the best acquisition strategy for meeting agency mission needs. The information should be structured in such a manner to allow “apples to apples” comparisons among the benefits of using different vehicles and entities as well as the fees associated with their use. The data should allow agency officials to make accurate comparisons between the cost to the agency of the fees involved with using another agency vehicle and the internal costs of replicating the capability within the agency.

Second, the data should be organized to allow oversight organizations, such as the Government Accountability Office and the agencies’ inspectors general greater visibility into the existing and planned vehicles and entities, trends in their use, and the degree and nature of any overlap among them. In particular, the initial survey should provide the groundwork for a meaningful comparison of the manner in which fees are calculated among different vehicles and entities to indicate whether a more systematic approach to fee establishment would be feasible or desirable.

Third, consideration of the information from the survey should be standard practice for any agency considering creating a new interagency or enterprisewide vehicle or continuing an existing one. The Panel believes that a major component of a proper business case justification must be a reasonable and detailed understanding of other alternative acquisition approaches that are available in the Federal government or to specific requirement holders in a prospective customer agency.

3. OMB institutionalize collection and public accessibility of the information, for example through a stand alone database or module within transactions-based FPDS-NG.

As noted, the Panel believes that the initial OFPP survey should serve as the foundation for an institutional base of data and information on vehicles and entities. An institutional database with timely updates will be critical for the agencies’ success in managing the vehicles and entities under their jurisdiction. Such a database will also be critical for agency managers to develop sound acquisition strategies involving interagency contracting capabilities to meet their agency’s mission needs. The Panel believes that such benefits will offset the costs of collecting and maintaining this information.

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OMB should explore various approaches to establishing such a database, whether as an additional module in the transactions-based FPDS-NG or as a stand-alone system. The Panel believes that the different approaches have merits and costs, and careful analysis of the alternatives must be conducted before deciding on a single approach.

- 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 governmentwide 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.**

The Panel recognizes there is statutory authority for the creation and continuation of GWACs, Franchise Funds, and the Federal Supply Schedules. The Panel recommends that these statutory authorities should not be altered in any way. With respect to the GWACs, the Panel further recommends that OMB reconsider the current requirement for annual review and reauthorization of these vehicles. The Panel believes that this period is too short given the complex nature and long-term nature of the work being undertaken under the GWACs.

The Panel does believe that the cognizant agency should review the procedures under which these vehicles and entities are created and continued and revise them in ways they deem appropriate to ensure that emphasis is placed on meeting specific agency needs and the overall effectiveness of governmentwide contracting. The availability of more comprehensive data on other existing vehicles and entities should allow for more effective procedures for avoiding duplication that does not serve such overarching goals.

- 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. Enterprisewide vehicles**
 - c. Assisting entities**

Although the Panel recommends review and revision of the current procedures for the creation and continuation/reauthorization of GWACs, Franchise Funds, and Federal Supply Schedules, it believes these procedures are fundamentally sound. However, there are no comparable common procedures for other interagency vehicles and assisting entities. The Panel considered different approaches to address the problems associated with the proliferation of these interagency vehicles and entities. One approach that was considered would be to allow agencies full discretion to establish vehicles or assisting entities involved in interagency contracting. This “market approach” would rely on the extent of agency utilization over time to determine the viability of a given vehicle or assisting entity. Unfortunately, it does not appear that reliance on

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this approach alone would be effective in addressing the negative impacts caused by the uncontrolled proliferation of vehicles.

The approach at the other end of the spectrum that the Panel considered would be to establish a process whereby OMB would formally authorize or reauthorize these vehicles and assisting entities. Based on previous experience with centralized approval processes (e.g. Brooks Act authorizations for automated data processing equipment and services), the Panel believes this approach risks being too cumbersome and would be beyond the scope of existing or likely OMB resources. The Panel also believes that this approach may inhibit the establishment or creation of a diverse set of interagency vehicles.

The Panel believes that rather than serving as a central approval authority, the proper role for OMB is to issue guidance and procedures to structure the agency decisions with respect to the creation and continuation of individual vehicles or entities. The individual agencies should retain the responsibility for making decisions regarding the creation and continuation of these vehicles and assisting entities. The agencies have the personnel, resources, and requirements to establish or expand vehicles or assisting entities within the context of the agency mission. While recognizing this agency responsibility, the Panel believes that achieving improvements in interagency contracting is best assured through the establishment of a more formal process within these agencies for the creation and reauthorization of these vehicles and entities. This heads of agencies should be accountable for the implementation of this process. All these vehicles and entities, along with those currently authorized by OMB and GSA, form the landscape of interagency contracting and should be covered by more formal procedures where they do not currently exist.

The Panel notes that defining “expansion” precisely for the purposes of these recommendations is challenging. The term is intended to apply not only to cases where an existing vehicle or an assisting entity is opening up a new business line but also to cases where there is a significant increase in scope or size of contracts under an interagency or enterprisewide vehicle.

- 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 or 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.**

As noted above, certain of the interagency vehicles and assisting entities, such as the GWACs, Federal Supply Schedules, and Franchise Funds, are subject to periodic review and continuation/reauthorization. The Panel believes that the other interagency vehicles and assisting entities should be subject at the agency level to periodic review and disestablishment if they do not continue to meet specific agency needs and support the effectiveness of governmentwide contracting. The result of such periodic reviews should be the elimination of vehicles and

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assisting entities that represent unproductive duplication or for which there is no longer a valid business case.

The Panel believes that this process must have teeth rather than be a pro forma review. The standard for the review should be the degree to which the vehicle or assisting entity is tracking to (or meeting) the performance measurements established at its inception. The OMB guidance on continuation should provide sufficient clarity to allow agency decisions on continuation/reauthorization to be subject to meaningful review and audit by oversight organizations.

With respect to the appropriate review timeframes, the Panel believes that there is no “one size fits all” approach. The Panel recognizes that each type of vehicle or class of assisting entity will justify OMB establishing different continuation/reauthorization review periods. A major consideration in establishing such review periods should be the nature and length of contracts and options under the vehicles or being managed by the assisting entities. A continuation/reauthorization review period for a given vehicle that is significantly shorter than the contract periods under the vehicle could present an agency with a serious obstacle to appropriate action if a continuation/reauthorization review indicates that the vehicle should be terminated rather than continued.

7. Have the OMB interagency task force define the process and the mechanisms anticipated by recommendations #5 and #6.

The Panel believes that OMB should be the responsible agency for preparing and issuing the guidance to implement recommendations #5 and #6. The process should be the result of collaboration with the chief acquisition officers and senior procurement executives of the individual agencies having jurisdiction over interagency, enterprisewide, or assisting entities. The current OMB Task Force on Interagency Contracting, formed to address the management concerns raised by the Government Accountability Office, has the breadth of participation to allow a balance between the need for explicit guidance with clear performance measures and the need for a reasonable degree of flexibility in implementation. The Panel believes that the OMB Task Force should remain in existence until the task of promulgating procedures and mechanisms for these vehicles and entities has been completed.

8. OMB promulgation of detailed policies, procedures, and requirements should include:

- a. Business case justification analysis (GWACs as model).**
- b. Projected scope of use (products and services, customers, and dollar value).**
- c. Explicit coordination with other vehicles/entities.**
- d. Ability of agency to apply resources to manage vehicle.**
- e. Projected life of vehicle including the establishment of a sunset, unless use of a sunset would be inappropriate given the acquisitions made under the vehicle.**

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- f. **Structuring the contract to accommodate market changes associated with the offered supplies and services (e.g. market research, technology refreshment, and other innovations).**
 - g. **Ground rules for use of support contractors in the creation and administration of the vehicle.**
 - h. **Criteria for upfront requirements planning by ordering agencies before access to vehicles is granted.**
 - i. **Defining post-award responsibilities of the vehicle holders and ordering activities before use of the vehicle 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.**
 - j. **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.**
 - k. **Procedures to preserve the integrity of the appropriation process, including guidelines for establishing bona fide need and obligating funds within the authorized period.**
 - l. **Require training for ordering agencies' personnel before access to the vehicle is granted.**
 - m. **Use of interagency vehicles for contracting during emergency response situations (e.g. natural disasters).**
 - n. **Competition process and requirements.**
 - o. **Agency performance standards and metrics.**
 - p. **Performance monitoring system.**
 - q. **Process for ensuring transparency of vehicle features and use.**
 - i. **Defined point of contact for public – Ombudsman.**
 - r. **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)**
9. **OMB conduct a comprehensive, detailed analysis of the effectiveness of Panel recommendations and agency actions 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.**

In order to achieve the greatest impact in performing its analysis, OMB should publish a timeline on carrying out the analysis including an identification of agencies' responsibilities, as soon as practicable. In conducting its analysis, OMB should evaluate the degree of compliance of a representative sample of vehicles with business case guidance stipulated by OMB as well as an analysis of the degree to which the vehicles in the sample represent unwarranted duplication or overlap with other interagency and enterprisewide vehicles. The evaluation should incorporate recommendations for consolidating or terminating vehicles where unwarranted

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duplication or overlap has been identified. The analysis should also include identification of any cost savings associated with the implementation of the recommendations and proposed measures to address the unintended negative consequences of such recommendations. Finally, OMB should include in each analysis formal consideration of whether to require OMB-level approval on a case-by-case basis of agency decisions to create or continue vehicles or assisting entities that are not otherwise covered under a statutorily mandated process.

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CHAPTER 4

SMALL BUSINESS

REPORT OF THE
ACQUISITION ADVISORY PANEL

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APPENDICES

Appendix 1: 2004 Small Business Goal Achievements by Major Federal Department

Appendix 2: Summary of Small Business Subcontracting Requirements and Issues

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I. Introduction

Small businesses have been long recognized as one of the nation's most valuable economic resources. As reflected in Table 1, small businesses participate in all major U.S. industries. Indeed, studies commissioned by the U.S. Small Business Administration ("SBA") Office of Advocacy reveal that small businesses represent 99.7 percent of all employers and employ about half of all private sector employees.¹ The Office of Advocacy studies further show that small businesses pay 44.3 percent of the total U.S. private payroll and have generated 60 to 80 percent of net new jobs annually.² In addition, small businesses employ 39 percent of high tech workers (such as scientists, engineers, and computer workers) and produce 13 to 14 times more patents per employee than large firms.

Table 1: Small Business Employment by Major Sector

Industry	Percent of Small Business Employees	Number of Employees (in millions) By Major Sector				
		2000	2001	2002	2003	2004
Goods-producing industries	48.41	24.65	23.87	22.55	21.81	21.88
Natural resources and mining	38.24	0.60	0.61	0.58	0.57	0.59
Construction	96.15	6.79	6.83	6.71	6.73	6.96
Manufacturing	42.34	17.27	16.44	15.26	14.51	14.33
Service-producing industries	55.03	107.14	107.96	107.79	108.19	109.59
Trade, transportation and utilities	52.32	26.22	25.99	25.50	25.29	25.51
Wholesale trade	62.79	5.93	5.77	5.65	5.61	5.65
Retail trade	42.92	15.28	15.24	15.02	14.92	15.04
Information	25.56	3.63	3.63	3.39	3.19	3.14
Financial activities	39.73	7.69	7.81	7.85	7.98	8.05
Professional and business services	44.83	16.67	16.48	15.98	15.99	16.41
Education and health services	47.84	15.11	15.65	16.20	16.59	16.95
Leisure and hospitality	61.43	11.86	12.03	11.99	12.18	12.48
Other services	86.16	5.17	5.26	5.37	5.40	5.43
Government	0	20.79	21.12	21.51	21.58	21.62

Notes: Seasonally adjusted. See <http://www.bls.gov/ces/cessuper.htm> for NAICS code equivalents for each sector. The small business percentage by sector is based on 2002 firm size data.

Sources: U.S. Small Business Administration, Office of Advocacy, using data from the U.S. Department of Commerce, Bureau of the Census; U.S. Department of Labor, Bureau of Labor Statistics.

¹ See U.S. Small Bus. Admin., *Frequently Asked Questions: Academic Research on Small Businesses (How important are small businesses to the U.S. economy?)*, available at <http://app1.sba.gov/faqs/faqindex.cfm?areaID=24> (last visited Aug. 31, 2005).

² *Id.*

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Recognizing the vital role of small businesses in the U.S. economy, both the Legislative and Executive Branches have emphasized small business contracting as a fundamental socioeconomic goal underlying federal procurement policy. In Section 8(d) of the Small Business Act, for example, Congress explicitly declares that “[i]t is the policy of the United States that small business concerns have the maximum practicable opportunity to participate in the performance of contracts let by any federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems.”³ To effectuate that policy, Congress established a government-wide small business contracting goal of not less than 23 percent of the total value of all federal prime contract awards each fiscal year.⁴ Congress further established separate contracting goals for the various categories of small businesses, including a five percent goal for small disadvantaged businesses (“SDBs”); a five percent goal for Woman Owned Small Businesses (WOSBs); a three percent goal for HUBZone (Small Business Concerns (SBCs)); and a three percent goal for Service Disabled Veteran Owned (SDVO) small businesses.⁵

The Executive Branch also has consistently acknowledged the government’s fundamental interest in supporting small businesses through federal contracting. The current Small Business Agenda, which President George W. Bush unveiled in March 2002, outlines specific proposals to improve the access of small businesses to federal contracts.⁶ As part of that Agenda, the President reiterated that small businesses are the heart of the American economy and that the contracting process should be fair and open to these businesses. More recently, President Bush issued an Executive Order designed to strengthen and increase contracting opportunities for SDVO small businesses.⁷ In that October 20, 2004 Order, President Bush charged agencies with responsibility for developing strategies to reserve contracts exclusively for SDVO small businesses and to encourage their participation in competitive contract awards.

Consistent with the national policy to maximize small business participation in procurements, the total small business share of federal contracting dollars has continued to grow in recent years. FPDS-NG reports that in Fiscal Year (“FY”) 2005, small businesses received a record \$79.6 billion in federal prime contracts.⁸ Those dollars represent 25.4 percent of the total \$314 billion of federal prime contracting dollars awarded in FY 2005, as adjusted for goaling

³ 15 U.S.C. § 637(d). As the basis for the government’s small business contracting policy, Section 3(a) of the Small Business Act explains that encouraging and developing the capacity of small business is critical to promoting the country’s economic well being and national security. 15 U.S.C. § 631(a).

⁴ 15 U.S.C. § 644(g)(1).

⁵ *Id.*

⁶ President Bush’s Small Business Agenda is available on the official Whitehouse web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited Aug. 31, 2005).

⁷ See “Executive Order: Service-Disabled Veterans Executive Order,” <http://www.whitehouse.gov/news/releases/2004/10/20041021-5.html> (last visited Aug. 31, 2005).

⁸ The complete Small Business Goaling Report is available at <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>.

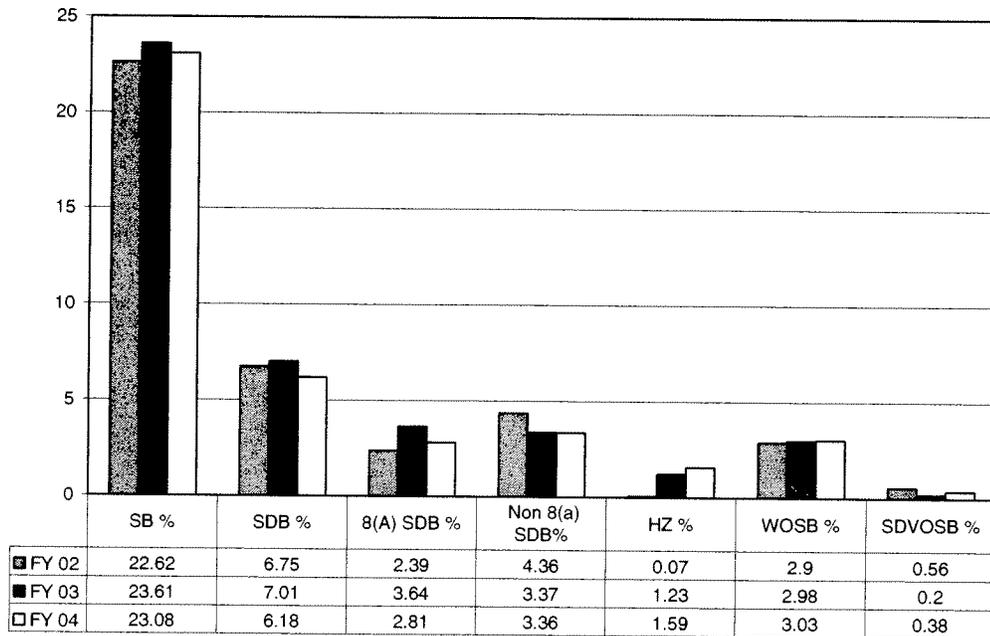
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purposes.⁹ A list of the percent of small business contracting dollars for FY 2005, by major federal department and small business category is provided at Appendix 2.

As reflected in Figure 1 below, many of the small business categories experienced a steady climb in the amount of prime contracting dollars in recent years. For example, the prime contracting dollars awarded to WOSBs increased by \$814.6 million to a record \$9.1 billion. That represents about three percent of the total federal prime contracting dollars, up from 2.98 and 2.9 in FY 2003 and 2002, respectively. Likewise, HUBZone and SDVO SBCs have received a record amount of contracting dollars in FY 2004. In particular, HUBZone SBC dollars increased by 40 percent, to \$4.78 billion. Also in FY 2004, SDVO SBC dollars more than doubled, reaching \$1.15 billion, up from \$550 million in FY 2003. Despite the increase in contracting dollars to WOSBs, HUBZone and SDVO SBCs, however, agencies have never achieved the statutory goals for any of those three categories of small businesses. In addition, even in the SDB category where the government has exceeded the government-wide statutory goal of five percent, the total dollars to SDBs decreased from 7.01 percent in FY 2003, to 6.18 percent in FY 2004.

Figure 1: Small Business Percent of Total Federal Prime Contracting Dollars

FY 2002 – 2004



⁹ As explained in SBA’s Goaling Guidelines, the baseline for the total value of prime contract awards used to determine small business goal achievements excludes several categories of procurements that are not covered under the goaling program. Among the exclusions are procurements using non-appropriated funds; procurements using mandatory sources such as the Javits-Wagner-O’Day (“JWOD”) Act (41 U.S.C. 46-48c) participating nonprofit agencies; contracts for foreign governments or international organizations; and contracts not subject to the Federal Acquisition Regulation (“FAR”). See *Goaling Guidelines for the Small Business Preference Programs*, available at <http://www.sba.gov/GC/goals/ggetotal71503.pdf> (last visited on Nov. 10, 2005).

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Source: FPDS Annual Reports.

As discussed in greater detail later in this Chapter, the small business goal achievements on multiple award multi-agency contracting vehicles also has been mixed. The small business share of awards against GSA's Federal Supply Schedule ("FSS" or "Schedule") has been among the most significant, representing about 80 percent of the Schedule contract awards and 37.6 percent, or \$13.2 billion, of FSS sales in FY 2006.¹⁰

Taken together, federal agencies have made significant progress in expanding small business contracting. However, although the government has achieved the overall small business goal of not less than 23 percent of the total value of prime contract awards, agencies have fallen short of the statutory goals for the small business subcategories of WOSBs, HUBZone and SDVO SBCs.

A. Statement of Issues

In reviewing small business issues, the Panel focused on five general areas of consideration: commercial practices, performance-based service acquisitions, interagency contracts, workforce, and inherently governmental functions. The Panel identified two primary issues relating to interagency contracting, commercial practices, and workforce.

First, the Panel analyzed the extent to which federal services acquisition strategies are structured to afford small business participation on the prime contracting level. Specifically, in light of the varied small business goal achievements, the Panel reviewed existing laws, regulations and policies to ensure that there is adequate guidance in selecting specific small business contracting mechanisms and appropriate interagency contracting vehicles to facilitate small business goal achievements. The Panel further analyzed the laws and policies governing the process for defining requirements. The Panel's primary objective in this regard was to identify effective incentives and acquisition planning tools to encourage small business contracting in the face of a shrinking acquisition workforce and the recent initiative to leverage spending through strategic sourcing.

Second, the Panel examined the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including government-wide agency contracts ("GWACs") and the GSA schedules. The Panel's underlying objective in this second area was to identify salient policies and practices that may be used to build on successful small business goal achievements, particularly in the context of commercial item buys from GSA's Schedule. Further, the Panel sought strategies to promote small business contracting opportunities, without compromising the overarching goals of contracting integrity, competition and efficiency.

¹⁰ GSA Data, *Contractors Report of Sales – Schedule Sales FY2006 Final* (Oct. 24, 2006).

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The Panel initially explored possible issues regarding compliance in small business subcontracting, as a result of early public statements recommending reforms in this area. However, the Panel concluded that more accurate and reliable data is necessary to fully analyze small business subcontracting issues. The government recently launched a new electronic Subcontracting Reporting System (“eSRS”), which is designed to create higher visibility and transparency in the collection of federal subcontracting data and accomplishments. Once this web-based reporting tool is fully operational, it will provide more accurate and timely data, as well as analytical tools to permit a comprehensive examination of small business subcontracting activity. A summary of the relevant subcontracting requirements and eSRS reporting capabilities is provided at Appendix 3 to this Chapter.

Further, the Panel recognized as a threshold matter that although there are many small business contracting issues of substantial importance to the federal procurement community, time and resources constraints would not permit examination of every issue. Notable examples involve issues relating to small business size standards. The issue of small business recertification on multiple award contracts, for example, has garnered significant attention in recent years.¹¹ The Panel is aware that SBA has recently promulgated final regulatory amendments.¹²

Likewise, the Panel also acknowledged the fundamental need for reforms to the system for defining and applying the size status of a business concern. Since SBA has already published an Advance Notice of Proposed Rulemaking (“ANPRM”) to simplify and restructure small business size standards,¹³ that issue was viewed as not appropriate for consideration here. Nonetheless, the Panel expresses its full support of SBA’s effort to simplify small business size standards.

B. Methodology

To analyze the two major issue areas, the Panel reviewed the relevant statutes, regulations and policies. It also analyzed available data from FPDS-NG, Inspector General and Government Accountability Office (“GAO”) reports, and Comptroller General bid protest decisions. In addition, the Panel reviewed records of various congressional hearings and interviewed procurement experts from both industry and the public sector to obtain information on best practices. Significantly, the Panel took into account public comments submitted to the Panel including those presented during the Panel’s public meetings held in Washington, DC, Texas and California.

¹¹ See, e.g., U.S. GAO, *Reporting of Small Business Contract Awards Does Not Reflect Current Business Size*, GAO-03-704T (May 7, 2003).

¹² See 71 Fed. Reg. 66434 (Nov. 15, 2006).

¹³ SBA published the ANPRM on December 3, 2004. It requested public input on how best to simplify and restructure small business size standards. 69 Fed. Reg. 70197 (Dec. 3, 2004). The ANPRM comment period closed on April 3, 2005. SBA received more than 6,100 comments. In June 2005, SBA also conducted public hearings in 11 locations across the country to provide interested parties an opportunity to meet with SBA officials and discuss their views on the issues. See 70 Fed. Reg. 25133 (May 12, 2005) (discussing the purpose, location and format of the scheduled hearings).

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This Chapter describes the Panel's findings and accompanying recommendations based on its analysis of the extensive information reviewed. The Chapter has two main sections corresponding to each of the two general areas of consideration. Each section begins with a discussion of the relevant legal background and is followed by an analysis of the Panel's findings and the supporting documentation. Each section then concludes with specific recommendations, including any necessary proposed line-in/line-out statutory and regulatory amendments.

II. The Process of Structuring Acquisition Strategies to Afford Small Business Participation

A. Background

The performance of acquisition functions generally cuts across different agency lines of responsibility. Thus, for example (and as discussed elsewhere in this Report), the contracting community must balance the need for quick and efficient contracting (especially in light of current workforce issues and the emphasis on strategic sourcing) with the achievement of socioeconomic, or small business, goals. Consequently, the Panel studied this balance with respect to two aspects of acquisition planning -- guidance in using the various small business contracting programs and guidance in promoting small business participation in consolidated contracts.

1. Guidance in Using Small Business Contracting Programs

The Small Business Act sets forth several specific contracting or business assistance programs, which include the 8(a) BD,¹⁴ HUBZone,¹⁵ SDVOSB¹⁶ and WOSB¹⁷ programs. These programs provide contracting preferences, either through a sole source or reserve (set aside) award, or through use of a price evaluation preference, to eligible small businesses in federal contracting. The Act also sets forth requirements for reserving acquisitions for small businesses, depending on the dollar value of the procurement.¹⁸ The Government collects data on the number of contracts and the amount of contract dollars each of these small businesses receive

¹⁴ 15 U.S.C. § 637(a) (if the SBA certifies to any officer of the Government having procurement powers that there is a competent and responsible 8(a) Participant which can perform a specific Government contract, the officer shall be authorized in his discretion to let such procurement contract). Section 8(a) awards can be made pursuant to competition restricted to 8(a) concerns, or on a sole source basis. *Id.* § 637(a)(1)(D) & (a)(1)(B).

¹⁵ 15 U.S.C. § 657a(b)(2) (the statute provides that "[n]otwithstanding any other provision of law" . . . "a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns. . . ." and allows the contracting officer ("CO") to make sole source awards to responsible HUBZone SBCs in limited situations).

¹⁶ 15 U.S.C. § 657f(a) & (b) (permits agencies to award sole source and set aside contracts to SDVO SBCs when certain conditions are met).

¹⁷ 15 U.S.C. § 637(m) (permits agencies to restrict competition to WOSBs in industries in which WOSBs are underrepresented).

¹⁸ 15 U.S.C. §§ 644(a) & 644(j). The Act provides that contracts for the purchase of goods and services valued greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for SBCs unless there are less than two SBCs that will submit a competitive offer. *Id.* § 644(j)(1). In general, the Small Business Act also requires a fair proportion of contracts be let to SBCs. *Id.* § 644(a).

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from the different agencies.¹⁹ The Government uses this data to determine whether or not the agency is meeting its small business goals.²⁰

The SBA has attempted to reconcile the Act's various programs, including the various set aside and sole source provisions, in its regulations.²¹ For example, the regulations provide discretion to the CO by stating that the CO should consider setting aside the SBA's requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.²²

The FAR has also attempted to reconcile the various programs through its regulations.²³ For example, the FAR provides that before deciding to set aside an acquisition for SBCs, HUBZone SBCs, or SDVO SBCs, the CO should review the acquisition for offering under the 8(a) program.²⁴ According to the FAR, if the acquisition is offered to the SBA, SBA regulations give first priority to HUBZone 8(a) concerns.²⁵ As noted above, this regulation now conflicts with the SBA's regulations and leaves less discretion to the CO.

The courts and GAO also have attempted to address the preferences within the Small Business Act and interpret the implementing regulations. In Contract Management, Inc. v. Rumsfeld, the court ruled that "the SBA and FAR regulations pertaining to the HUBZone program sufficiently promote the congressional objective of parity between the HUBZone and 8(a) programs."²⁶ In USA Fabrics, Inc., the protester challenged an agency's decision to set aside the acquisition for SBCs and not to set aside the procurement for HUBZone SBCs.²⁷ The GAO

¹⁹ See FPDS Next Generation, www.fpds.gov.

²⁰ These goals are summarized as follows: SBCs-23%; SDBs-5%; WOSBs-5%; HUBZone-3%; and SDVO SBCs-3%. 15 U.S.C. § 644(g)(1). Because these statutory goals are Government-wide, the percentages are based on the aggregate of all Federal procurement. The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for SBCs. *Id.* This agency goal is separate from the Government-wide goal.

²¹ The SBA implements its statutory programs in its regulations as follows: 8(a) BD, 13 C.F.R. pt. 124; SDB, 13 C.F.R. pt. 124; HUBZone, 13 C.F.R. pt. 126; and SDVO, 13 C.F.R. pt. 125. The SBA has not yet issued regulations implementing the WOSB program.

²² 13 C.F.R. §§ 124.503(j), 125.19(b), & 126.607(b).

²³ The FAR states that CO's must set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone SBCs and must consider HUBZone set-asides before considering HUBZone sole source awards or small business set-asides. 48 C.F.R. § 19.1305(a). Further, the FAR provides that a CO shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible SBCs offering the products or services of different SBCs. *Id.* § 19.502-2(b). Further, the FAR provides that the contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVO SBCs and shall consider service-disabled veteran-owned small business set-asides before considering SDVO SBC sole source awards. *Id.* § 19.1405(a).

²⁴ 48 C.F.R. § 19.800(e).

²⁵ 48 C.F.R. § 19.800(e). This is no longer true. The SBA amended its regulations to provide that "... the contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVO SBC contracting before setting aside the requirement as a small business set-aside." 13 C.F.R. § 126.607(b).

²⁶ *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166, 1177 (D. Hawaii 2003); *aff'd* 434 F.3d 1145 (th Cir. 2006).

²⁷ *USA Fabrics, Inc.*, B-295737; B-295737.2, 2005 CPD ¶ 82 (Apr. 19, 2005).

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ruled that the agency failed to conduct adequate market research to determine whether at least two HUBZone SBCs could submit an offer at fair market price and sustained the protest.²⁸

In an attempt to address the agency's socioeconomic goals and need to quickly and efficiently conduct a procurement, some agencies are using "cascading" procurements.²⁹ In other words, the agency will issue a solicitation that is open to 8(a), HUBZone, SDVO SBCs and other than SBCs and set a cascading order of priority in the solicitation.³⁰ The GAO has stated that it has no basis to object to the scheme since it has the effect of increasing the opportunity for SBCs under an otherwise unrestricted solicitation.³¹ Currently, there is no statute or regulation that precludes a cascading procurement, and only recently has there been a statutory provision providing guidance on its use.³² This has caused some problems with carrying out the acquisition.³³

Some businesses believe that cascading procurements allow the procuring agency to avoid performing the requisite market research and selecting its acquisition strategy at the outset of the acquisition.³⁴ At least one procurement official acknowledged that agencies appear to be using cascading procurements at the end of the fiscal year, when fiscal year money is about to

²⁸ *Id.*

²⁹ See *Carriage Abstract, Inc.*, B-290676 *et al.*, 2002 CPD ¶ 148 (Aug. 15, 2002). In that protest, the GAO stated that although an agency may review a large business proposal submitted under a cascading set aside preference, the agency is not required to do so. GAO also stated it found no reason to question the use of cascading set aside preference provisions previously used by HUD. HUD argued that the approach promotes the interests of small business concerns and provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized.

³⁰ For example, the solicitation might state that the agency will first issue an award to an 8(a) BD concern, but if an award cannot be made to such a concern, it will issue an award to a HUBZone SBC, etc.

³¹ *Carriage Abstract, Inc.*, *supra*. We note, however, that the GAO has not technically addressed whether such procurements are in accordance with the law since the GAO has only addressed this issue post award. Also, agencies are using similar types of cascading procurements to address the Act's preference programs as well as other programs, such as the Randolph-Sheppard Act (RSA). In *Automated Commc'n Sys., Inc. v. United States*, 49 Fed. Cl. 570, 578 (2001), the court ruled that the HUBZone price evaluation preference and the preference to certain blind persons licensed by a State agency pursuant to the RSA can be given its due and that the agency could issue the solicitation as a full and open competition and if the blind vendor submits a bid and the CO decides to conduct negotiations with that vendor, the RSA preference takes priority; if the blind vendor does not receive the contract award, the HUBZone SBCs receive the benefit of the price evaluation preference. See also *Intermark, Inc.*, B-290925, 2002 CPD ¶ 180 (Oct. 23, 2002) (the GAO stated that the solicitation could contain a set of cascading preferences or priorities whereby competition is limited to SBCs and blind vendors).

³² See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 106-163, § 816, 119 Stat. 3382. Prior to this statute, there was no statutory or regulatory guidance. See *Urban Group, Inc.; McSwain & Assocs., Inc.*, B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 7.

³³ *Greenleaf Constr. Co. v. U.S.*, 67 Fed. Cl. 350 (2005). In *Greenleaf*, HUD had issued a cascading procurement. The initial competitive range offerors were SBCs. Later, however, one offeror was found to be other than small and another was found to be technically noncompetitive. Because this left only one offeror, the CO cascaded the procurement to the unrestricted category. The court ruled that HUD had adequate competition at the small business tier and the fact that only one SBC offeror remained in the competitive range did not compel a cascade to the unrestricted tier.

³⁴ Prepared statement of Steve Ayers, SAIC, AAP Pub. Meeting (July 25, 2005) 3 (available at <http://www.arnet.gov/comp/aap/documents/SAIC%20Prepared%20Statement%2007%2027%2005.pdf>).

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expire and “time to re-solicit is not available.”³⁵ In addition, businesses must spend time and money preparing bids or proposals and yet, their bid or proposal may never be considered by the procuring agency.³⁶

In sum, the Panel analyzed the myriad of different laws providing for preferences to SBCs to determine whether the contracting community has adequate guidance in deciding which preference is applicable to a particular procurement.³⁷ If not, this can create a burden (in time and administration, and cost if there is a subsequent protest) on the procuring agency. As a subset of this issue, the Panel reviewed a current, creative contracting practice – cascading procurements – to see if it addresses the agency’s socioeconomic requirements while at the same time providing an efficient contracting mechanism.

2. Guidance with Contract Consolidation

Contract bundling and consolidation are not new. For several years now, agencies have been consolidating contracts to streamline the procurement process, reduce administrative efforts and costs, and leverage their buying power.³⁸ Further, contract consolidation may be necessary if an agency is interested in strategic sourcing – which is the leveraging of an agency’s spending power to the maximum extent possible by acquiring commodities and services more effectively and efficiently.³⁹

However, the President, in his Small Business Agenda,⁴⁰ and Congress have expressed concern about contract consolidation or bundling.⁴¹ Thus, there are specific statutory provisions

³⁵ Test. of Paul Stone, U.S. SBA, AAP Pub. Meeting (May 23, 2005) Tr. at 194.

³⁶ Ayers Statement at 3.

³⁷ We note that in addition to the small business preferences set forth in the Small Business Act, there are several statutes that provide contracting preferences to other types of entities. This includes preferences for products and services of the Federal Prison Industries, 18 U.S.C. § 4124, preferences for supplies and services of certain nonprofit agencies employing people who are blind or who have other severe disabilities, 41 U.S.C. § 47(d)(2)(A), and a preference for the operation of vending facilities on Federal property to blind persons licensed by a State agency, 20 U.S.C. § 107 (the RSA). We believe that it would be best to first address any problems associated with guidance in using the statutory preferences set forth in the Act before tackling the larger issue of guidance for the Act’s preference programs in conjunction with the ones set forth above.

³⁸ U.S. Government Accountability Office, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 4 (May 2004), available at <http://www.gao.gov/new.items/d04454.pdf>.

³⁹ Office of Management and Budget, Memorandum on Implementing Strategic Sourcing, (May 20, 2005), available at http://www.whitehouse.gov/omb/procurement/comp_src/implementing_strategic_sourcing.pdf (last visited on Oct. 26, 2005). The OMB explains that strategic sourcing will ultimately help agencies optimize performance, minimize price and increase achievement of socio-economic goals, among other things. *Id.*

⁴⁰ President Bush’s Small Business Agenda is available on the official White House web site at <http://www.whitehouse.gov/infocus/smallbusiness/agenda.html> (last visited on Aug. 31, 2005).

⁴¹ See 15 U.S.C. § 631(j); see also S. Rep. No. 105-62, at 21 (1997) (“Often bundling results in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain. As a result, the government can experience a dramatic reduction in the number of offerors. This practice, intended to reduce short term administrative costs, can result in a monopolistic environment with a few large businesses controlling the market supply”).

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defining and addressing bundling.⁴² Both the SBA and the FAR have further defined these bundling provisions in regulations.⁴³ Recently, the SBA and the FAR Council amended their regulations to address interagency contract vehicles and bundling.⁴⁴ Specifically, these regulations state that orders placed against an FSS contract or multiple award indefinite delivery indefinite quantity (IDIQ) contract awarded by another agency must comply with all requirements for a bundled contract when the order meets the definition of “bundled contract.”⁴⁵

Bundling, as defined by the Small Business Act, is not *per se* prohibited. The statute allows an agency to bundle its requirements, if the agency has performed sufficient market research and has justified the bundled action.⁴⁶ In sum, a bundled procurement is justified if the agency will derive measurably substantial benefits as a result of consolidating the requirements into one large contract.⁴⁷ This is true even if the acquisition involves “substantial bundling.”⁴⁸

The Act requires all agencies to provide SBA’s Procurement Center Representative (PCR) with a copy of the solicitation when the procurement renders small business prime contractor participation unlikely and the statement of work includes goods or services currently being performed by SBCs.⁴⁹ If the bundling is justified, the PCR will work with the procuring activity to preserve small business prime and subcontract participation *to the maximum extent practicable*.⁵⁰ If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract.⁵¹

⁴² 15 U.S.C. §§ 632(o), 644(a) & 644(e).

⁴³ See 13 C.F.R. § 125.2, 48 C.F.R. §§ 2.101, 7.104(d)(2)(i), 7.107 and subparts 19.2, 19.4.

⁴⁴ 48 C.F.R. §§ 2.101, 8.404(c)(2), 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii).

⁴⁵ 48 C.F.R. § 8.404(c)(2); see also 48 C.F.R. § 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii); *Sigmatech, Inc.*, B-296,401 (Aug. 10, 2005) (GAO sustained a protest challenging the bundling of system engineering and support services with other requirements under a single-award BPA issued under awardee's FSS contract).

⁴⁶ The Small Business Act requires the agency to perform certain “market research to determine whether consolidation of the requirements is necessary and justified” before proceeding with a bundled acquisition strategy. 15 U.S.C. § 644(e)(2)(A); see also 13 C.F.R. § 125.2(d)(3); 48 C.F.R. § 10.001(a)(3)(vi).

⁴⁷ 15 U.S.C. § 644(e)(2)(B); see also 13 C.F.R. § 125.2(d)(5)(i); 48 C.F.R. § 7.107(a).

⁴⁸ 13 C.F.R. § 125.2(d)(7); 48 C.F.R. § 7.107(e). Substantial bundling is \$7 million or more for the Department of Defense; \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration and the Department of Energy; and \$2 million or more for all other agencies. 13 C.F.R. § 125.2(b)(2)(i); 48 C.F.R. § 7.104(d)(2)(i).

⁴⁹ 15 U.S.C. § 644(a); see also 13 C.F.R. § 125.2(b)(3); 48 C.F.R. § 19.202-1(e).

⁵⁰ See 15 U.S.C. §§ 644(a) (create procurement that encourages small business prime participation); 15 U.S.C. § 644(e) (“To the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contracts, subcontractors, and suppliers); 15 U.S.C. § 644(e)(3) (maximize small business participation at the subcontract levels).

⁵¹ 15 U.S.C. § 644(e)(3); see also 13 C.F.R. § 125.2(d)(7), 48 C.F.R. § 7.107(e).

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Sometimes, the agency is amenable to the SBA's suggestions to promote small business participation in a bundled procurement.⁵² Other times, the agency itself attempts to mitigate the impact.⁵³ For example, in *Phoenix Scientific Corporation*, the Air Force issued a multiple award IDIQ task order supply and support contract for maintenance of the agency's weapons systems.⁵⁴ All offerors, including SBCs, could compete for four unrestricted awards.⁵⁵ After that selection process, the Air Force would consider any previously unselected SBCs for the award of two contracts reserved for SBCs.⁵⁶ At least 15 percent of the total value of all task orders would be awarded to SBCs as prime contractors and the large business primes would be required to subcontract a minimum of 23 percent of the total value of their task orders to SBCs.⁵⁷ The GAO ruled that this was not a bundled requirement pursuant to the Small Business Act because it was suitable for award to a SBC since SBCs would receive at least two awards as prime contractors and would receive a percentage of the task order awards.⁵⁸

Similarly, in *Teximara*, the GAO approved an Air Force acquisition in which the agency separated its requirement into two contracts – the Big BOS and the Little BOS.⁵⁹ The Air Force did not reserve any of the Big BOS for small business participation as prime contractors but reserved the Little BOS for SBCs.⁶⁰ The Air Force required a minimum of 25 percent small business participation under the Big BOS, encouraged a greater percentage of small business participation through the award fee incentive provisions of the RFP, and stated it would continue to reserve the performance of approximately \$15 million in construction and other miscellaneous work for SBCs.⁶¹ The GAO believed this satisfied the requirement to maximize small business participation on the requirement as a whole.⁶²

Nevertheless, reports issued by the Office of Federal Procurement Policy (OFPP) and the SBA's Office of Advocacy indicate that the use of bundled and consolidated contracts has resulted in a decline of awards to SBCs.⁶³ These reports also state that contract bundling and

⁵² See e.g. *B.H. Aircraft Company, Inc.*, B-295399.2 (July 25, 2005) (SBA agreed to the bundling with certain conditions, intended to promote and preserve small business participation for these parts, and which were memorialized in writing between the SBA and DLA).

⁵³ The U.S. Department of Defense's Office of Small and Disadvantaged Business Utilization has prepared a Contract Consolidation Guide, available at <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>, which addresses mitigation of consolidated requirements. For example, the Guidebook recommends giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans. Guidebook at 2-2 through 2-5.

⁵⁴ *Phoenix Scientific Corp.*, B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Teximara*, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Office of Federal Procurement Policy, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*, at 3-4 (Oct. 2002), available at www.acqnet.gov (OFPP Reports), citing to Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY*

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consolidation has grown with the increased use of interagency contracting vehicles.⁶⁴ Further, testimony received demonstrates that there are still SBCs that believe contract consolidation has resulted in a decline in contract awards to SBCs (despite the fact that Federal purchasing has increased).⁶⁵

Meanwhile, other reports concerning contract bundling have commented on the need for timely and accurate data on bundling.⁶⁶ According to one GAO report, only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs even though, by definition, a small business is precluded from award of a bundled contract).⁶⁷ Similarly, a report by the SBA's Inspector General's (IG's) office reveals that procuring agencies are incorrectly applying the statutory definition of bundling to their requirements or simply failing to notify the SBA of such actions.⁶⁸ Specifically, the report stated that officials at two of four agencies contacted did not know they were mandated to report

2001, at 5 (Oct. 2002), available at www.sba.gov/advo/research/rs221tot.pdf ("for every increase of 100 bundled contracts there was a decrease of 60 contracts to small business; and for every additional \$100 awarded on bundled contracts there was a decrease of \$12 to small business. At a level of \$109 billion in FY 2001, bundled contracts cost small businesses \$13 billion annually. This is making it increasingly difficult for small businesses to compete and survive in the federal marketplace."). We note that the report issued by the Office of Advocacy utilized a definition for the term "bundling" different than set forth in statute but nevertheless provides data on a "type" of contract consolidation.

⁶⁴ OFPP has stated that bundling has been "exacerbated by the use of contract vehicles that are not uniformly reviewed for contract bundling. Orders under agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs) and GSA's Multiple Award Schedule program are not subject to uniform reviews for contract bundling issues." OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*, at 5. According to the report issued by the SBA's Office of Advocacy, there were over 10,000 consolidated orders/modifications issued in FY 1992 - FY 2001 off the FSS for a total of over \$50 million. Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 - FY 2001*, at 5, 15, 27 (the most frequently used contract vehicles for bundling are GSA Schedules, MACs, BOAs and IDIQ contracts).

⁶⁵ See Testimony of William Correa, Paragon Project Resources, May 23, 2005, p. 30; see also Amey, p. 329; Lozano at p. 1-2.

⁶⁶ GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 6; IG, *Audit of the Contract Bundling Process*, No. 5-20 at 8-9; OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*, at 8.

⁶⁷ U.S. Government Accountability Office, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 2. The report takes issue with the data showing that 33% of the bundled contracts were awarded to SBCs since, by definition, a small business is precluded from award of a bundled contract. *Id.* at 6.

⁶⁸ Office of the Inspector General, U.S. Small Bus. Admin., *Audit of the Contract Bundling Process*, No. 5-20 at 4-5 (May 20, 2005); GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 6 (agencies are confused by statutory definition of bundling). According to the report, officials at two of four agencies contacted did not know they were mandated to report all potential bundlings. *Id.* at 5. Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did. *Audit of the Contract Bundling Process*, at 6.

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all potential bundled contracts.⁶⁹ Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did.⁷⁰

As evidenced from the above, the Panel studied current practices, law and available data to identify issues the contracting community faces with respect to defining requirements and particularly with respect to the practice of consolidating requirements. Specifically, the Panel considered whether the contracting community has adequate guidance in promoting the use of small businesses when consolidating requirements.

B. Findings

1. Guidance in Using Small Business Contracting Programs

Based upon the Panel's review of governing laws, policies, practices, available data, testimony, and court and administrative board decisions, the Panel has made several findings concerning the structuring of acquisition strategies to afford adequate small business participation.

The Panel made four specific findings concerning the adequacy of guidance in selecting among the myriad of small business contracting mechanisms. The Panel has determined that the contracting community needs better guidance in deciding which small business preference is applicable to an acquisition. This guidance should provide contracting officials with some flexibility to enable agencies to meet their small business goals. Further, the contracting community needs further training on the "newer" small business programs, as well as the use of all of SBA's small business programs. Finally, cascading procurements curtail competition by SBCs who may not want to spend the time and money to submit a proposal that may never be evaluated. The specifics for each finding is set forth below.

First, the Panel determined that contracting officers need definitive guidance on the priority for applying the various small business contracting preferences to specific acquisitions. There are at least five small business "programs" – 8(a) BD, HUBZone, SDVO, WOSB and SBC – that contracting officials must consider during acquisition planning. Each program has its own statutory and regulatory requirements that provide guidance on its use. For example, the Small Business Act's provisions on the HUBZone program appear to provide a priority for HUBZone SBCs over all other SBCs, including 8(a) BD and SDVO SBCs. Meanwhile, the statutory provisions regarding the 8(a) BD, SDVO and WOSB programs provide discretion to the contracting officer on the utilization of such programs. Both the SBA and the FAR Council have attempted to interpret these statutory provisions and have implemented such interpretations in different sections of the Code of Federal Regulations (13 C.F.R. parts 124, 125 and 126 for the SBA and 48 C.F.R. parts 19.5, 19.8, 19.13, and 19.14 for the FAR). In general, the SBA's regulations provide for parity among most of the programs and give discretion to the CO by stating that the CO should consider setting aside the requirement for 8(a), HUBZone, or SDVO

⁶⁹ *Id.* at 5.

⁷⁰ *Id.*

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SBC participation before considering setting aside the requirement as a small business set aside. The FAR provides some discretion to contracting officers; however, it currently conflicts with the SBA's regulations.

In a time when the federal workforce is shrinking, but federal spending is increasing, agency officials do not have the time to research multiple statutory and regulatory directions to reconcile the use of the SBA's small business programs. Thus, it is clear that the contracting community needs better guidance in deciding which preference is applicable to an acquisition. In addition, this guidance must be clear and concise, and if set forth in different regulations, consistent.

Second, the Panel finds that contracting officers need explicit guidance on how to exercise their discretion and flexibility in selecting the appropriate small business contracting method for a procurement. Agencies must meet the statutory government-wide goals, as well as the agency established goals, for all of the small business programs. An agency will have difficulty meeting its small business goals if any one small business program takes a priority over the others. As an example, testimony received from a small business reveals that if a priority is given to one "group" over another, it effectively eliminates the one "group" from competition for those products or services.⁷¹

Further, according to FPDS data, in FY 2004 many agencies exceeded their small business goals and met or exceeded their 8(a) goals.⁷² On the other hand, most agencies made a dismal number of awards to HUBZone and SDVO SBCs.⁷³ For example, in FY 2004, the DoD awarded 22% of its contracts to small businesses, but only 1.479% to HUBZone SBCs and .327% to SDVO SBCs.⁷⁴ It is clear from FPDS data that many contracting officials should be considering whether their acquisitions are suitable for award to HUBZone or SDVO SBCs as a result of their goals, rather than focusing on an established hierarchy of small business programs. Thus, the guidance must give the contracting officer discretion in utilizing the various programs, based upon the goals and needs of the agency.

Third, the Panel finds that the agencies must use the FPDS-NG in real time to assess whether or not the agencies are meeting their goals. The government uses FPDS-NG to collect data on the number of contracts and the amount of contract dollars each of the SBA's small business programs receives from the different agencies. In the past, this data was used to evaluate the agency's goal achievement in the prior fiscal year. Now, with the new FPDS-NG,

⁷¹ Testimony of Mark Toteff, Traverse Bay Manufacturing, Sept. 27, 2005, p. 192 ("Because of some of the rules and regulations under one of the JWOD programs, we just seemed to never get the opportunity to bid on them, and the opportunity that we did have when we were a subcontractor, it worked very well, but because of some rules and regulations that we're really not accustomed to, don't know a lot about, we are no longer able to assist in manufacturing.").

⁷² See FPDS Next Generation Small Business Goaling Report FY 2004, <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>

⁷³ *Id.*

⁷⁴ *Id.*

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agencies have (almost) real time information on their contracting actions.⁷⁵ Thus, the agencies can use this database to determine their goal achievement on a daily basis, rather than at the end of the fiscal year. This will enable agencies to determine which small business programs are being underutilized.

Fourth, the Panel finds that the current practice of cascading procurements fails to balance adequately the need for quick contracting with the requirement to provide maximum practicable opportunities to SBCs. If the agency structures the procurement to review 8(a) BD concerns first, then SDVO SBCs and then HUBZone SBCs, SDVO and HUBZone SBCs may not want to submit an offer knowing that the agency may never review it, given the costs associated with a proposal.⁷⁶ In addition, if the contracting officer performs adequate market research, which has been made easier through the merging of SBA's PRO-Net into the Central Contractor Registration (www.ccr.gov), then he or she should know up front whether the acquisition is suitable for one of the SBA's small business programs and there would be no need for a cascading procurement. Consequently, cascading procurements appear to circumvent the requirement to perform market research.

2. Guidance with Contract Consolidation

The Panel made two findings in analyzing the issues concerning the adequacy of guidance in promoting small business participation in consolidated contracts. First, the Panel determined that the contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions. There is a misunderstanding of contract bundling, inaccurate bundling data, and disparate mitigation strategies for justified bundled contracts. These issues appear to stem from the complicated statutory provisions relating to bundling, including the reporting and review requirements.

These statutory provisions requiring the reporting of bundled requirements to the SBA's PCR for a specific review process. These provisions attempt to create a check and balance on the use of bundling and require the procuring agency to decide whether the acquisition is bundled. If the agency determines it is, then the solicitation package must be sent to the PCR, regardless of whether the bundled procurement is justified or not. This reporting and review process has appeared to have confused officials at agencies, some of whom do not believe they have to report all bundled procurements to the SBA and others of whom are unsure whether they have to report the bundled procurements to the SBA without the SBA's specific request for the solicitation. In addition, some agencies may believe that if they have justified the bundle, it is no

⁷⁵ According to FPDS Next Generation, generally, the contract data is available to the public when the contract is awarded to the vendor and thus the information is now available in "almost" real-time. FPDS-NG Report Suite Information, http://www.fpds-ng.com/public_welcome_text.html. Prior to FPDS Next Generation, the data would not be available for up to nine months from the time the contract was awarded. *Id.* With FPDS-NG, the information is now available in near real-time. *Id.*

⁷⁶ See Ralph C. Nash, John Cibinic, *Cascading Set-Asides: A Legal and Fair Procedure?* 19 No. 8 Nash & Cibinic Rep. 39 (Aug. 2005); see also *CODSIA Asks OFPP to Prohibit Agencies' Use of Cascading Set-Asides*, 200 BNA A-4 (Oct. 18, 2005); Ayers, p. 3.

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longer considered a bundled contract and therefore there are no reporting and review requirements.

Testimony shows that staffing is short at the procuring agencies, and many experienced procurement officials are retiring, which leaves new and untrained procurement officials the task of structuring the acquisition.⁷⁷

If the contracting community better understands contract bundling, mitigation of bundled requirements, and the impact of such bundling on small businesses, it could alleviate some of the concern many have that bundling is detrimental to SBCs.

Moreover, there have been several reports issued that attempt to address the impact of contract bundling, the results and findings of which differ.⁷⁸ Some reports directly attribute bundling to a decrease in contract awards to SBCs. However, one of these reports used a definition for the term “bundling” that differs from the statutory term for its analysis. Meanwhile, a recent report showed that only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs despite the fact SBCs, by statute, cannot receive a bundled contract).

There is also confusion regarding the requirement of and need to mitigate the impact of contract bundling on small businesses. For example, if the bundling is justified, and assuming the agency realizes it must report the requirement to the SBA’s PCR, the PCR will work with the procuring activity to preserve small business prime and subcontract participation *to the maximum extent practicable*. If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract. Thus, the statute requires agencies to mitigate the effects of bundling on SBCs, but does not provide specific strategies on such mitigation. The implementing regulations provide a little more direction, but do not provide enforceable requirements. For example, the SBA’s regulations state that the agency will make “recommendations” on maximizing small business participation. Likewise, if the bundling is “substantial,” the agency must merely document actions designed to maximize small business participation as primes and subcontractors. There is no requirement that the agency take certain mitigation actions. At least one procurement official acknowledged that “every case is really an individual case. I don’t think you can just say we are going to consolidate all aspects of a base operation for every base. . . .”⁷⁹ Another procurement official acknowledged that in some cases, the procuring agency has

⁷⁷ Testimony of Thomas Reynolds, September 27, 2005, p. 31 (“Currently where I am stationed at, we have got approximately 15 people trying to manage a \$1.4 billion a year cost reimbursement contract. We are now getting pressure to try and award more small business contracts out of this large management contract, which is fine. There’s still only 15 people there. How are they going to do that?”).

⁷⁸ GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*; IG, *Audit of the Contract Bundling Process*, No. 5-20; OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*; Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY 2001*, (Oct. 2002).

⁷⁹ Testimony of Ronald Poussard, U.S. Air Force, September 27, 2005, p. 176.

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taken steps to ensure “that a certain portion of the business needs to go to small business. In other cases, they haven't been as explicit.”⁸⁰ Therefore, the mitigation strategy must be tailored to fit the particulars of the acquisition, and should be readily apparent so that the small business is aware of the opportunities for potential contracts. .

With respect to mitigation, generally, the SBA recommends that procuring agencies unbundle the requirement and break out specific parts of the bundle for award to SBCs. Some agencies reserve a few of the contract awards for SBCs, if the agency plans to issue multiple awards.⁸¹ Agency officials recognize it is necessary to “create opportunities within the multiple award service acquisitions for small business” or else small businesses will lose their contracts to large business.⁸² Other agencies separate a bundle into two requirements – one reserved for SBCs and the other for large businesses.⁸³ In addition, the DoD has issued a Guidebook with specific examples of ways to mitigate bundling.⁸⁴ For example, the Guidebook recommends giving evaluation points and greater credit to offerors that have identified small business teaming partners, joint ventures, or other small business subcontractors in their proposals, or establishing an award fee or other incentive that monetarily rewards contractors for meeting or exceeding goals in subcontracting plans.⁸⁵

It is not clear that such mitigation strategies, or the justification for such strategies, are a sufficient balance of the need to bundle and the need to ensure small businesses receive maximum practicable opportunities in federal contracting. Testimony reveals that even those SBCs that receive the subcontracts are hurt by the bundled procurement. Specifically, those SBCs are “beholden” to the large business prime contract and sometimes must perform the work at a lower rate than what they had on their original prime contract with the Government or their work has actually been reduced.⁸⁶

Accordingly, existing law offers little in the way of guidance or requirements for mitigating the potential harm caused by bundling on SBCs. Although implementing regulations provide some guidance, they are only recommendations. While some agencies, such as DoD, have attempted to create guidelines for mitigating bundling, these guidelines are not universal.⁸⁷ While it may be best to allow each agency to develop its own mitigation plan tailored to the particular acquisition, there must be some specific, core mitigation techniques that should be followed by and available to all agencies.

The Panel’s second finding with respect to contracting bundling, which also relates to the government’s small business contracting programs generally, is that the acquisition community

⁸⁰ Testimony of Eugene Waszily, Office of Inspector General, General Services Administration, p. 223.

⁸¹ See e.g. *Phoenix Scientific Corp.*, B-286817, 2001 CPD ¶ 24 (Feb. 22, 2001).

⁸² Poussard, p. 175.

⁸³ *Teximara*, B-293221.2, 2004 CPD ¶ 151 (July 9, 2004).

⁸⁴ U.S. DoD’s Office of Small and Disadvantaged Business Utilization Contract Consolidation Guide, <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>.

⁸⁵ Id. at 2-2 - 2-5.

⁸⁶ Waszily Test. at 224.

⁸⁷ See DoD’s Contract Consolidation Guide, <http://www.acq.osd.mil/sadbu/news/contractconsolidation.pdf>.

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needs more training on current small business contracting policies and programs. According to the most recent FPDS data, in FY 2004 many agencies exceeded their small business goals and met or exceeded their 8(a) goals.⁸⁸ On the other hand, most agencies made few awards to HUBZone and SDVO SBCs.⁸⁹ For example, in FY 2004, the DoD awarded 22% of its contracts to small businesses, but only 1.479% to HUBZone SBCs and .327% to SDVO SBCs.⁹⁰

One possible explanation is that agencies are familiar with and knowledgeable about the small business “rule of two” and the sole source and set aside provisions of the 8(a) BD program while at the same time less familiar with two of SBA’s newer programs – the HUBZone program and the SDVO SBC program, both created within the last ten years. Thus, these contracting officials may be more comfortable utilizing the “older” programs rather than the “newer” ones. This could result in a perceived competition amongst the various small business contracting programs – a competition that is in reality nonexistent since ultimately each agency, and the federal government in total, must meet certain contracting goals for all of the small business programs. Training, as well as clearer guidance on the use of these programs, is therefore needed.

C. Recommendations

1. Guidance in Using Small Business Contracting Programs

The Panel has made several findings concerning the need to structure acquisition strategies to afford adequate small business participation. The Panel determined that there is currently inadequate guidance in both statute and regulation for deciding which small business preference is applicable to an acquisition. The Panel also determined that any guidance provided the contracting community must allow for flexibility to ensure that the agencies are able to achieve their small business goals. Thus, the Panel recommends several changes to both statute and regulation.

The Panel recommends amending the Small Business Act to remove any statutory provisions (such as the one contained in the HUBZone Act) that appear to provide for a hierarchy of small business contracting among certain small business programs. This is necessary because an agency will have difficulty meeting its small business goals if any one small business program takes a priority over the others.⁹¹

The Panel also believes this is necessary despite the fact the SBA has not interpreted the HUBZone language as providing a preference for one small business program (such as the 8(a)

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ See FPDS Next Generation Small Business Goaling Report FY 2004, <http://www.sba.gov/GC/goals/Goaling-Report-08-21-2005.pdf>

⁹¹ When the HUBZone Act was first introduced, it contained a priority for HUBZone awards over 8(a) awards. The bill was amended to include a provision on parity and the committee report states that the HUBZone program was not designed to compete with the 8(a) program. S. Rpt. 105-62 (Aug. 19, 1997). Ultimately, the parity language was removed. Amendment No. 1543 to S. 1139 (Oct. 31, 1997).

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or SDVO SBC) over another, with the exception of small business set-asides. According to an August 17, 2001 letter issued by the SBA's Acting General Counsel to the Honorable Christopher S. Bond, when the SBA promulgated its HUBZone regulations, the agency reviewed all of the provisions of the Small Business Act, including the provisions of the HUBZone program and the provisions of the 8(a) BD program.⁹²

The SBA stated that according to the rules of statutory construction, various provisions of a single statute must be read so that all provisions may have effect and that the statute be a "consistent and harmonious whole."⁹³ In addition, the SBA stated its belief that although the HUBZone Act provides that "[n]otwithstanding any other provision of law," the CO may award a HUBZone sole source and shall award a HUBZone set-aside if certain requirements are met, courts have held that the phrase "notwithstanding any other provision of law" is not always dispositive.⁹⁴ Consequently, when promulgating the HUBZone regulations, the SBA took into consideration the requirement to read the Small Business Act, and all of its provisions, in concert so that it would be a "harmonious whole."⁹⁵ Thus, as explained in the preamble to the final HUBZone regulations, "SBA balanced HUBZone contracting with the stated Congressional purpose in the Small Business Act of maximizing 8(a) contracting, where practicable."⁹⁶ In doing so, the SBA determined that the phrase "notwithstanding any other provision of law," contained in § 31 of the Small Business Act, is best interpreted as requiring the disregard only of provisions of law outside of the Small Business Act and not provisions of law contained in the Small Business Act, such as § 8(a).⁹⁷ At least one court has ruled that the SBA's interpretation, *i.e.*, parity for the 8(a) and HUBZone programs, is reasonable.⁹⁸

Nonetheless, there appears to be some confusion regarding this issue, including conflicting FAR and SBA regulations. Further, the Panel believes that more discretion should be afforded to CO's, and therefore believes that the CO should have discretion when selecting which small business program to utilize. In other words, the Panel believes that the 8(a), HUBZone and SDVO set-asides programs should be given parity and priority over regular small business set-asides. A statutory change to the HUBZone statute would be necessary to accomplish this goal.

⁹² Letter from SBA's Acting General Counsel to the Honorable Christopher S. Bond, dated August 17, 2001. *See* Appendix 3.

⁹³ *Id. citing to* 73 Am. Jur. 2d *Statutes* § 254 at 425 (1974).

⁹⁴ *Id. citing to Oregon Natural Resources Council v. Thomas*, 92 F.3d 792 (9th Cir. 1996) (statutory phrase "notwithstanding any other provision of law" is not always construed literally); *E.P. Paup Co. v. U.S. Dept. of Labor*, 999 F.2d 1341 (9th Cir. 1992) (phrase "notwithstanding any other provision of law" is not necessarily preemptive); *In re The Glacier Bay*, 944 F.2d 577 (9th Cir. 1991) (phrase "notwithstanding the provisions of any other law" was not dispositive of whether that statute implicitly repealed limitation of liability provisions of a different statute).

⁹⁵ *Id.*

⁹⁶ *Id. citing to* 63 Fed. Reg. 31897 (June 11, 1998).

⁹⁷ *Id.*

⁹⁸ *Contract Management, Inc. v. Rumsfeld*, 291 F.Supp.2d 1166, 1177 (D. Hawaii 2003), *aff'd* 434 F.3d 1145 (9th Cir. 2006).

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The Panel does not believe such a change would harm the intent and purpose of any of the programs. For example, the purpose of the HUBZone program is to “help qualified small businesses located in economically distressed inner cities and rural areas create new jobs – new jobs for people without jobs today” and to “provide for an immediate infusion of cash through the creation of new jobs and investment in economically distressed areas.”⁹⁹ The intent and purpose of the 8(a) BD program is business development for small business owned and controlled by socially and economically disadvantaged individuals.¹⁰⁰ The intent and purpose of the SDVO SBC program is to provide procurement opportunities for small businesses owned and controlled by service-disabled veterans.¹⁰¹ The Panel believes that the provision of adequate guidance and parity among the programs will serve to enlighten and educate the contracting community on the powerful tools (set-asides and sole source awards) available to enable them to meet their socio-economic requirements and the above-stated intent and purpose of each program.

Thus, the Panel recommends the following:

- Amend 15 U.S.C. § 657a(b)(2) to resolve any confusion and ensure that contracting officer’s have the discretion to award HUBZone set aside and sole source awards.

15 U.S.C. § 657a(b)(2):

(2) Authority of contracting officer

~~Notwithstanding any other provision of law—~~

(A) ~~a~~A contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern, if--

* * * * *

(B) ~~a~~ A contract opportunity ~~shall~~ **may** be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price; and . .

The Panel also recommends that the implementing regulations provide the contracting community discretion in utilizing the various programs, based in part upon the goals and needs of the agency. This does not mean that the goals should become the sole determining factor in directing an agency’s contracting behavior. For example, when an agency has already met its HUBZone goal, but has not yet met SDVO goal, the CO would still have the discretion to utilize the HUBZone program’s contracting mechanisms. Further, the CO must still comply with other

⁹⁹ S. 208, *The HUBZone Act of 1997: Hearing Before the Comm. On Small Business*, 105th Cong., 1st Sess. 1 (1997).

¹⁰⁰ See 15 U.S.C. § 637(a); 13 C.F.R. § 124.1.

¹⁰¹ See 15 U.S.C. § 657f.

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statutory provisions for each program, *e.g.*, anticipated award price limits for sole source or competitive awards, awards to be made at fair market price etc.

Thus, the Panel recommends that the SBA and FAR regulations be amended to comply with these statutory changes and to resolve any current conflicts. The Panel recommends the following:

- Delete 48 C.F.R. § 19.800 (e)
~~Before deciding to set aside an acquisition in accordance with subpart 19.5 [small businesses], 19.13 [HZ], or 19.14 [SDVO] the contracting officer should review the acquisition for offering under the 8(a) program. If the acquisition is offered to the SBA, SBA regulations (13 C.F.R. § 126.607(b)) give first priority to HUBZone 8(a) concerns.~~
- Amend 48 C.F.R. § 19.201(c) to add the following at the end of the paragraph:
*** * *In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.**
- Amend 13 C.F.R. § 124.504(j) to read as follows:
The contracting officer ~~should~~ **shall** consider setting-aside the requirement for HUBZone, 8(a), or SDVO SBC participation before considering setting aside the requirement as a small business set aside.
- Renumber paragraphs (b) through (e) as (c) through (f) and add a new paragraph (b) to 13 C.F.R. § 125.2 to read as follows:
In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.
- Amend 13 C.F.R. § 125.19(b) to read as follows:
If the contracting officer determines that §125.18 does not apply, the contracting officer ~~should~~ **shall** consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation

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before considering setting aside the requirement as a small business set aside.

- Amend 13 C.F.R. § 126.607(b) to read as follows:
If the contracting officer determines that §126.605 does not apply, the contracting officer shall **consider** *setting* aside the requirement for HUBZone, 8(a), or SDVO SBC participation before setting aside the requirement as a small business set aside.
- Delete 13 C.F.R. §126.609:
~~If a contract opportunity for competition among qualified HUBZone SBCs does not exist under the provisions of §126.607, the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set aside procedures, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through another appropriate contracting method.~~

In addition, to achieve their small business goals, the agencies must have access to and utilize real time data such as the FPDS-NG and the acquisition community must be provided with more training on the SBA's programs, especially the "newer" ones. Thus, the Panel recommends that:

- GAO be directed to perform a systems review of FPDS-NG to examine: (1) the type of small business data being collected by the system; (2) how agencies are currently using the system to support goal achievement; and (3) whether agencies have real-time access to agency goaling data. The report should address necessary upgrades to FPDS-NG and any related data collection processes required to provide agencies with real-time access to goal achievements data.

The Panel also found that the current practice of cascading procurements fails to balance adequately the need for efficient contracting with the requirement to provide maximum practicable opportunities to SBCs because it could impede competition and circumvent the requirement to perform market research. Congress believes the same and has recently issued guidance on the use of cascading procurements for the U.S. Department of Defense, set forth in § 816 of HR1815, the National Defense Authorization Act for Fiscal Year 2006, Public Law No. 109-163.¹⁰²

¹⁰² This new statutory provision states:

(cont...)

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Although this new statutory provision is meant to deter the use of cascading procurements, it nonetheless still allows such procurements in limited situations. For the reasons set forth in the findings and above, the Panel believes that the use of cascading procurements should be precluded. If a contracting officer performs adequate market research, he/she will know whether there are two or more 8(a), HUBZone, SDVO SBCs or small businesses that can offer on the requirement. Therefore, the Panel recommends that Congress repeal this new provision and that language should be added to preclude the use of cascading procurement. This language should be included in 41 U.S.C. § 253, to apply to the civilian agencies, and 10 U.S.C. § 2304 to apply to the DoD. The recommended amendments are as follows:

- Add a new paragraph to 10 U.S.C. § 2304 as follows:

(I) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.

- Add a new paragraph to 41 U.S.C. § 253 as follows:

(j) The Federal Acquisition Regulation shall prescribe guidance for the executive agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.

2. Guidance with Contract Consolidation

As discussed above, in analyzing the issues involving small business participation in consolidated contracts, the Panel made two findings. First, the Panel determined that the contracting community does not properly apply and follow the governing contract bundling

GUIDANCE ON USE OF TIERED EVALUATIONS OF OFFERS FOR CONTRACTS AND TASK ORDERS UNDER CONTRACTS.

(j) *Guidance Required.* -- The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts. (b) *Elements.*--The guidance prescribed under subsection (j) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract unless the contracting officer-- (1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations; (2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and (3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

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definition and requirements. Second, the Panel determined that agency officials need targeted training on the general requirements and benefits of contracting with small businesses.

Specifically, the Panel recommends that:

- The OFPP create an interagency task force to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.
- The OFPP coordinate the development of a government-wide training module for all federal acquisition team members and program managers to acquaint them with the legislative and regulatory requirements of contracting with small business, as well as contract bundling. The training module should include a segment on the laws and regulations regarding bundling, and subcontracting with small businesses, with the goal of developing a common understanding and standard implementation of small business subcontracting goals across Government. Training should emphasize uniform guidance to large businesses in relation to developing and/or specifying categorical small business goals for Small Business subcontracting plans. Training also should emphasize processes for determining realistic and achievable goals based on both the objective of achieving government-wide small business utilization goals, and consideration and analysis of the unique functional and programmatic requirements of each particular solicitation.

III. The Ability of Small Business to Compete in the Multiple Award Contracting Environment

A. Background

As discussed elsewhere in this Report, the Federal Acquisition Streamlining Act of 1994 (FASA)¹⁰³ formalized the task or delivery order contracting technique, whereby the government acquires supplies or services during the contract period by issuing an order to the contractor. Generally, the government is only obligated to acquire a stated minimum of supplies or services, and the contractor is only obligated to provide a stated maximum. Congress established a preference for the award of multiple contracts when utilizing the technique, and a requirement that each contractor be provided a "fair opportunity" to compete for an order, with limited exception.¹⁰⁴ Contracting officers were given wide latitude in conducting competitions for

¹⁰³ Pub. L. No. 103-355, 108 Stat. 3423 (1994).

¹⁰⁴ FAR 16.505(b).

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orders.¹⁰⁵ Thus, there are two levels of competition - offerors must compete for award of one of the contracts, and then must compete with other contract awardees for each order.

The passage of FASA, the enactment of the Clinger-Cohen Act¹⁰⁶ two years later, and the expansion of the General Services Administration's (GSA's) Multiple Award Schedules (MAS) program has led to a marked increase in the use of multiple award indefinite delivery, indefinite quantity (IDIQ) contracting vehicles.¹⁰⁷ The data suggests that small business concerns (SBCs) have been able to compete for and obtain multiple IDIQ contracts and subsequent orders.¹⁰⁸ The reason may be due in large part to the creation of innovative procurement procedures by procuring agencies in an effort to meet their annual SBC prime contracting goals.¹⁰⁹ Some procuring agencies have "reserved" one or more prime contract awards for SBCs under solicitations that were competed "full and open," although there is no express authority for such an action. Some procuring agencies have awarded IDIQ contracts that contain ordering procedures that provide that competition for an order may be limited to SBCs. However, it is unclear whether agencies have authority to limit competition for orders to SBCs, in light of the fair opportunity provisions mentioned above. Moreover, the Section 803 procedures applicable to the Department of Defense (DoD) may prevent DoD from limiting order competitions to SBCs.¹¹⁰ Under GSA's Multiple Award Schedule (MAS) program, which has its own unique ordering procedures, procuring agencies have used a variety of methods to target small business MAS contractors. GSA has implemented policies and procedures that enhance procuring

¹⁰⁵ FAR 16.505(b)(1)(ii).

¹⁰⁶ The Clinger-Cohen Act authorizes agencies to award multiple information technology task or delivery order contracts which are open to other federal agencies and are referred to as Government-Wide Acquisition Contracts (GWACs). Divisions D and E of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106, 110 Stat. 186 (1996)).

¹⁰⁷ According to the Government Accountability Office (GAO), total federal government expenditures valued over \$25,000 on Indefinite Delivery, Indefinite Quantity (IDIQ) contracts, Blanket Purchase Agreements (BPAs), and the General Service Administration's (GSA's) Multiple Award Schedules (MAS) program increased from 16 percent of federal procurement expenditures in fiscal year 1994 to 25 percent of federal procurement expenditures in fiscal year 1999. Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, p. 20 (2001). Sales under the GSA's MAS program have grown at least 21 percent sequentially for the past seven years, and totaled \$31.1 billion in fiscal year 2004.

¹⁰⁸ Gen. Acct. Off., Rep. No. GAO-04-738T, *Small Business: Trends in Federal Procurement in the 1990s*, pp. 12-20 (2001) (Small business concerns (SBCs) "received the legislatively mandated goal for federal contract expenditures each fiscal year from 1993 to 1999" and the small business share of dollars awarded under task and delivery order vehicles increased from 24 percent in fiscal year 1994 to 32 percent in fiscal year 1999); Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 8-11 (1998). SBCs received approximately 22-23% of total federal procurement expenditures for fiscal years 2000-2003.

¹⁰⁹ Congress has established an annual government-wide goal for prime contracting with small businesses of not less than 23 percent of the total value of awarded contracts. 15 U.S.C. § 644(g)(1). Each agency also establishes its own annual goals for small business prime contracting. 15 U.S.C. § 644(g)(2).

¹¹⁰ Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); Defense Federal Acquisition Regulation (DFAR) §§ 208.405-70, 216.505-70.

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agencies ability to target small business MAS contractors, and SBCs received 37.6 percent of the dollars awarded under the MAS program in fiscal year 2006.¹¹¹

Given the fact that procuring agencies have created varying procurement procedures applicable to SBCs in the multiple award contracting environment, it may be time for policy-makers to address whether procuring agencies have the authority to reserve prime contract awards for SBCs under multiple award solicitations that are competed as full and open, and whether competition for orders under full and openly competed contracts can be limited to SBCs.

1. Competition for Multiple Award Contracts

The FAR provides that a contracting officer shall set aside any acquisition over \$100,000 for exclusive small business participation if there is a reasonable expectation that offers will be obtained from at least two responsible SBCs and award will be made at a fair market price.¹¹² Obviously, this regulation was written to address a single-award procurement. If a contracting officer expects to award five contracts, the fact that he or she reasonably expects two SBCs to submit offers does not compel a total small business set-aside of all five contracts. What some agencies have done is "reserve" one or more contracts for SBCs in the context of a full and open multiple award procurement.¹¹³ However, such an action may be illegal under current law. Arguably, the Competition in Contracting Act and its implementing regulations strictly provide for competition that is either full and open, i.e., contracts awarded without regard to size status, or competition that is only open to SBCs.¹¹⁴

Under current law, a procuring agency receives full credit towards its small business goals for a prime contract awarded to an SBC, regardless of the method of competition, i.e., regardless of whether the SBC must perform any specific portion of the work.¹¹⁵ However, if an

¹¹¹ As of the end of fiscal year 2006, approximately 80 percent of the 17,668 MAS contracts were held by SBCs. In fiscal year 2006, SBCs received \$13.2 billion of the \$35.1 billion in dollars awarded under the MAS program. See GSA Data, *Final FY 2006 Schedule Data - Contracts in Effect*; GSA Data, *Contractors Report of Sales - Schedule Sales FY 2006 Final* (Oct. 24, 2006).

¹¹² FAR 19.502-2(b).

¹¹³ See Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002); *Phoenix Scientific Corporation*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; Gen. Acct. Off., Rep. No. GAO/NSIAD-98-215, *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, pp. 10-11 (1998). Some agencies have labeled these "reserves" as partial small business set-asides, but the partial small business set-aside FAR provisions only apply to definite quantity supply contracts - the acquisition must be divided into severable economic production runs or reasonable lots which have comparable terms and delivery schedules, and any small business which wants to compete for the set aside portion must submit a responsive offer on the non-set-aside portion. FAR 19.502-3.

¹¹⁴ See 10 U.S.C. § 2304(b)(2) ("The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644)"); 41 U.S.C. § 253(b)(2) ("An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15"); FAR 6.203(a) ("contracting officers may set aside solicitations to allow only such [small business] business concerns to compete").

¹¹⁵ 15 U.S.C. § 644(o); FAR 52.219-14; 13 C.F.R. § 125.6.

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SBC teams with a large business as a prime, or teams with other SBCs as a prime and they collectively exceed the size standard, the agency will get no credit for the award towards its small business prime contracting goals.¹¹⁶ GSA has implemented a Contractor Team Arrangement policy applicable to MAS orders that allows an SBC to team with other MAS contractors, both large and small, and allows the procuring agency to receive credit towards its small business prime contracting goals for the portion of the order performed by SBCs.¹¹⁷

2 Competition for Task Orders

The set aside requirements of FAR Part 19 generally apply before task or delivery order contracts are solicited and awarded, not when an order competition is conducted or the order is placed.¹¹⁸ Nevertheless, agencies have awarded IDIQ contracts with ordering procedures that provide that certain orders will be competed exclusively among SBCs.¹¹⁹ Limiting competition for orders to SBCs on a full and openly competed contract may be contrary to the fair opportunity requirements.¹²⁰ This issue was raised in a bid protest before the Government Accountability Office (GAO), but the protest was dismissed on jurisdictional grounds.¹²¹ Moreover, DoD may not be able to limit competition for orders to SBCs because of the Section 803 requirement to provide notice of a purchase to *all* contractors and fairly consider all responses.¹²² If an order competition is limited to SBCs under a full and openly competed

¹¹⁶ Concerns submitting an offer to perform a prime contract are generally considered to be joint venturers, and affiliated for purposes of determining size for that particular procurement. 13 C.F.R. § 121.103(h)(2). There are some exceptions to this general rule for bundled or very large contracts and joint ventures created pursuant to the Small Business Administration's (SBA's) 8(a) Business Development program Mentor-Protégé regulations. 13 C.F.R. § 121.103(h)(3).

¹¹⁷ These so-called Contractor Team Arrangements (CTA) allow the "team" to meet the government agency's needs by providing a total solution that combines the supplies and/or services from the team members' separate GSA MAS contracts. It permits contractors, especially SBCs with limited specialties, to complement each other's capabilities to compete for orders for which they may not independently qualify. A customer benefits from a CTA by buying a solution rather than making separate buys from various contractors. In light of increasing demand for total solutions, often at odds with the effort to curtail contract bundling, a CTA may be an effective way for an SBC to enhance its competitiveness. GSA's CTA policy also promotes large-small business partnership, as opposed to subcontracting arrangements, which allows the small business team partner be paid in a timely manner. A procuring agency receives credit towards its small business prime contracting goals for the portion of the requirement that small business team members perform.

¹¹⁸ FAR 8.404(a), 38.101(e).

¹¹⁹ See *Size Appeal of the Department of the Air Force*, SBA No. SIZ-7432 (2005), where the SBA's Office of Hearings and Appeals (OHA) held that an agency can set aside a solicitation for an order under an IDIQ contract, and can request size new certifications in connection with the order competition. The United States Court of Federal Claims denied an appeal of the OHA decision. *LB&B Associates, Inc. v. U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005).

¹²⁰ FAR 16.505(b) provides that each contract awardee must be provided a "fair opportunity" to be considered for award of an order valued over \$2,500, unless: (1) the need for the goods or services is so urgent that providing a fair opportunity would lead to unacceptable delays, (2) only one awardee is capable of providing the unique or highly specialized goods or services, (3) the order is a logical follow-on to a previous order and every awardee was provided with a fair opportunity to compete for the original order, or (4) the order is necessary to fulfill a minimum guarantee.

¹²¹ *Professional Performance Development Group, Inc.*, B-294054.3, Sep. 30, 2004, 2004 CPD ¶ 191.

¹²² Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); DFAR 216.505-70.

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contract, it is unclear whether the winner of the order competition would have to comply with the limitations on subcontracting provisions, since the statute and regulations specifically reference "contracts" that are "set aside" for SBCs.¹²³

GSA's MAS program "provides federal agencies . . . with a simplified process for obtaining commercial supplies and services at prices associated with volume buying."¹²⁴ Orders placed in accordance with FAR subpart 8.4 are considered to be issued using competitive procedures.¹²⁵ Ordering agencies are not generally required to notify all contractors on a particular Schedule of their intent to purchase.¹²⁶ For orders above the micro-purchase threshold (\$3000), contracting officers generally must review the capabilities of, or solicit quotes from, at least three MAS contractors.¹²⁷ However, when DoD orders services valued over \$100,000 under an MAS it must provide notice of its intent to purchase to: (1) all contractors under the applicable Schedule, or (2) as many MAS contractors as practicable to ensure that at least three quotes are received.¹²⁸ Posting a requirement on GSA's electronic request for quotation system (e-Buy) is one way DoD can meet this requirement.¹²⁹ Procuring agencies on average receive three quotes in response to a solicitation posted on e-Buy.

The set aside requirements of FAR Part 19 also apply to the MAS program "at the acquisition planning stage prior to issuing" a solicitation for a contract, not at the order level.¹³⁰ Although there is no requirement to conduct small business set-aside analysis prior to placing an order under GSA's MAS program, FAR subpart 8.4 provides that "Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s)."¹³¹ In addition, agencies have limited consideration for orders exclusively to SBCs, and one GSA MAS contract (Schedule 70, SIN 132-51) specifically

¹²³ 15 U.S.C. § 644(o) ("A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees that" it will perform a specific portion of the work); 13 C.F.R. § 125.6 ("In order to be awarded a full or partial small business set-aside contract" an SBC must agree to perform a specific portion of the work).

¹²⁴ FAR 8.402(a).

¹²⁵ FAR 8.404(a); 41 U.S.C. § 259(b)(3) provides that the schedule program is a "competitive procedure" if participation in the program is open to all responsible sources, and orders and contracts under such procedures result in the lowest overall cost to the government. The term "full and open competition" is defined in 42 U.S.C. § 403(6) to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement".

¹²⁶ The fair opportunity provisions of FAR subpart 16.5 do not apply to MAS orders. FAR 16.500(c). As discussed *supra*, there are additional notice requirements applicable to DoD when ordering services valued over \$100,000 under the MAS program.

¹²⁷ FAR 8.405-1, 8.405-2.

¹²⁸ DFAR 208.405-70.

¹²⁹ FAR 8.405-2(d); DFAR 208.405-70(c)(2).

¹³⁰ FAR 8.404(a)(1), 38.101(e).

¹³¹ FAR 8.405-5(b).

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authorized ordering agencies to limit competition for award of an order to SBCs.¹³² However, under current MAS ordering procedures procuring agencies are required to provide solicitations to any MAS contractor that requests it, and to evaluate all quotes received in response.¹³³ Nevertheless, some agencies continue to limit competition for orders to SBCs, because there is no explicit prohibition in the FAR.¹³⁴ On June 30, 2005, GSA issued an Acquisition Letter which allows ordering activities to "make socio-economic status a primary evaluation factor when making a best value determination."¹³⁵

B. Findings

1. Competition for Multiple Award Contracts

Based upon its review of governing laws, policies, practices, available data, and court and administrative board decisions, the Panel has determined that the existing procurement strategy of reserving prime contract awards for small businesses in full and open multiple award procurements may be effective in providing small business prime contracting opportunities, if properly utilized. Specifically the Panel has determined that the procurement mechanism: helps ensure that SBCs have an opportunity to compete for orders at the prime contractor level; helps procuring agency achieve their annual small business prime contracting goals; and helps agencies mitigate the effects of bundling. The Panel has also recognized that because there is no express authority for the procurement mechanism, there are also no implementing regulations, which has resulted in inconsistent or confusing utilization of the procurement mechanism.

Some agencies are reserving prime contracts for SBCs in the context of full and open multiple award procurements, even though there is no express legal authority for reserving prime contracts for SBCs in the context of full and open multiple award procurements.¹³⁶ The mechanism has been cited in Federal Court Decisions, General Services Administration Board of Contract Appeals decisions, GAO bid protest decisions, SBA's regulations, GAO reports and legal journal articles.¹³⁷ Reserving prime contract awards for SBCs in the context of full and open multiple award procurements has been beneficial to both SBCs and procuring agencies.

¹³² GAO upheld a procuring agency's decision to require MAS contractors to submit size certifications along with their quotations in an order competition limited to SBCs that was conducted among Schedule 70, SIN 132-51 MAS contractors. *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132. The SBA's OHA has held that if a procuring agency limits competition for an MAS order (or BPA) to SBCs, a concern must be small at the time of their quote in order to be eligible for award. *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of SETA Corporation, Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002). GSA requires contractors to re-certify their size status when an option is exercised, typically every five years. GSA Acquisition Letter MV-03-01, February 21, 2003.

¹³³ FAR 8.405-2(c)(4), (d).

¹³⁴ See *Systems Plus, Inc.*, B-297215-4, Dec. 16, 2005, 2006 CPD ¶ 10.

¹³⁵ GSA Acquisition Letter V-05-12 (June 6, 2005).

¹³⁶ See FAR subpart 16.5, part 19.

¹³⁷ See *Widnall v. B3H Corp.*, 75 F.3d 1577, 1578-9 (C.A. Fed. 1996), on remand *B3H Corp. v. Dep't of the Air Force*, 96-2 BCA ¶ 28360, GSBICA No. 12813-P-REM (G.S.B.C.A. May 3, 1996); *Phoenix Scientific Corp.* B-286817, Feb. 22, 2001, 2001 CPD ¶ 24; 13 C.F.R. § 125.2(b)(6)(i)(C); U.S. GAO, *Acquisition Reform: Multiple-*

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Reserving prime contract awards for SBCs ensures that SBCs have an opportunity to compete, as prime contractors, for future orders. Without the mechanism, SBCs would be unable to compete for award for prime contracts under many of the broadly written statements of work utilized in today's contracting environment,¹³⁸ relegating SBCs exclusively to a subcontracting role. Procuring agencies created the reservation mechanism as a result of concern about their ability to achieve their small business prime contracting goals when utilizing multiple award contracts competed on a full and open basis.¹³⁹ In a report on multiple-award contracting, GAO examined the practices of six federal organizations and noted that most of the organizations had taken some action to enhance small business participation. Three of the six organizations that GAO reviewed had reserved one or more prime contract awards for SBCs under full and openly competed contracts.¹⁴⁰ GAO singled out the Department of Transportation's (DOT's) "comprehensive" initiative to promote small business competition, where the agency divided its information technology services requirement into three functional areas, and reserved one award in each functional area for a small business and a small disadvantaged business participating in the 8(a) BD program.¹⁴¹ GAO concluded that DOT's approach "appears to have been successful," noting that ten of 20 contracts were awarded to small businesses, and small business prime contractors received 39 percent of the orders issued.¹⁴² SBA's regulations specifically cite the reservation of prime contract awards for SBCs in the context of full and open multiple award procurements as a way for agencies to mitigate bundling.¹⁴³ In fact, because GAO has held that if an agency reserves one or more prime contract awards for SBCs the procurement is "suitable" for award to an SBC and therefore does not meet the definition of bundling in the Small Business Act, agencies that reserve awards for SBCs do not have to comply with the regulatory bundling analysis and justification provisions.¹⁴⁴

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. There are infinite variations on the small business "reserve." Agencies are reserving contracts for the various types of SBCs, e.g., 8(a), Small Disadvantaged Business (SDB), HUBZone, Service-Disabled Veteran-Owned (SDVO). Agencies reserve awards for SDBs, even though there is currently no authority to conduct SDB set-asides.¹⁴⁵ Contracts are reserved for 8(a) concerns, even though 8(a) contracts are defined by statute as contracts that are awarded sole source or on the basis of competition limited exclusively to 8(a) concerns.¹⁴⁶ In

Award Contracting at Six Federal Organizations, GAO/NSIAD-98-215,10-11 (1998); Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002).

¹³⁸ See Benjamin Test. at 440-1.

¹³⁹ See GAO/NSAID-98-215 at 8-11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 10-11.

¹⁴² *Id.* at 11.

¹⁴³ 13 C.F.R. § 125.2(b)(6)(i)(C).

¹⁴⁴ See 15 U.S.C. § 632(o)(2); 13 C.F.R. § 125.2(d); *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001, 2001 CPD ¶ 24.

¹⁴⁵ 61 Fed. Reg. 26041, 26048 (1996).

¹⁴⁶ Generally, dollars awarded to an 8(a) concern only count towards an agency's 8(a) prime contracting goals if the contract was an 8(a) contract. In light of the narrow definition of an 8(a) contract, it is questionable whether SBA can accept a contract that has been reserved for 8(a) concerns into the 8(a) BD program, where orders will not be

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addition, the 8(a), HUBZone, and SDVO small business programs take precedence over the small business set-aside program.¹⁴⁷ Arguably, an agency could violate the law by reserving a contract for SBCs, if the contracting officer is aware that two or more responsible 8(a), HUBZone, or SDVO SBCs are likely to submit fair market price offers in response to the solicitation.

2. Competition for Task Orders

Based upon the Small Business Working Group's review of governing laws, policies, practices, available data, and court and administrative board decisions, the Panel developed one specific finding concerning the ability of SBCs to compete for orders under multiple award contracts. Specifically the Panel has determined that explicit guidance is necessary for utilizing small contracting reservations for orders against multiple award contracts. The Panel recognizes that agencies are limiting competition for orders to SBCs under full and openly competed multiple award IDIQ contracts. The Panel has determined that the procurement mechanism is not contrary to the fair opportunity provisions, but contrary to the Section 803 requirements applicable to DoD orders for services valued over \$100,000. However, in the context of orders under the MAS program, Section 803 does not prevent agencies from limiting competition for orders to SBCs. Finally, the Panel recognizes that because there is no express authority for the procurement mechanism, there are also no implementing regulations, which has resulted in inconsistent or confusing utilization of the procurement mechanism.

Agencies are awarding multiple-award contracts that allow competition for orders to be limited to SBCs,¹⁴⁸ even though there is no express legal authority to limit competition for orders based on socioeconomic status.¹⁴⁹ Agencies are limiting competition for MAS orders to SBCs,¹⁵⁰ even though there is no express legal authority to limit competition for MAS orders to

competed exclusively among 8(a) concerns. Assuming that SBA can accept such an offer, because competition for that particular contract is limited to 8(a) concerns, it is questionable whether any order awarded to the 8(a) concern can be counted towards the agency's 8(a) prime contracting goals if the 8(a) concern competed with non-8(a) concerns for the order. 15 U.S.C. § 637(a)(1)(D); 13 C.F.R. § 124.501(b).

¹⁴⁷ FAR 19.501(c)-(e); 13 C.F.R. § 125.19.

¹⁴⁸ See *LB&B Assoc., Inc. v. United States*, Case No. 05-1066c, United States Court of Federal Claims; *Profl Performance Dev. Group, Inc.*, B-294054, Sep. 30, 2004, 2004 CPD ¶ 191; *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); Mary Mosquera, *21 Firms to Compete in New Treasury Initiative*, Wash. Post, Nov. 14, 2005, at D4 (Department of Treasury's five-year, \$3 billion TIPPS-3 contract, where orders under \$250,000 will be set aside for SBCs).

¹⁴⁹ See FAR subpart 16.5, part 19.

¹⁵⁰ See *Client Network Services, Inc. v. U.S.*, 64 Fed. Cl. 784 (Fed. Cl. 2005); *Systems Plus, Inc.*, B-297215; *Information Ventures, Inc.*, B-297225, Dec. 1, 2005, 2005 CPD ¶ 216; *Planned Systems International, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Information Services, Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Services, Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the MIL Corporation*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistronix, Inc. and Department of Justice*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistronix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Associates, Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-

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SBCs,¹⁵¹ and the FAR appears to prohibit an agency from denying participation in a competition for an order based on socioeconomic status.¹⁵²

In the Panel's view, limiting competition for orders is not contrary to the "fair opportunity" requirements. In contrast to the Section 803 requirements, the fair opportunity provisions do not require procuring agencies to formally notify all contractors offering the required services of their intent to make a purchase, or to fairly consider all offers to perform a particular order.¹⁵³ Moreover, the fair opportunity provisions do not prohibit a procuring agency from considering socioeconomic status when placing orders.¹⁵⁴ In contrast to the fair opportunity provisions, Section 803 and its implementing regulations provide that when ordering services valued over \$100,000, DoD must provide notice of its intent to make a purchase to all contractors offering the required services, including a description of the work and the basis upon which selection will be made, unless one of the fair opportunity exceptions apply.¹⁵⁵ Further, DoD must afford "all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered."¹⁵⁶ However, the Panel finds that limiting competition for orders (under multiple award contracts, except for MAS) to SBCs is contrary to the "Section 803: requirements. In contrast to the fair opportunity provisions, Section 803 and its implementing regulations provide that when ordering services valued over \$100,000, DoD must provide notice of its intent to make a purchase to all contractors offering the required services, including a description of the work and the basis upon which selection will be made, unless one of the fair opportunity exceptions apply.¹⁵⁷ Further, DoD must afford "all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered."¹⁵⁸

As discussed in Section III(A) of this Report, while the fair opportunity provisions do not apply to MAS orders, Section 803 did impose additional requirements on DoD activities ordering services under the MAS program. In the Panel's view, limiting competition for an MAS order to SBCs is not contrary to the "Section 803" requirements. Section 803 provides that "notice may be provided to fewer than all contractors offering such services" under a MAS contract "if notice is provided to as many contractors as practicable."¹⁵⁹ Section 803 further provides that where notice is not provided to all contractors, a purchase may not be made unless: (1) offers were received from at least three qualified contractors or (2) a contracting officer determines that in

4484 (2002); *Size Appeals of SETA Corporation and Federal Emergency Management Agency*, SBA No. SIZ-4477 (2002).

¹⁵¹ See FAR subpart 8.4.

¹⁵² The FAR provides that "[t]he ordering activity shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it" and "[t]he ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors." FAR 8.405-2(c)(4), (d).

¹⁵³ See FAR 16.505.

¹⁵⁴ *Id.*

¹⁵⁵ DFAR 216.505-70.

¹⁵⁶ *Id.*

¹⁵⁷ DFAR 216.505-70

¹⁵⁸ *Id.*

¹⁵⁹ Section 803(b)(3) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); see also DFAR 216.505-70.

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writing that that no additional qualified contractors exist.¹⁶⁰ As of September, 2005, 4402 of 5086 contractors on GSA's Schedule 70 (General Purpose Commercial Information Technology Equipment, Software, and Services) are SBCs (approximately 87%). As of the same date, 1166 of 1666 contractors on GSA's 874 MOBIS Schedule (Mission Oriented Business Integrated Services) are SBCs (approximately 70%). Thus, under these very popular Schedules, a DoD procuring activity could provide notice of its intent to purchase to a small percentage of SBCs on the Schedule and easily receive at least three offers.

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. As reflected in Section III(A) of this Report, there have been numerous size protest and appeal decisions concerning size status, and thus eligibility, for orders that were awarded pursuant to competition limited to SBCs.¹⁶¹

C. Recommendations

1. Competition for Multiple Award Contracts

An agency must conduct market research to determine whether a total or partial small business set-aside is appropriate before issuing any solicitation, including a solicitation where multiple contracts will be awarded. See FAR §§ 10.001, 10.002, 19.502-2, 19.800(e), 19.1305, 19.1405, 38.101(e); 13 C.F.R. § 125.19(b). If a set-aside is not appropriate, then a solicitation for multiple awards will be issued on a full and open competitive basis. As discussed in the Background and Findings under Section III of this Report, some procuring agencies are reserving one or more prime contracts for SBCs in the context of full and open multiple award procurements. The Working Group found that reserving multiple award contracts for SBCs helps procuring agencies achieve their annual small business prime contracting goals and mitigates the effects of bundling. There is no express legal authority for a small business reserve in the context of a full and open procurement. In fact, reserving contracts based on socio-economic status under full and open multiple award procurements may be contrary to the Competition in Contracting Act and its implementing regulations. Consequently, the Panel recommends that 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) be amended to provide a new paragraph (C):

(3) The regulations implementing this subsection shall --

¹⁶⁰ Section 803(b)(4) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); see also DFAR 216.505-70.

¹⁶¹ *LB&B Assoc., Inc. v. U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005); *Client Network Servs., Inc. v. United States*, 64 Fed. Cl. 784 (2005); *Sys. Plus, Inc.*, B-297215; *Planned Sys. Int'l, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Info. Servs., Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Info. Servs. Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Servs., Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); *Size Appeal of the MIL Corp.*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Mgmt. Tech., Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistrionix, Inc. & Dep't of J.*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistrionix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Assoc., Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Techs. & Labs. Int'l, Inc.*, SBA No. SIZ-4484 (2002); *Size Appeals of SETA Corp. & Fed. Emergency Mgmt. Agency*, SBA No. SIZ-4477 (2002).

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(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); ~~and~~

(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.; ~~and~~

(C) establish criteria for reserving one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)), when a total set aside is not appropriate.

Proposed paragraph (C) would give agencies the discretion to reserve contracts for HUBZone, SDB, SDVO and Women-Owned SBCs, but not 8(a) concerns, because of the way 8(a) procurements are conducted and the way dollars awarded to 8(a) concerns are counted. The authority to reserve contract for SBCs in full and open multiple award procurements would not supersede or diminish statutory or regulatory set-aside analysis requirements applicable to multiple award procurements. See FAR §§ 10.001, 10.002, 19.502-2, 19.800(e), 19.1305, 19.1405, 38.101(e); 13 C.F.R. § 125.19(b).

2. Competition for Task Orders

As discussed in the Background and Findings, agencies are limiting competition for particular orders to SBCs. The Panel found that this practice benefits procuring agencies by enhancing their ability to meet their prime contracting goals, and benefits SBCs by providing them with an opportunity to compete for orders on a level playing field. The Panel found that the practice is probably not contrary to the fair opportunity provisions, but is contrary to the Section 803 provisions applicable to DoD. Thus, the Panel recommends that contracting agencies, including DoD, be given explicit discretion to limit competition for orders to SBCs. Consequently the Panel recommends that 10 U.S.C. § 2304c and 41 U.S.C. § 253j be amended to redesignate paragraphs (c), (d), (e) and (f) as paragraphs (d), (e), (f) and (g) and include a new paragraph (c):

(a) Issuance of orders.--The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for such order under section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

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(2) Except as provided in subsection (b), a competition (or a waiver of competition approved in accordance with section 2304(f) of this title) that is separate from that used for entering into the contract.

(b) Multiple award contracts.--When multiple task or delivery order contracts are awarded under section 2304a(d)(1)(B) or 2304b(e) of this title, all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless--

(1) the agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

(c) Notwithstanding paragraph (b) and Section 803 of Pub. Law No. 107-107, 115 Stat. 1012 (2002), a contracting officer has the discretion to set forth procedures in multiple award contracts that provide that competition for particular orders may be limited to small business concerns, including the subgroups identified in Section 15(g)(2) of the Small Business Act (15 U.S.C. 644(g)(2)).

The Panel recommends that FAR § 16.504 be amended to provide:

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

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(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

* * * *

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1)) **and state whether competitor for particular orders may be limited based on socio-economic status;**

* * * *

The Panel further recommends that FAR § 16.505 be amended to provide:

(b) Orders under multiple award contracts—

(1) Fair opportunity.

(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$2,500 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

(ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The

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contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. However, the contracting officer must—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition;

(D) Include the procedures in the solicitation and the contract; and

(E) Consider price or cost under each order as one of the factors in the selection decision.

(iii) The contracting officer should consider the following when developing the procedures:

(A) (1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

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(6) Whether competition for orders will be limited based on socio-economic status.

* * * *

The Panel further recommends that DFAR § 216.505-70 be amended to provide:

(a) This subsection--

- (1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107);
- (2) Applies to orders for services exceeding \$100,000 placed under multiple award contracts, instead of the procedures at FAR 16.505(b)(1) and (2) (see Subpart 208.4 for procedures applicable to orders placed against Federal Supply Schedules);
- (3) Also applies to orders placed by non-DoD agencies on behalf of DoD; and
- (4) Does not apply to orders for architect-engineer services, which shall be placed in accordance with the procedures in FAR Subpart 36.6.

* * * *

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer--

(1)(i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the required services under the multiple award contract; and

~~(2) (ii) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered;~~**or**

(2) (i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all small business contractors offering the required services under the multiple award contract; and

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(ii) Affords all small business contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

* * * *

With respect to the ability of procuring agencies to limit competitions for orders under the MAS program to SBCs, the Panel recommends that FAR § 8.405-5 be amended to provide as follows:

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA.

(1) Ordering activities may, in their sole discretion, explicitly limit competition for an order to small business concerns, including veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s).

(2) At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at <http://www.gsa.gov/fss> contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

In addition, the Panel recommends that FAR § 8.405-2(d) be amended to provide:

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(d) *Evaluation.* The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors (**unless competition was limited based on socio-economic status (see 8.405-5(b)(1))**). The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order, or establish the BPA, with the schedule contractor that represents the best value (see 8.404(d)). After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

The Panel also recommends that DFAR § 208.404-70 be amended to provide:

(a) This subsection--

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107) for the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services under Federal Supply Schedules, including orders under blanket purchase agreements established under Federal Supply Schedules; and

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD.

* * * *

(c) An order exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to--

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements, and the contracting officer--

(i)(A) Receives offers from at least three contractors that can fulfill the requirements; or

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(B) Determines in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

(2) As many small business schedule contractors as practicable, consistent with market research appropriate under the circumstances, and the contracting officer receives offers from at least three small business schedule contractors that can fulfill the work requirements; or

~~(2)~~(3) All contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(d) See PGI 208.405-70 (Pop-up Window or PGI Viewer Mode) for additional information regarding fair notice to contractors and requirements relating to the establishment of blanket purchase agreements under Federal Supply Schedules.

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Appendices

Appendix 1
Federal Procurement Data System Small Business Goaling Report
Actions Reported Between FY 2005 (Q1) and FY 2005 (Q4)

Department Name	Small Business Goal	Small Business Actual	Total SDB Actual	8(a) Goal	8(a) Actual	Other SDB Goal	Other SDB Actual
Total Federal	23.00%			3.00%		5.00%	
DEPT OF DEFENSE (9700)	23.00%	24.57%	6.63%	2.60%	3.24%	3.10%	3.38%
ENERGY, DEPARTMENT OF (8900)	5.50%	4.11%	1.35%	2.20%	0.85%	1.00%	0.50%
NATIONAL AERONAUTICS AND SPACE ADMINISTRATIO N (8000)	16.16%	14.44%	6.47%	3.69%	3.21%	3.00%	3.25%
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (75 00)	30.32%	36.43%	8.33%	5.50%	3.99%	11.12%	4.34%
GENERAL SERVICES ADMINISTRATION (4700)	43.00%	34.95%	10.79%	5.00%	5.43%	8.00%	5.35%
HOMELAND SECURITY, DEPARTMENT OF (7000)	23.00%	46.30%	7.57%	2.50%	2.94%	2.50%	4.63%
AGRICULTURE, DEPARTMENT OF (1200)	45.00%	49.53%	8.34%	5.00%	3.29%	5.00%	5.05%
JUSTICE, DEPARTMENT OF (1500)	31.50%	34.63%	5.18%	3.70%	2.20%	12.00%	2.97%
INTERIOR, DEPARTMENT OF THE (1400)	56.14%	55.24%	21.67%	8.26%	11.41%	8.91%	10.26%
STATE, DEPARTMENT OF (1900)	40.00%	35.32%	13.29%	7.00%	2.17%	7.00%	11.11%
LABOR, DEPARTMENT OF (1600)	26.00%	33.68%	11.20%	4.84%	2.95%	5.20%	8.25%
EDUCATION, DEPARTMENT OF (9100)	23.00%	9.20%	3.01%	4.00%	1.13%	1.00%	1.87%
COMMERCE, DEPARTMENT OF (1300)	44.80%	51.96%	15.53%	6.11%	6.11%	10.35%	9.41%
ENVIRONMENTAL PROTECTION AGENCY (6800)	27.00%	33.76%	12.29%	6.30%	4.76%	3.00%	7.53%
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	44.25%	4.10%	6.38%	1.23%	2.33%	24.56%	4.04%
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	38.13%	63.56%	37.20%	6.09%	18.73%	7.07%	18.46%
SOCIAL SECURITY ADMINISTRATION (2800)	33.50%	35.92%	10.12%	8.50%	6.73%	5.80%	3.38%
OFFICE OF PERSONNEL MANAGEMENT (2400)	19.90%	34.14%	6.03%	2.20%	0.25%	3.40%	5.78%
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	50.00%	15.19%	5.21%	15.00%	1.08%	25.00%	4.12%
SMITHSONIAN INSTITUTION (3300)	50.00%	26.40%	11.09%	6.66%	1.60%	6.66%	9.49%

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**Federal Procurement Data System Small Business Goaling Report
 Actions Reported Between FY 2005 (Q1) and FY 2005 (Q4)**

Department Name	HUBZone		Woman Owned Small Business		Women Owned Small Business		Service Disabled Veteran Owned Small Business		Service Disabled Veteran Small Business	
	Goal	Actual	Goal	Actual	Goal	Actual	Goal	Actual	Goal	Actual
Total Federal	3.00%		5.00%		3.00%		3.00%		3.00%	
DEPT OF DEFENSE (9700)	3.00%	1.94%	5.00%		3.00%		3.00%		3.00%	0.49%
ENERGY, DEPARTMENT OF (8900)	1.50%	0.19%	3.30%		0.57%		1.50%		3.00%	0.21%
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (8000)	3.00%	0.28%	5.00%		2.08%		3.00%		3.00%	1.12%
HEALTH AND HUMAN SERVICES, DEPARTMENT OF (7500)	3.03%	1.67%	5.05%		4.99%		3.00%		3.00%	0.44%
GENERAL SERVICES ADMINISTRATION (4700)	3.00%	4.06%	5.00%		6.19%		3.00%		3.00%	1.20%
HOMELAND SECURITY, DEPARTMENT OF (7000)	3.00%	2.05%	5.00%		4.53%		3.00%		3.00%	0.48%
AGRICULTURE, DEPARTMENT OF (1200)	3.00%	9.10%	5.00%		5.31%		3.00%		3.00%	0.60%
JUSTICE, DEPARTMENT OF (1500)	3.13%	1.15%	5.00%		6.40%		3.00%		3.00%	0.78%
INTERIOR, DEPARTMENT OF THE (1400)	3.00%	8.96%	5.47%		8.97%		3.00%		3.00%	1.09%
STATE, DEPARTMENT OF (1900)	3.00%	0.16%	5.00%		6.23%		3.00%		3.00%	2.01%
LABOR, DEPARTMENT OF (1600)	3.00%	1.33%	5.20%		5.28%		3.00%		3.00%	0.85%
EDUCATION, DEPARTMENT OF (9100)	3.00%	0.23%	5.00%		2.50%		3.00%		3.00%	0.08%
COMMERCE, DEPARTMENT OF (1300)	3.00%	2.20%	7.80%		9.63%		3.00%		3.00%	1.27%
ENVIRONMENTAL PROTECTION AGENCY (6800)	3.00%	1.01%	5.00%		4.65%		3.00%		3.00%	0.20%
AGENCY FOR INTERNATIONAL DEVELOPMENT (1152)	3.00%	0.08%	5.00%		1.27%		3.00%		3.00%	0.18%
HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF (8600)	3.00%	6.74%	15.03%		24.30%		3.00%		3.00%	1.52%
SOCIAL SECURITY ADMINISTRATION (2800)	3.00%	2.13%	5.00%		5.21%		3.00%		3.00%	0.42%
OFFICE OF PERSONNEL MANAGEMENT (2400)	3.00%	0.05%	5.00%		15.97%		3.00%		3.00%	0.13%
EXECUTIVE OFFICE OF THE PRESIDENT (1100)	3.00%	0.67%	9.00%		2.51%		3.00%		3.00%	0.10%
SMITHSONIAN INSTITUTION (3300)	3.33%	3.40%	7.77%		5.26%		3.33%		3.33%	0.01%

Appendix 2

Subcontracting with Small Businesses

The Panel's Small Business Working Group initially explored issues related to large entities subcontracting with small business concerns. Specifically, the panel reviewed whether recommendations could be made to support greater integrity in the area of 'other than small business' ("OTSB") subcontracting with small businesses. An OTSB is any entity that is not a small business. In most cases this includes large businesses, public utilities, universities, non-profits, and foreign-owned firms.

The Working Group spent significant time reviewing two primary facets of this question: prompt payments by OTSB to small businesses; and, OTSB compliance with small business subcontracting plans. A review was conducted of the legal and regulatory history, oversight reports, and government contracting databases, testimony was received from small business witnesses, interviews were conducted with leaders of the Small and Disadvantaged Business Offices from variety Federal agencies, and discussions were held with leaders from several large businesses.

Ultimately, the Panel's Working Group was unable to assemble comprehensive data required to permit in-depth analysis and the crafting of recommendations.

The Panel's Working Group does, however, believe an opportunity exists today to ensure that the next panel assigned to review this issue is in a better position to do so. The federal government recently launched the first generation of a new electronic Subcontract Reporting System (eSRS – see www.esrs.gov for more information), which is designed to expand visibility and transparency in the collection of federal subcontracting data and accomplishments. In its initial release, the system will eliminate the need for paper submissions and processing of the SF 294's, Individual Subcontracting Reports, and SF 295's, Summary Subcontracting Reports, and replace the paper with an easy-to-use electronic process to collect the data. It is the Panel Working Group's hope that once this web-based reporting tool is fully operational, it will provide more accurate and timely data, as well as analytical tools to permit a comprehensive examination of small business subcontracting activity.

The Panel's Working Group encourages eSRS program leadership to review the system to validate that it will capture data at a meta-level, as well as a contract-specific level, to permit future panels to better study the issues. The Working Group views this is an opportunity to further enhance the system's capabilities prior to full utilization. We strongly encourage eSRS program leadership to take advantage of this period as an opportunity to be more aggressive in their approach to ensure compliance with various subcontracting program requirements.

The Panel's Working Group recommends the eSRS program leadership review the following areas for inclusion in the eSRS system:

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- 1) A means of validating annual Federal-wide small business subcontract award statistics;**
- 2) Characterization of the type of work being performed by a small business subcontractor on a given contract (e.g. technology, service, or product orientation);**
- 3) Support for the gathering of small business subcontractor performance for past performance citations; and,**
- 4) Finally, with regard to ‘stovepiping,’ the panel strongly suggests that eSRS leverage existing data collection systems and methods (e.g. CCR) and support the integration of those systems, and related data, to allow for more robust data collection and analysis.**

Background

Over the past 20 years, small businesses have succeeded in winning significant business as subcontractors. According to data from the Small Business Administration (SBA), in a period from 1985 to 2003, small businesses were awarded subcontracting dollars ranging from a low of \$20.8 billion in FY 1993 to a high of \$45.5 billion in FY 2003. During this period, the percentage of subcontracting dollars ranged from a low of 35.1 percent to a high of 41.9 percent. Within the context of this success, however, the General Accountability Office (GAO), small businesses, agency representatives, and others document areas for improvement in the small business subcontracting program.

During the Small Business Working Group’s initial investigation into subcontracting with small businesses, the panel heard from many and widely varied small businesses. Two areas which emerged as common themes of concern included:

- 1) Compliance by OTSBs with subcontracting plans; and,
- 2) Prompt payments to small business subcontractors by their primes.

The degrees of concern expressed by witnesses, as well as anecdotal evidence brought by Panel members, drew the panel to focus on these two areas.

With regard to subcontracting plans, the impression exists that small firms are tapped by larger primes for the purpose of achieving compliance with Federal small business subcontracting requirements, with no real intent on the part of the prime to utilize the small businesses after an award is made. OTSB contractors must submit subcontracting plans establishing participation goals for small business and small disadvantaged businesses for all Federal contracts or subcontracts for goods and services exceeding \$1,000,000 in the case of construction contracts for public facilities, or \$500,000 for all other contracts.

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Prompt payment concerns emphasized the severe impact untimely payments can inflict on small businesses with limited working capital to float financial commitments to employees and suppliers. It is important, however, to note that within testimony received, the prompt payment issue was not limited to prime contractors but was also raised with regard to payments from Federal agencies working directly with small businesses.

The President's Small Business Agenda reiterates that the small business contracting process should be fair, open, and straightforward. To successfully execute this agenda, all stakeholders must have confidence that the spirit of existing subcontracting laws and regulations are consistently and fairly implemented. Federal agencies, prime contractors, and small business subcontractors all deserve fair treatment.

Subcontracting with Small Businesses

Governing Law - In 1958, Congress passed, and the President signed, Public Law (P.L.) 85-563, which amended the Small Business Act of 1953 and established a voluntary subcontracting program. An early mechanism used by Federal agencies to award subcontracts to small and socially and economically disadvantaged businesses was a contractual clause set forth in the Armed Services Procurement Regulation (ASPR) 7-104.36. In 1977, a Comptroller General Report concluded that this clause was ineffective because it did not specifically detail how contractors were to promote the subcontracting. Therefore, in 1978, Congress acted to explicitly declare, with the enactment of P.L. 95-507, codified at 15 U.S.C. § 637(d), that "[it] is the policy of the United States that small business concerns have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems." Additionally, 15 U.S.C. § 644(a) also provides that it is in the interest of the government to ensure that "a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns"). As the basis for this policy, Section 211 of this Act provides that "no contract shall be awarded to any offeror unless the procurement authority determines that the plan of the proposed prime contractor offers such maximum practicable opportunity."

The Federal Acquisition Regulation (FAR) Part 19.7 implemented the requirements of P.L. 105-507 by setting forth the structure for a subcontracting program. The Small Business Subcontracting Program's primary mission is to promote maximum possible use of small businesses by requiring OTSBs awarded Federal contracts to submit a subcontracting plan if: 1) The contract exceeds \$500,000 (\$1 million for construction of a public facility); and, 2) Offers further subcontracting opportunities. Among other elements, those small business subcontracting plans must contain the following information:

- Goals stated in both dollars and percentages . The contractor must state the total subcontracting dollars, and then state separately the total dollars that will be subcontracted to SB, SDB, WOSB, HUBZone SB, VOSB and

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SD/VOSB. The SB dollar amount must include all the small business subset amounts. The percentages must be expressed as percentages of the total subcontracting dollars. Goals for option years must be broken out separately.

- Total dollars planned to be subcontracted to each group;
- A description of the types of supplies and services to be subcontracted to each group, including the supplies and services to be subcontracted to OTSB subcontractors;
- A description of the method used to develop each of the goals;
- A description of the method used to identify potential sources;
- A statement as to whether or not indirect costs were included in the subcontracting goals.

OSTB compliance with subcontracting plans are tracked and audited via a number of avenues, including periodic reports, compliance reviews, and audits. For a detailed discussion of the subcontracting plan creation and management, reporting requirements and auditing functions, please see the Small Business Administration's publication, *Small Business Liaison Officer Handbook*, published in January 2005.

Prompt Payment

***Governing Law* - With regard to the prompt payment of small business subcontractors, Public Law 95-507 established the framework for OTSBs to subcontract with small businesses. Subsequent to the enactment of this law in the late 1970s, the Federal Acquisition Council implemented regulatory processes for agencies to comply with the law. FAR Clause 52.219-8, Utilization of Small Business Concerns, states that "it is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns."**

FAR 32.5, Progress Payments Based on Costs, established the "paid cost rule." This rule required large businesses to pay a subcontractor before including the payment in progress payment billings to the government customer. In contrast, small businesses needed only have incurred those costs to include them in their billings, provided they paid their vendors in the ordinary course of business. In 2000, this FAR rule was eliminated. According to Department of Defense memoranda, this change meant that there would be consistent treatment of all incurred subcontract costs, without regard to whether the cost was incurred by a large or small business. Provisions now require that both large and small business prime contractors pay incurred subcontract amounts 1) in accordance with the terms of a subcontract or invoice and, 2) ordinarily before submittal of the next payment request sent to the government.

FAR Supplement 32.112 addresses actions that contracting officers must take when a subcontractor alleges nonpayment, and requires and immediate response on the part of

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contracting officers to subcontractor complaints. Most recently, Defense Contract Management Agency issued an Information Memorandum No. 05-022, August 24, 2005, that provides administrative contracting officers and contract administrators with guidance on the remedies available to them for the untimely payment to subcontractors. An inquiry has been made as to the existence of similar guidance for civilian agencies.

Since Public Law 95-507, subcontracting on large federal contracts has become important to small business. Based on data from the Small Business Administration (SBA), the dollars paid to small subcontractors increased by 40 percent from fiscal year 1993 to fiscal year 2001.

Prompt Payment – Background, Current Practices and Oversight

Federal agencies maintain a high degree of interest in their contractor teams efficiently working together to achieve program and mission goals. A program where prime contractors consistently pay subcontractors on time can indicate financial solvency on the part of all involved, as well as satisfactory subcontractor performance. Failure to pay, however, can portend financial difficulties on the part of the prime or unacceptable performance on the part of the subcontractor and, as a result, increase the risk of program failure.

According to Defense Contract Management Agency Memorandum No. 05-022, Contracting Officers and Contract Administrators have the following remedies available when prime contractors fail to pay subcontractors in accordance with the terms and conditions of a subcontractor or subcontract invoice:

- **Recommend removal of the prime from the Direct Billing Program for not following approved payment procedures, in coordination with DCAA.**
- **Assign high risk ratings on prime contractor subcontracting plans for failure to manage subcontracts.**
- **Decrement billing rates, in coordination with DCAA.**
- **Implement fee or payment withholding.**
- **Suspend or reduce progress payments.**
- **Document poor subcontract management in contract performance ratings**
- **Disallow unpaid subcontract costs for financing and interim payments.**

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Legislation and Regulations Affecting Federal Primes and Subcontracts

1. **Public Law 85-536**. Passed in 1958, this legislation amended the Small Business Act of 1953 and authorized a voluntary subcontracting program. Prior to 1978, this statute was implemented most effectively in the Armed Services Procurement Regulations (ASPR), a predecessor to the FAR. It required large contractors receiving contracts over \$500,000 with substantial subcontracting opportunities to establish a program that would enable minority business concerns to be considered fairly as subcontractors or suppliers.
2. **Public Law 95-507**. Passed in 1978, this legislation amended Section 8(d) of the Small Business Act and created the foundation for the Subcontracting Assistance Program, as it is known today. It changed the participation of large contractors in the program from voluntary to mandatory, and it changed the language of the law from "best efforts" to "maximum practicable opportunities." Key features include:
 - a. A requirement that all Federal contracts in excess of \$100,000 (as amended) provide maximum practicable opportunity for small and small disadvantaged business to participate; and
 - b. A requirement that all Federal contracts in excess of \$500,000 (\$1,000,000 in the case of construction contracts for public facilities) is accompanied by a formal subcontracting plan containing separate goals for small business and small disadvantaged business.
3. **Public Law 98-577 (The Small Business and Federal Procurement Enhancement Act of 1984)**. This legislation amended the Small Business Act as follows:
 - a. By providing that small and small disadvantaged businesses be given the maximum practicable opportunity to participate in contracts and subcontracts for subsystems, assemblies, components, and related services for major systems; and
 - b. By requiring Federal agencies to establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small and small disadvantaged businesses.
4. **Public Law 99-661 (The National Defense Authorization Act of 1987)**. Section 1207 of this statute required the Department of Defense to establish as its objective a goal of five percent of the total combined amount obligated for contracts and subcontracts entered into with small and small disadvantaged businesses in each of fiscal years 1987, 1988, and 1989. Also, the use of SDB set-asides was authorized. (Subsequent legislation extended this period through the year 2000; however, the set-aside aspect of the program was suspended in fiscal year 1996.)
5. **Public Law 100-180 (The National Defense Authorization Act of 1988 and 1989)**. Section 806 required the Secretary of Defense to increase awards to small and small disadvantaged business.

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6. **Public Law 100-656 (The Business Opportunity Reform Act of 1988)**. The principal focus of this legislation was the 8(a) Program, but it contained a number of other provisions which affected the Subcontracting Assistance Program. These other provisions included the following:
 - a. Section 304 requires that the FAR be amended to include a requirement for a contract clause authorizing the Government to assess liquidated damages against large contractors which fail to perform according to the terms of their subcontracting plans and cannot demonstrate that they have made a good faith effort to do so;
 - b. Section 502, now codified at 15 U.S.C. Section 644(g)(1), requires the President to establish annual goals for procurement contracts of not less than 20 percent for small business prime contract awards and not less than 5 percent for small disadvantaged business prime contract and subcontract awards for each fiscal year [emphasis added]; and,
 - c. Section 503 requires the SBA to compile and analyze reports each year submitted by individual agencies to assess their success in attaining Government-wide goals for small and small disadvantaged businesses, and to submit the report to the President.
7. **Public Law 101-189 (Defense Authorization Act)**. Section 834 established the Test Program for the Negotiation of Comprehensive Subcontracting Plans. This statute authorized a pilot program limited to a few Department of Defense large business large contractors approved by the Office of Small and Disadvantaged Business Utilization (OSDBU) at the Pentagon. The program allows these companies to have one company-wide subcontracting plan for all defense contracts, rather than individual subcontracting plans for every contract over \$500,000, and it waives the requirement for the semi-annual SF 294 *Subcontracting Report for Individual Contracts*. The large contractor is still required to submit the SF 295 semi-annually, and it is required to have individual subcontracting plans and to submit SF 294s on any contracts with other Government agencies. Public Law 103-355, Section 7103, extended this test program through September 30, 1998.
8. **Public Law 101-510 (The National Defense Authorization Act for Fiscal Year 1991)**. Section 831 established the Pilot Mentor Protégé Program to encourage assistance to small disadvantaged businesses through special incentives to companies approved as mentors. The Government reimburses the mentor for the cost of assistance to its protégés, or, as an alternative, allows the mentor credit (a multiple of the dollars in assistance) toward subcontracting goals. Prior to receiving reimbursement or credit, mentors must submit formal applications.
9. **Public Law 102-366 (The Small Business Credit and Business Opportunity Enhancement Act of 1992)**. Section 232(a)(6) removes the requirement from SBA to do the Annual Report to Congress on Unacceptable Subcontracting Plans, which had been found in Section 8(d) of the Small Business Act.

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- 10. Public Law 103-355 (The Federal Acquisition Streamlining Act of 1994 (FASA)).** FASA significantly simplifies and streamlines the Federal procurement process. Section 7106 of FASA revised Sections 8 and 15 of the Small Business Act to establish a Government-wide goal of 5 percent participation by women-owned small businesses, in both prime and subcontracts. Women-owned small businesses are to be given equal standing with small and small disadvantaged business in subcontracting plans. In practical terms, this means that all subcontracting plans after October 1, 1995, must contain goals for women-owned small businesses and that all FAR references to small and small disadvantaged business have been changed to small, small disadvantaged and women-owned small business.
- 11. HUBZone Empowerment (Public Law 105-135).** The HUBZone Empowerment Contracting Program, which is included in the Small Business Reauthorization Act of 1997, stimulates economic development and creates jobs in urban and rural communities by providing contracting preferences to small businesses that are located in HUBZones and hire employees who live in HUBZones.
- 12. The Veteran's Entrepreneurship and Small Business Development Act of 1999 (Public Law 106-50).** This established a goal for subcontracts awarded by prime contractors to service-disabled veteran-owned small business concerns of 3 percent. A best effort goal will be established for veteran-owned small businesses. Subcontracting plans must incorporate these goals.
- 13. FAR Part 19 (48 CFR).** Implements the procurement sections of the Small Business Act. Federal contracting agencies must conduct their acquisitions in compliance with these regulations. OTSB contractors are required to comply with certain clauses and provisions referenced in the FAR.

 - a. Subpart 19.1 prescribes policies and procedures for Size Standards. (Also in Title 13 of the U.S. Code of Federal Regulations.)
 - b. Subpart 19.7 prescribes policies and procedures for subcontracting with SB, SDB, WOSB, VOSB, SD/VOSB, and HUBZone SB concerns.
 - c. Subpart 19.12 prescribes policies and procedures for the SDB Participation Program including incentive subcontracting with SDB concerns.
 - d. Subpart 19.13 prescribes policies and procedures for the HUBZone SB Program.

Source: *Small Business Liaison Officer Handbook, 01/2005, produced by the Small Business Administration*

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CHAPTER 5

THE FEDERAL ACQUISITION WORKFORCE

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

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I. Background

A. Why Focus on the Acquisition Workforce?

At the outset, we should explain briefly how the federal acquisition workforce came to be a focus of the work of the Acquisition Advisory Panel. Unlike most of the other topics addressed by the Panel, the state of, and the problems of, the federal acquisition workforce was not one of the topics specifically identified by Congress in the legislation directing the establishment of the AAP. Although some might view the condition of the federal acquisition workforce as an odd issue for this Panel to consider, there was a clear understanding from the beginning that we could not provide the insight and assistance that Congress sought without addressing the problems presented by the federal acquisition workforce.

Based on our experience, we recognized a significant mismatch between the demands placed on the acquisition workforce and the personnel and skills available within that workforce to meet those demands. Accordingly, we believed that there was a serious risk that problems stemming from the shortcomings of the acquisition workforce would be misunderstood as problems with the procurement system. More specifically, because of workforce shortcomings, techniques that constitute important parts of the acquisition tool kit of the federal government, such as performance-based service contracting, commercial item contracting, and interagency and government-wide contracts might be viewed as unworkable without recognition that some issues affecting the use of these techniques are workforce related.

The Panel's findings and recommendations in the areas of Performance-Based Service Contracting, Commercial Practices, Interagency Contracting, Small Business and Data, make clear how essential the acquisition workforce is to the effectiveness of these elements of the federal acquisition system. Because workforce issues cut across the Panel's findings and recommendations, it is no accident that the Panel has determined that recommendations for improvement in these aspects of the federal acquisition system result in additional demands on the federal acquisition workforce.

Of course, any change in the status quo will have an effect on the workforce. Some of the Panel's recommendations in each of these areas inevitably have workforce implications. Consider the following recommendations:

- In the area of Interagency Contracting, the Panel has adopted recommendations that include: a survey and establishment of a database of all interagency contracts (#1-3); review and revision of current procedures for the creation and continuation of GWACs and Franchise Funds, and the GSA Schedule, as well as establishing a formal process for creation or expansion of multi-agency contracts, enterprise-wide vehicles, and assisting entities (#4-5); and requiring each agency to authorize/reauthorize the use of such contracts pursuant to detailed OMB guidance (#6-8).

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- With respect to Commercial Practices, the Panel has adopted recommendations that include: requiring agencies to devote more resources to requirements definition (#2); increasing competition under multiple award IDIQs, as well as under the GSA Schedule by applying Section 803 government-wide and to services and supplies; providing enhanced competition for large orders under such contracts (# 3a,b); providing a debriefing for large orders (#5b); creation of a new competitive services Schedule (#4); requiring a post-award synopsis of sole source orders under IDIQ contracts; and allowing for protests of large orders under multiple award IDIQs (#7).
- The Panel's recommendations regarding Small Business would, among other things: eliminate cascading procurements (#4); authorize small business reservations of prime contract awards in full and open procurements for multiple award IDIQ contracts; authorize agencies to limit competition for orders under multiple award IDIQs to small business.
- In the area of Performance-Based Acquisition, the Panel's recommendations call for more detailed guidance on the use of performance-based acquisition (#2); improvement of post-award contract performance monitoring and contract specific "Performance Improvement Plans" (#5); establishment of a "Contracting Officer's Performance Representative (COPR) with specialized training for performance-based contracts (#8); obtaining improved data through use of A-PART (#9).
- Even the Workforce recommendations will result in additional burdens. As discussed below, these recommendations include: a call for collection of data government-wide and establishment of a new database using a consistent definition of the acquisition workforce (#1-4); a requirement for an improved human capital planning process (#2-3); more training and additional training requirements (#3).
- In a series of recommendations regarding the Appropriate Role of Contractors Supporting the Government, the Panel's recommendations include: new principles for determining functions that must be performed by government personnel (#1-2); new rules regarding use of personal services contracts (#3-4); new rules with additional procedures for identifying and addressing organizational conflicts of interest (#5); potentially new guidance regarding personal conflicts of interest (#6); and new rules regarding protection of contractor data (#5).
- The Panel also recommended that additional procedures be adopted for accurate data collection and improvements to FPDS-NG, including; specifically imposing responsibility for accurate data on the Head of the

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Agency (#4); requiring training to improve data accuracy (#5); an Independent Verification and Validation to test the data validation rules (#3); audits that include agency compliance in providing accurate data (#9); collection of data specifically on orders placed under interagency and enterprise-wide contracts and reporting such data, including the level of competition in such orders; and developing reports that show the dollar transactions by type of interagency vehicle (#11).

These recommendations will necessarily place additional demands on the acquisition workforce. That is part of the price of improving the acquisition system. Ultimately, whether one focuses on the problem areas of the federal acquisition system, or on solutions designed to alleviate these problems for the future, the close link between the acquisition workforce and effective strategies for acquisition reform, is inescapable.

The importance of recognizing this point is that the bolstering of the acquisition workforce that we recommend is not undertaken for the sake of the acquisition workforce, but because of the importance of the acquisition mission. Although strengthening of the acquisition workforce will by no means be cost-free, continuing failure to invest in an appropriate sized and skilled acquisition workforce will be far more expensive than making the required investment.

B. The Problem of Counting the Workforce

In order to draw meaningful conclusions about the size of the federal government's acquisition workforce several conditions must be fulfilled:

- 1) We have to agree on what we are trying to measure.
- 2) We have to develop means for accurately measuring the panels that we are trying to measure.
- 3) We have to implement those measures consistently in different agencies across the face of the federal government.
- 4) We have to implement those measures consistently from year to year.

Looking backward, we are forced to conclude that these conditions have not been met

What should we be measuring?

We are far from the first to recognize the need to gauge and improve the state of the federal acquisition workforce. In the early 1970's, the Commission on Government Procurement emphasized the importance of timely and adequate information regarding the procurement workforce.¹ In a discussion reminiscent of our own efforts, the Commission noted that with the increasing emphasis on improving the quality, efficiency, economy, and performance of the procurement system, it was imperative that there be a focal point and a "comprehensive Federal

¹ Report of the Comm'n on Gov't Procurement, Summary 17 (Dec. 1972).

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procurement Personnel Information system” for overseeing the development and maintenance of a competent acquisition workforce.² In fact, the 1972 Commission had to resort to its own survey in order to obtain information on the federal acquisition workforce sufficient to perform its analysis.³ A recurring theme has been the need to re-conceptualize and reorganize the procurement function in a manner that helps to make procurement an effective and efficient tool for achieving agency missions. Indeed, the Office of Federal Procurement Policy was created to address this very concern. The 1972 Commission specifically recommended that OFPP be tasked with determining the overall acquisition workforce needs of the government and seeing that they were met.⁴

The National Performance Review in the 1990’s echoed these sentiments, leading with the statement that “No matter how good a policy may be on paper, it will not be effective without well-motivated, competent people to implement it.”⁵ The NPR, while reducing the federal workforce,⁶ made recommendations for changes in the management of the procurement system that emphasized a broader role for line managers, encouraged the creation of competitive enterprises within government; expanded the use of the GSA Schedules, and emphasized acquisition of commercial items (as did the Section 800 Panel Report). Many of these proposals were subsequently enacted as part of FASA, FARA and the Government Management Reform Act of 1994. As a consequence of implementation of many of these proposals, and the increased use of interagency contracts, there are more people whose responsibilities touch on the acquisition function. In addition, a consensus has emerged that a functional definition of the acquisition workforce should not be limited to persons engaged in entering contracts. Rather, the acquisition function and workforce should be understood to include, as well:

- Agency personnel responsible for determining and defining agency requirements for goods and services
- Agency personnel responsible for intimate familiarity with the markets in which the agency will seek goods and services to meet agency needs
- Agency personnel responsible for monitoring and measuring contract performance, including testing of goods, auditing, contract administration, and evaluation of contractor performance

² *Id.*

³ *Id.*

⁴ *Id.* ch. 5..

⁵ National Performance Review, *Reinventing Federal Procurement*, PROC02 (Sept. 14, 1993); compare the statement of the 1972 Commission “People are the most critical part of any effective procurement process. We have good people throughout all levels of procurement organizations today, but nowhere is it more apparent that concerted management attention is needed than in the area of organizing and planning for the procurement workforce of the future.” Comm’n Report, ch.5 at 46.

⁶ During the 1990s, the overall federal workforce was reduced by about half a million people. See Jacques S. Gansler, *A Vision of the Government as a World-Class Buyer: Major Procurement Issues for the Coming Decade* 19 (Univ. of Md. 2002).

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- Agency personnel responsible for managing the programs in which the goods and services acquired are employed.

This broad conception of the acquisition function has gradually been under discussion for decades, particularly with respect to the importance of requirements definition, but has not been implemented to a consistent degree across the face of the federal government. Quite recently, in April 2005, this approach has been formally extended to the workforce of civilian agencies by the promulgation of Office of Federal Procurement Policy Letter 05-01.⁷ But the results of that instruction have yet to become visible across the face of the agency acquisition workforce.

Although this broadened conception of the acquisition workforce is in many respects a desirable development, in some respects the broadened conception could actually confound the task of accurately and consistently measuring the acquisition workforce. It is important to emphasize that this is not meant as a criticism of this broader conception of the acquisition function, but only to point out that redefining the acquisition workforce at this relatively late date could have an important unintended consequence. By changing the way we define and count the acquisition workforce, we have made it very difficult to generate meaningful longitudinal studies of the acquisition workforce because the Acquisition Workforce has been defined and counted in significantly different ways at different times.

There is also a concern that the evolution of workforce definitions is not just random static that obscures trends affecting the Acquisition Workforce. Instead, some critics of the workforce-related policies of recent administrations have suggested that broadening the definition of the Acquisition Workforce has served to hide the increased inadequacy of the workforce.⁸ But one need not accept that charge as to the intent behind this shift in conceptualizing the acquisition workforce to understand that an accurate understanding of the key *trends* about the size and composition of the federal workforce cannot be had without using a consistent benchmark. Moreover, because the program managers and others who are “customers” and users of the goods and services being acquired have important responsibilities outside the realm of acquisition, we would overstate the resources available for the acquisition function if we regard all of these members of the broadly conceived acquisition workforce as full-time members of the population available for acquisition functions.

In order to understand where we stand in the enterprise of counting the federal acquisition workforce, it is useful to understand the different approaches taken in recent years to counting the workforce. As we shall see, significantly different approaches have been used by different agencies. Moreover, there has been significant inconsistency over time.

⁷ Available at http://www.whitehouse.gov/omb/procurement/policy_letters/05-01_041505.html.

⁸ Steven L. Schooner, *Feature Comment: Empty Promise for the Acquisition Workforce* 47 Government Contractor No. 18, ¶ 203 (2005).

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The FAI Count; Its Limitations and Alternatives

Since the late 1970s, the Federal Acquisition Institute has collected and reported data on the federal acquisition workforce. At least since the report covering Fiscal Year 1982, this data has been identified as the Federal Acquisition Personnel Information System (“FAPIS”) Report. Although the FAPIS Report has been generated reasonably consistently since 1982, the coverage of the report has not been entirely consistent over that time. The basis for the FAI/FAPIS count of the acquisition workforce has been various General Schedule “occupational series” in the 1100 series that form the core of the traditional procurement workforce, including 1102s (“Contract Specialists”) and 1105s (“Purchasing”). However, the exact coverage of the report has varied from year to year. For instance, for 1977-1980, most of the data collected covered 1102s and 1105s, plus 1101s (“General Business and Industry”) and 1150s (“Industrial Specialist”).⁹ No comprehensive definition of the Acquisition Workforce was attempted in these years, nor was data reported concerning the numbers of personnel working for the federal government encompassed by any such definition.

In the report for FY 1982, by contrast, statistics are provided for a broad “Acquisition Workforce” and for a narrower category labeled the “Procurement Workforce.” The Acquisition Workforce data presented includes subcategories for Logistics Management, Procurement, Equipment Specialists, Quality, Supply and Transportation, but the specific occupational series included are not identified. The “Procurement Workforce” data includes 1101s, 1102s, 1103s, 1104s, 1105s and 1150s.¹⁰ The overall Procurement Workforce, so defined, was 51,968 for FY 1982, a number that had grown significantly from the number that had been reported for 1978, 40,775. The broader Acquisition Workforce, as reported in the FY 1982 report, had grown from 133,615 to 136,971 in the same time period.¹¹ The count of 1102s for FY 1982 was: 22,165. The count of 1105s was 5023.

Skipping forward to some of the most recent data available from FAI, the report for FY 2004 discloses:

- The aggregate number of 1102s across the government was 26,936
- The total number of 1105s across the government was 3,186
- An overall “acquisition workforce” consisting of 1101s, 1102s, 1104s, 1105s, 1106s, and 1150s consisted of 58,161¹²
- A broader count of “logistics occupations populations” measured 122,454.¹³

⁹ FAI, *Procurement Workforce Demographics 1980 and Four Year Profile (FY 1977–1980)*. **Some data was also presented on other occupational series, but not in all categories.**

¹⁰ FAI, *Report on the Acquisition Work Force Through Fiscal Year 1982*.

¹¹ See below note (14).

¹² FAI, *Report on the Federal Acquisition Workforce, Fiscal Years 2003 and 2004*, 39, tbl 4-2. Note that this is not strictly comparable to the data for FY 1982 mentioned above, which includes 1103s, but does not include 1106s.

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Note that if we want to employ consistent measures over the course of the last quarter century, we are compelled to employ the narrowest definitions of the acquisition workforce, looking only at data on 1102s and 1105s. But even this approach may offer a distorted benchmark, as the proportion of contracting officers, for instance that are designated as 1102s, may not be consistent over time, and across agencies.

Undoubtedly, the traditional FAI count of the acquisition workforce casts too narrow a net in gauging the resources available to do the government's acquisition work. For instance, the Panel is aware that there are today some agencies, such as GSA, in which there are more non-1102 contracting officers than there are 1102 contracting officers. In such agencies the FAI data (which counts only 1102s) is extremely misleading. On the other hand, broader measures of the acquisition workforce such as those used in the DoD counting methods (discussed below) may overstate the resources of the acquisition workforce because they include many people doing non-Acquisition-related work in Acquisition organizations. This is particularly true of the "Acquisition Organization" definition of the acquisition workforce described below, but it has some relevance even to the more carefully constructed AT&L workforce definition that is also described below. Specifically, as explained below, the AT&L definition includes personnel in acquisition-related organizations who perform technology-related functions. There is no denying that these personnel play an important role in the acquisition process; yet many of these personnel have other responsibilities besides acquisition and their inclusion in a count of the acquisition workforce may therefore result in overstating the resources available for the performance of acquisition functions, and may thus disguise the extent of the sharp decline in personnel trained for core acquisition functions.

Definitions Make a Difference

Parsing different definitions of the Acquisition Workforce is a highly technical matter that some might doubt will yield information of policy importance. In fact, however, discrepancies in definition and measurement of the workforce are so large in magnitude as to drown out the evidence of the changes that we are trying to measure and understand, unless we properly take account of these differences in definition and measurement. This is visible if we examine the widely differing approaches that have been used in recent years to count the Department of Defense acquisition workforce.

Counting the Defense Acquisition Workforce

There are at least three different ways of counting the Defense Department portion of the acquisition workforce that have been used over the last 15 years. The measures employed by the Department of Defense itself, moreover, historically have not been

¹³ *Id.* at 38, tbl. 4-1. Because the 1982 count for what was then labeled the "Acquisition Workforce" did not list the occupational series comprised therein, a rigorous comparison between this 2004 "logistics occupations populations" count and the 1982 count for the "Acquisition Workforce" is not possible.

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commensurable with those used to measure the Acquisition Workforce of civilian agencies. The three approaches to counting the DoD acquisition workforce are as follows:

FAI Count for DoD

The Federal Acquisition Institute has counted the DoD component of the federal acquisition workforce using the same categories as it uses to count that workforce across the face of the federal government. Thus data has been collected and reported on the number of 1102s and 1105s, and the numbers in some of the other 1100 occupational series within the Defense Department. By summing up the data FAI has reported for the Army, Air Force, Navy and Other DoD we can generate an FAI count for the DoD acquisition workforce. This is the narrowest measure of the acquisition workforce for DoD.

Acquisition Organization Count (for DoD)

By contrast, Section 912(a) of the National Defense Authorization Act for Fiscal Year 1988, defines the term “defense acquisition personnel” to include all personnel employed in any of 22 listed “acquisition organizations,” regardless of the employee’s own occupation, but excluding civilian DoD employees employed at maintenance depots. This version of the Acquisition Workforce count is usually known as the “Acquisition Organization” Count. The House Armed Services Committee historically has requested that DoD use this count in reporting acquisition workforce levels to the Committee.¹⁴ Moreover, the series of reductions in the Acquisition Workforce mandated by Congress in the 1990s was gauged with reference to this Acquisition Organization count.

The overbreadth of this Acquisition Organization approach is apparent if one examines the list of Acquisition Organizations. Any organization whose mission includes significant acquisition programs is included in this list, even though many, and in some cases most, of its employees are primarily engaged in other functions. For instance, the Missile Defense Agency is included in this list even though many of its personnel undoubtedly are primarily engaged in other functions. The DoD Inspector General has noted that the Acquisition Organization workforce count includes “non-acquisition personnel performing support functions” including “firefighting, police, human resources, administration, accounting, legal, engineering technicians, supply, transportation and trades (such as equipment and facilities operations and maintenance).”¹⁵ On the other hand, in a different respect, the Acquisition Organization count is too narrow as well, because it excludes any personnel engaged in acquisition functions outside of the listed “acquisition organizations.” Clearly, there are some such personnel.

The ATL Count (for DoD)

¹⁴ U.S. DOD IG, *Human Capital: Report on the DoD Acquisition Workforce Count*, D-2006-073, 7 (2006).

¹⁵ *Id.*

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In contrast to the approach taken in Section 912(a), Section 912(b) of the National Defense Authorization Act for Fiscal Year 1988 required DoD to develop for itself a definition of the Defense Acquisition Workforce, and to use that definition uniformly within DoD. After study, the Secretary of Defense informed Congress that DoD would henceforth employ a method, known as the “Refined Packard Model” to produce a workforce count known as the “Acquisition, Technology and Logistics” (ATL) count. The Senate Armed Services Committee relies on data for the ATL produced through this Refined Packard Model, whereas their House counterpart now receives both data on this ATL count and data on the Acquisition Organizations workforce count described above.¹⁶

The ATL count is produced by combining three categories of employees:

- First, the count includes all civilians in what is called Category I --- the contracting-related occupational series, such as GS 1102s and 1105s, no matter where in DoD they serve.
- Second, in Category II the ATL count includes civilian DoD employees in acquisition or technology-related occupations (such as electronics engineering, budget analysis or computer engineering), but only if they are serving in organizations that perform primarily acquisition-related missions; it also includes military officers in these same organizations
- Finally, in category III, the ATL definition of the acquisition workforce allows for additions to this count, as well as for deletions from the count, by particular military services and other DoD organizations in order to more accurately reflect the predominant nature of particular employees’ functions and responsibilities.

Several observations about the Refined Packard Model/ATL count seem appropriate:

- First, this approach seeks to cast a broader net than the traditional FAI count, which includes only the contracting occupational series.
- It is, in a different respect, broader than the Acquisition Organization count, because, unlike that count, it includes acquisition personnel in traditional contracting specialties outside acquisition organizations.
- Like the Acquisition Organization count, the formulation of the ATL count recognizes that the acquisition function is broader than the task of contracting. It does so by inclusion of category II and III personnel. On the other hand, it recognizes that the Acquisition Organization count is

¹⁶ *Id.* at 8.

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overstated in important respects because it includes almost *all personnel* in such organizations, no matter how remote their function is from the acquisition process.

- In this respect, the ATL count seeks to strike a compromise between the narrow occupational categories-based definition of the Acquisition Workforce employed by FAI and the overbroad approach of the Acquisition Organization count.
- But this compromise is necessarily imperfect if the AT & L count is to be employed as a gauge of the resources available for acquisition functions. Although every member of the category II grouping included in the AT&L count may have some degree of involvement in acquisition functions, many of these category II personnel spend most of their time on non-acquisition functions.

(It is theoretically conceivable that the concerns raised by the last bullet point might be addressed by having Category II positions rated according to the percentage of their normal workload that is devoted to acquisition-related activities. We could thus translate the gross number of Category II personnel into a smaller number of full time equivalent positions devoted purely to acquisition. But the drawbacks of any such alternative approach are also evident. First, it might well prove unmanageable in practice. Second, this suggestion may founder on the fact that a significant portion of the time of many category II employees will be devoted to activities that inextricably intertwine acquisition and program functions. At most this kind of approach might warrant a pilot study to see if it is readily operationalizable and whether it yields useful information for human capital managers.)

A different response to the concern noted in the last bullet point above can be found in the provision for inclusion or exclusion of individual employees from the Acquisition Workforce count under the rubric of category III. Indeed, Category III provides the AT&L workforce definition with flexibility that both the FAI and Acquisition Organization approaches lack. This feature provides some ability to adjust the workforce definition and count to respond to the concern stated above—that category II may have the effect of overstating the resources that are available for acquisition functions. On the other hand, this same flexibility is also the source of a potential weakness in the Refined Packard Model. That is, by allowing organizations to make individualized determinations as to inclusions and exclusions from the Acquisition Workforce, this provision could potentially open the door to nonuniformity and inconsistency in the definition and counting of the federal acquisition workforce. This could particularly be a problem if this approach were extended to agencies beyond the Department of Defense. A consistent, detailed and uniform methodology for making these category III determinations would have to be applied uniformly by all agencies for this to yield comparable results across the face of different federal agencies.

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At all events, at least in the past, the DoD definitions and counting methods do not match up with the FAI counts for the civilian agencies. So uniformity and consistency on a federal government-wide basis certainly have yet to be achieved.

Just to give a sense of the dramatic impact of these varying methods for counting the DoD component of the acquisition workforce, note the following:

- For Fiscal Year 2004 the DoD Acquisition Organization Workforce count was 206,653¹⁷
- For the same fiscal year, the DoD Refined Packard methodology count was 134,602¹⁸
- And the total of personnel in the FY 2004 FAI count for DoD organizations -- covering the five major 1100 occupational series tracked by FAI -- was: 25,918.¹⁹

Equally significantly, although the trends reflected in the differing counts go in the same direction, they are sharply different in magnitude:

- Between 1999 and 2004 the Acquisition Organization Count for DoD declined from 230,556 to 206,653,²⁰ a drop of more than 10%.
- In the same time period, the ATL count declined much less, from 138,851 to 134,602,²¹ a decline of just slightly more than 3%.
- As for the FAI count for DoD, in the same time period the total of the five major occupational series tracked by FAI, dropped from 31,131²² to 25,918, a decline of almost 27%, reflecting the sharpest decline.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 9

¹⁹ FAI, *Report on the Federal Acquisition Work Force: Fiscal Years 2003 and 2004*. This number actually appears nowhere in the cited report. For reasons that are not apparent, the report nowhere sums the acquisition workforce for DoD or any of its components. But it does break out each of the following occupational series (1101, 1102, 1105, 1106, 1150) by agency in a table ostensibly designed to show breakout by grade level. By summing the total across grade levels, and summing totals across for the Army, Air Force, Navy and other-DoD, and then summing these occupational series, we have derived this total. Note that although this report includes data on 1104s elsewhere, it does not include this data on 1104s, so they have been omitted from this count. These details are noted here mostly to provide an example of the frustrating inconsistency in the way the workforce related data has been collected and reported.

²⁰ DODIG D-2006-073, at 7.

²¹ *Id.* at 9.

²² This number was derived from the Federal Acquisition Institute, *Report on the Federal Acquisition Workforce-1100 Series Fiscal Year 1999*, using the technique described in footnote 20 with respect to the FY 2004 data.

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Thus although all of these statistics show a declining work force, there are major differences as to the extent of that decline. A comparison of the trends suggests that reductions were sharpest in the core contracting competencies and functions. Focusing on the ATL definition alone tends to obscure the extent of this reduction. We ultimately conclude that no single definition of the acquisition workforce would secure the information necessary for successful human capital planning to meet our acquisition needs for the future, and recommend that a dual approach be taken to defining and counting the workforce.²³

When an effort is made to track the Acquisition Workforce over longer periods of time, the data uncertainties loom even larger.

- This is partly because there is no data equivalent to the ATL/Refined Packard methodology count for years prior to 1999. Yet these are the years in which the most dramatic reductions occurred in the acquisition workforce as measured by the acquisition organization count.²⁴
- This is partly because there is simply no data for the past that was computed on a basis equivalent to the ATL count for non-DoD organizations.
- Thus, in order to track changes over the longest period of time using reasonably consistent measures, we are obliged to employ the narrowest definition of the acquisition workforce, focusing on the 1100 series of occupational categories, tracked by FAI (with some omissions) since 1982. For DoD, but not for civilian agencies, we have the additional option of focusing on the Acquisition Organization count, which has been available since 1990.

C. The Beacon Report

Much of the work of the panel with respect to the acquisition workforce was focused on the documentary record as to the size and capability of the federal acquisition workforce, as well as the demands that the changing acquisition function places upon the acquisition workforce. In some of these areas there is a voluminous literature collecting data and other information relevant to our inquiries. In other areas—such as systematic human capital planning—we were unaware of much of a literature. In order to master and assemble this literature, and to put some of the available data into usable form, the Panel was fortunate to be able to avail itself of the services of a contractor, Beacon Associates.

Beacon undertook several tasks for the Panel with respect to our inquiry into the state of the federal acquisition workforce:

²³ See Recommendations #1-1 and # 1-2 and accompanying discussion.

²⁴ See footnote _53___(in Finding #5)

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- First, Beacon prepared a transcript matrix which indexed the hearing testimony and the documents submitted to the panel for references to the state of the acquisition workforce.
- Second, Beacon assembled a comprehensive catalogue of government reports on the size, composition, effectiveness and competencies of the federal acquisition workforce that had been issued over the last three decades, prepared executive summaries. Most importantly, these materials were scanned and assembled on a CD-ROM making them accessible for use by Panel members, and preserving them for future use.
- Third, Beacon assembled a “Data Workbook” assembling the numerical data available about the federal acquisition workforce. This, too, was placed on a CD-ROM to make it accessible to Panel members, and preserving this information for future use.
- Finally, Beacon prepared for the Panel’s use, a report analyzing the available information about the size, composition, competencies and effectiveness of the federal acquisition workforce, and equally importantly, identifying shortcomings, gaps, and inconsistencies in the available data. This Beacon Report presents an extensive array of the available statistical information about the federal acquisition workforce, usually in graphical form. The Report also contains pointers, in the form of footnotes, to the original documents where the information cited can be found, which are now contained with the catalogue mentioned above. The Executive Summary section of that Report is included in our Panel Report as an Appendix. The entire Beacon Report is available on CD-ROM.

Because of the voluminous literature involved, as well as because of the frustrating inconsistencies and gaps in the data collected and reported previously, the services and products provided by Beacon were invaluable in the work of the Panel on the federal acquisition workforce.

II. Issues to Consider

1. Which government personnel should be understood to constitute the federal acquisition workforce (taking into account both the actual operation of the procurement process today and the ideal operation of the process in the future)?
2. Is the existing federal government acquisition workforce sufficient in numerical strength to perform the missions that it has been assigned in a manner that assures -- to the extent reasonably practicable -- the effective, efficient and lawful operation of the federal acquisition system?

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3. Is the existing workforce sufficiently qualified by background, aptitude, credentials, skills and training to perform the missions that it has been assigned in a manner that assures the effective, efficient and lawful operation of the federal procurement system?
4. Are additional data collection, workforce assessment and human capital planning measures necessary so that the federal government can assure that it can match the workforce “supply” to the functional demand for acquisition management today and in the future?

III. Acquisition Workforce-Related Findings

Finding #1:

The federal acquisition workforce is an essential key to success in achieving the government’s missions. Procurement is an increasingly central part of the government’s activities. Without a workforce that is qualitatively and quantitatively adequate and adapted to its mission the procurement reforms of the last decade cannot achieve their potential, and successful federal procurement cannot be achieved.

Discussion

The experience of Acquisition Advisory Panel members, the testimony received by the panel, and the data collected and surveyed by the Panel all make clear the centrality of the acquisition workforce to the accomplishment of the government’s missions. Both the increased dollar volume of procurement and the qualitative evidence confirm that we have entered what GAO has labeled a “new environment in which there is heavy reliance on contractors to perform functions previously performed by the government.”²⁵ The importance of this trend, already evident, was magnified in the response to the events of September 11, 2001, and the conflicts in Afghanistan and Iraq. As the Comptroller General has noted, expenditures on federal acquisition have increased over 65% since 2001, reaching the level of \$388 billion in fiscal year 2005.²⁶

We have also witnessed a constant stream of reports that document qualitative shortfalls in the performance of the acquisition system -- shortfalls that have been attributed in significant part to inadequate human resources in the acquisition workforce.²⁷ Significantly, among these

²⁵ U.S. GAO, *Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century*, GAO-07-45SP, 11-12 (2006).

²⁶ *Id.* at 4.

²⁷ A selective listing of a much larger body of reports includes: U.S. GAO, *High-Risk Series: An Update*, GAO-05-207 (2005); U.S. GAO, *DoD Acquisitions: Contracting for Better Outcomes*, GAO-06-800T (2006); U.S. GAO, *Contract Management: DoD Vulnerabilities to Contracting Fraud, Waste and Abuse*, GAO-06-838R (2006); U.S. GAO, *Defense Acquisitions: Assessments of Selected Major Weapon Programs*, GAO-06-391 (2006); U.S. GAO,

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are reports addressing procurement difficulties and shortcomings both in the response to Hurricane Katrina,²⁸ and in Iraq reconstruction efforts.²⁹

Workforce issues have surfaced repeatedly, as well, in the work of the Panel directed at substantive features of the procurement systems. Indeed, it is safe to say that all of the working groups of the Acquisition Advisory Panel encountered these issues.³⁰ Some of the reasons for this phenomenon are worth noting. The working groups initially established in the Acquisition Advisory Panel correspond to the specific mandates established for our Panel by Congress, including focus on the use of commercial practices, interagency and government-wide contracts, and performance-based services acquisition. These topics correspond to areas in Congress believed that the performance of the acquisition system could benefit from closer examination, and, if possible, substantive improvement. It is not mere coincidence that, in the course of examining these trouble spots in the operation of the federal procurement system, there was frequently evidence that the federal acquisition workforce had difficulty implementing the procurement system as designed. For these are all areas in which increased demands have been placed on the acquisition workforce, to handle an increased number of transactions and to acquire increasingly sophisticated goods and services.

As explained in more detail below, the skills and knowledge base that are required to successfully perform these procurement functions go well beyond the capabilities that were required of the federal acquisition workforce in an earlier era. Thus, each of the Panel's working groups took into account what role shortcomings in the federal acquisition *workforce* were playing in what appeared to be suboptimal performance of the acquisition *system*. At the same time, in devising recommendations for substantive improvements in these facets of the procurement system, it was necessary for each working group to keep in view a realistic estimate of the capabilities of the existing workforce and the future acquisition workforce, so as to make sure that reforms suggested by the panel were realistically capable of implementation. Thus, any carefully framed program of recommendations in the areas that Congress asked the Panel to address would have to pay close attention to the federal acquisition workforce issues that we have addressed.

Finding #2:

- **Demands on the federal acquisition workforce have grown substantially:**

Defense Acquisitions: DoD Has Paid Billions in Award and Incentive Fees Regardless of Acquisition Outcomes, GAO-06-66 (2005); U.S. GAO, *Defense Management: DoD Needs to Demonstrate that Performance-Based Logistics Contracts are Achieving Expected Benefits*, GAO-05-966 (2005).

²⁸ U.S. GAO, *Hurricane Katrina: Planning for and Management of Federal Disaster Recovery Contracts*, GAO-06-622T (2006).

²⁹ Special Inspector General for Iraq Reconstruction, DoD, *Iraq Reconstruction: Lessons in Contracting and Procurement 107-09, App. B* (2006).

³⁰ See for instance, the recommendations regarding Performance-Based Service Contracting, for the establishment of Contracting Officer Performance Representatives, at page _____, of this Report.

Finding #2-1:

- **The dollar volume of federal government procurement has increased dramatically since 9/11/2001. Procurement obligations have increased 60% in the last five years. [update data]**

Finding #2-2:

- **In the last twelve years the qualitative nature of the procurement activity has also changed, placing markedly greater demands on the Acquisition Workforce for capability, training, time, and sophistication.**

Finding #2-2-1:

- **There has been a pronounced shift from acquisition of goods to acquisition of services. Service contracting places additional demands on the acquisition workforce, both in the requirements definition and contract formation process, particularly in the realm of performance-based service acquisition, but also on the contract management side.**

Finding #2-2-2:

- **There has been a dramatic shift of federal procurement dollars to the federal supply schedules and other forms of interagency contracting. Although this is often perceived, correctly, as part of the solution to the government's procurement problems and its acquisition workforce shortcomings, it also opens the door to certain problems:**
 - **Heavy reliance on the schedules and other forms of interagency contracting can alleviate the burdens on understaffed agencies insofar as "getting to the initial award," but too often contributes to subsequent problems that arise when ordering agencies fail to define their requirements adequately, fail to use these vehicles appropriately, fail to secure competition in using these vehicles, or fail to manage contract performance under these vehicles. Some of these problems are more acute with respect to assisting entities as opposed to direct ordering vehicles.**

Finding #2-3:

- **Many transactions have been simplified by the federal acquisition reforms of the last decade. This is particularly true of the purchase card**

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and the simplified acquisition threshold. These simplified transactions represent the overwhelming bulk of procurement transactions if we simply count transactions. However, even the simplified purchase card transactions have a more complex impact on the acquisition workforce than was initially appreciated, because of the need to institute and maintain appropriate purchase card management and controls.

Finding #2-4:

- **But the remaining share of procurement –outside the ambit of simplified procedures-- is the portion that actually requires most of our attention going forward. For this critical share of the government’s procurement activity, the demands of procurement on the acquisition workforce have grown dramatically. The changes in our procurement system that produce these demands may be desirable, but they are not cost-free.**

Finding #2-4-1:

- **Procurement outside the simplified regimes is characterized by use of best value procurement procedures, which substantially increase the complexity of procurement and the demands on the acquisition workforce as compared with procurement on the basis of lowest price.**

Finding #2-4-2:

- **Procurement outside the simplified regimes is subject to requirements of past performance evaluation which substantially increase the burdens of procurement on the acquisition workforce.**

Finding #2-4-3

- **A substantial share of procurement outside the simplified regimes is performance-based services acquisition, which dramatically increases the complexity and burden of demands imposed on the federal acquisition workforce.**

Finding #2-4-4

- **Heightened requirements for use of commercial goods and services have increased the demand for a sophisticated acquisition workforce that has business skills appropriate to the rapidly changing commercial markets in which goods and services are to be secured.**

Discussion

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An important element of our findings is to emphasize that the demands on the federal acquisition workforce have grown *both quantitatively and qualitatively* in the period associated with the last round of procurement reform in the United States—from the mid 1990s until the present. Although the trends respecting the dollar volume of procurement are well known, the subtler impacts of the development of new procurement techniques and other changes in the procurement system are not widely enough understood or appreciated. They thus bear particular emphasis in our findings here. Moreover, while it is widely understood that some elements of the procurement reform program of the 1990s—such as the institution of the government purchase card—can reduce demands on the federal acquisition workforce (for lower dollar transactions), too little attention has been given to other aspects of the last decade of procurement reform that have had the opposite effect. Again, we seek here to portray the fuller picture.

Moreover, some of the new procurement techniques and vehicles are susceptible to implementation in ways that temporarily disguise acquisition workforce shortcomings, but which ultimately result in seriously disappointing performance of the acquisition system. Examples noted below include the shifting of procurement to the Federal Supply Schedules and other forms of interagency contracts. As noted in our Panel’s findings and recommendations on interagency contracts and on commercial practices, these procurement techniques divide responsibility for securing competition and best value for the federal government between the agency (GSA or other interagency contract sponsor) that establishes the vehicle, and the ordering agency. Unfortunately, it has too often been the case that agencies accept the acquisition workforce savings that come from use of interagency contracts, but fail to live up to the responsibility of using these vehicles in a competitive manner. They too often fail to invest the acquisition workforce resources that would be necessary to secure real competition when using these interagency contract vehicles.

Another phenomenon noted here is that a series of reform initiatives, each of which had its own policy justification, had a cumulative impact that was not fully appreciated when these were adopted in increments. The cumulative impact was dramatically to increase the aggregate complexity of the acquisition system. The ultimate result that we have witnessed is that the knowledge and skill base necessary successfully to operate the acquisition system and to secure good value for the government and taxpayers through the operation of the system, has outstripped the resources available to operate the system.

Key aspects of the foregoing findings are discussed below:

The sharp growth in procurement expenditures by the federal government, particularly since the attacks of September 11, 2001 is well known and has been noted elsewhere.³¹ But the changing qualitative nature of acquisition has been less well noted. More importantly, the ways

³¹ GAO asserts that the growth in acquisition expenditures between FY 2001 and FY 2005 is actually 65%. GAO-07-45SP, at 4.

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in which these qualitative changes have increased the burdens on the acquisition workforce have been too little noticed, and too little understood.

Acquisition workforce burdens frequently resulted from changes in the acquisition system adopted in the last fifteen years. The proponents of these reform initiatives may not have recognized the acquisition workforce demands that they would create, especially when the impact of all of these changes is aggregated. Our point is that the potential for successful mission achievement through acquisition of goods and services, and the pursuit of best value for the government in that process, are both undermined when the acquisition workforce lacks the resources to implement these newer procurement techniques and methods properly.

It is well known that service contracting continues to represent an increasing share of the federal acquisition pie.³² Less well known are the additional demands that service contracting places on the acquisition workforce. Service contracts require additional attention to a variety of steps in the contract formation process, especially in the stage of requirements definition. They also demand additional attention to contract management in order to enable the government to ensure that it is receiving the services for which it has contracted.

All of these phenomena are highlighted within the realm of performance-based services acquisition. As the Panel's findings and recommendations indicate, the proper use of performance-based service acquisition has yet to be mastered by most agencies.³³ In particular, agencies need help in learning to develop and deploy measurable performance standards for such contracts. To some extent, of course, this entails a learning curve, as agencies gain experience with, and adapt to, the proper use of a novel technique for procurement. But the fact remains that the proper use of performance-based services acquisition is –and will remain-- labor intensive for the acquisition workforce, even though it may ultimately save resources for the government as a whole. For instance, as the Panel has recommended, proper use of PBSA should include the development of a “Baseline Performance Case” as part of the associated Performance Work Statement or Statement of Work.³⁴ The findings and recommendations of the Panel on PBSA also emphasize the need for improved contract performance monitoring through the development of contract-specific “Performance Improvement Plans.”³⁵ The acquisition workforce impact of our Panel's PBSA recommendations are specifically addressed in PBSA recommendation 9 which proposes that the expanded role of contracting officer technical representatives (COTRs) in monitoring and managing performance under PBSA contracts be recognized with enhanced training in PBSA and redesignation of such COTRs as Contracting Officer Performance Representatives.³⁶

³² *Id.*

³³ See Report at _____. (PBSA Ch.)

³⁴ See Report at _____ (PBSA Rec. 5)

³⁵ See Report at _____ (PBSA Rec. 6)

³⁶ See Report at _____ (PBSA Rec. 9). This recognition also underlies the recommendation of the Panel that for more far-reaching performance-based acquisitions (“transformational” PBSA) the COPR be required to be project management certified. Test. of _____, AAP Pub. Meeting (Mar. 17, 2006) Tr. at 24-25.

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The Panel's findings regarding Interagency Contracting reflect the mushrooming growth of the federal supply schedules and other forms of interagency contracts.³⁷ As we have noted, usage of interagency contracts is often perceived, correctly, as a solution to problems of inadequate acquisition workforce and skill sets in the agencies that rely on such interagency contracts.³⁸ But heavy reliance on interagency contracts can also contribute to problems as well.³⁹ Specifically, reliance on the schedules and other forms of interagency contracting can alleviate the burdens on understaffed agencies insofar as "getting to the initial award." But where the ordering agencies' acquisition functions are understaffed or the acquisition workforce lacks appropriate skills and training, inappropriate use of such vehicles leads to characteristic kinds of problems. Such problems include failure to use these vehicles appropriately, including out of scope task orders, failure to secure competition in using these vehicles, and failure to manage contract performance under these vehicles. Again we emphasize that this is not to say that the shift to interagency contracting vehicles is undesirable or inappropriate. This trend has enabled many agencies to meet basic needs in a timely fashion. But too often this has been done while sweeping under the rug problems of securing competition, out-of-scope use of contract vehicles, and contract management.

A key objective of procurement reform in the last decade has been to simplify the process of acquisition. Certainly, a number of the new techniques introduced and expanded in this time period have had the effect of simplifying the transactions to which they apply. As we have noted, this is particularly true of the purchase card, the micro-purchase threshold and the simplified acquisition threshold. As we explain below, both here and in connection with Finding #3, however, the aggregate effect of the procurement reforms and other procurement system changes over the last fifteen years has been to complicate other kinds of transactions, and to make the overall system of procurement more complex.

The simplified transactions, such as the purchase card, micropurchases, and transactions below the simplified acquisition threshold represent the overwhelming bulk of procurement transactions if we simply count transactions. But even the simplified purchase card transactions have a more complex impact on the acquisition workforce than was initially appreciated, because of the need to institute appropriate purchase card management and controls.⁴⁰

But it is the remaining share of procurement –outside the ambit of simplified procedures– that actually requires most of our attention going forward. This remaining share has been estimated to represent only 1% of the transactions, but involves 85% of the procurement

³⁷ See Report at _____ (Interagency \$ share for most recent FY available)

³⁸ Test. of Geraldine Watson, GSA, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 37.

³⁹ *Id.* at 38.

⁴⁰ See OMB, *Improving the Management of Government Charge Card Programs* (August 9, 2005) App. B to OMB Circular A-123. The current version of this document is found at http://www.whitehouse.gov/omb/circulars/a123/a123_appendix_b.pdf.

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dollars.⁴¹ For this critical share of the government's procurement activity, the demands of procurement on the acquisition workforce have grown dramatically. Among the relevant trends and influences affecting the demands placed on the acquisition workforce are the following.

- Procurement outside the simplified regimes is characterized by use of negotiated procurements using best value selection procedures, which substantially increase the complexity of procurement and the demands on the acquisition workforce as compared with procurement on the basis of lowest price.

Here, as so often, our point is that quality acquisition is not cost-free. The best value or competitive negotiation procurement technique was adopted in order to try to achieve open, competitive, transparent procurement for sophisticated or complex goods and services. For these goods and services it would be inappropriate to force the government to use the sealed bidding acquisition technique where the source selection criterion must be the lowest price associated with a responsive offer. But to achieve transparency and competition, while affording the government flexibility to define the best value source selection criterion that is appropriate for the particular acquisition, is a labor intensive process for the acquisition workforce. For instance, a source selection plan must be devised, defining in advance of the receipt offers the factors to be weighed in source selection and the relative weight to be assigned to these factors. If awards are not made on initial proposals there will be two or more rounds of offers, and winnowing to be done between the rounds. After source selection and award, unsuccessful offerors are entitled to debriefing. Each of these procedures contributes to a competitive and transparent process, but each makes demands on the acquisition workforce.

- Procurement outside the simplified regimes is subject to requirements of past performance evaluation which substantially increase the burdens of procurement on the acquisition workforce.

A major criticism of federal acquisition practice prior to the 1990s was that in source selection contractors were neither rewarded for excellence of past performance, nor down-rated for substandard performance on earlier contracts.⁴² Accordingly, a major thrust of procurement reform in the 1990s was to institute uniform practices and policies to guide the evaluation of past performance as a source selection factor in best value procurements.⁴³ Agencies are required to routinely prepare an evaluation of contractor performance at the completion of each contract that exceeds the simplified acquisition threshold. The process requires that input be secured from the

⁴¹ The Procurement Roundtable concludes that transactions outside the area of simplified transactions and order account for 15% of the transaction, but 98% of the procurement dollars, and 99% of the complexity. Procurement Roundtable, *Attracting and Retaining the Right Talent for the Federal 1102 Contracting Workforce* 1-2 (April 2006).

⁴² Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (AEI Press, 1990).

⁴³ See FAR 15.304(c)(3); FAR 15.305(a)(2); FAR 42.15.

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appropriate COTR as well as the interested end user, and also requires that the contractor being evaluated be afforded an opportunity to comment on its tentative evaluation, with review of any disagreement above the contracting officer level.⁴⁴ Obviously, a lot is at stake for contractors being evaluated. The Office of Federal Procurement Policy has created, and periodically updated an elaborate guide to Best Practices for Collecting and Using Current and Past Performance Information.⁴⁵

This guide quite appropriately seeks to make performance evaluation a routine part of federal contract management so that the data necessary to use past performance as an evaluation factor in future best value acquisitions will be routinely available. But examination of the Best Practices guide will confirm that this transformation of federal acquisition practice requires a substantial investment of acquisition workforce time and effort.

- Heightened requirements for use of commercial goods and services have increased the demand for a sophisticated acquisition workforce that has mastery over the relevant business skills and commercial markets in which goods and services are to be secured.

Another major initiative that formed part of the procurement reform agenda adopted in the 1990s was to create a preference for government acquisition of items that exist in the commercial marketplace. Ultimately, this should save the government the need for research and development costs, reduce the need to develop government-unique specifications and for product testing and reduce the time required to complete acquisitions, and engender savings. But like other reforms that were instituted in the last generation, this initiative places significant demands on the acquisition workforce. The process of commercial item acquisition and the predicate process of determining *when* commercial item acquisition techniques are appropriate require contracting officers to develop and deploy substantial expertise about the markets in which they make purchases.⁴⁶

To sum up, recognizing the workforce impacts of these developments in the procurement system is not to criticize the procurement reforms that engendered these impacts. While the reforms can advance the government's ability to secure necessary goods and services in a cost-effective manner, achieving that potential requires that the government invest substantially in the acquisition workforce.

Finding #3:

⁴⁴ FAR 42.1502; 42.1503.

⁴⁵ The current version is available at

http://www.whitehouse.gov/omb/procurement/contract_perf/best_practice_re_past_perf.html.

⁴⁶ See FAR 12.101(a). This is true, more generally, of federal acquisition practice. Test. of Robert C. Marshall, Penn. State Univ., AAP Pub. Meeting (Oct. 27, 2005) Tr. at 45, 49; Test. of Glenn Perry, DoE, AAP Pub. Meeting (Feb. 23, 2006) Tr. at 131.

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Even though there are now available a variety of simplified acquisition techniques, the complexity of the federal acquisition system *as a whole* has markedly increased since the 1980s.

- **Procurement reforms designed to accelerate mission accomplishment nonetheless burden the acquisition workforce, which needs to choose among available techniques. There are difficult decisions to about when to use which approach.**
- **The acquisition workforce also needs to be equipped to exercise discretion in choosing the appropriate procedure for procurement.**
- **While some procurement functions can be performed satisfactorily by personnel with mastery only over the simplified techniques, more complex federal acquisitions demand procurement personnel with mastery of the range of procurement techniques. Thus the complexity of the acquisition system, taken as a whole, has become a major challenge to the acquisition workforce.**

Discussion

This finding builds on the trends and developments noted in Findings #2 through #2-4-4. But we have stated it separately because it makes a distinctive point that we consider one of the most important findings that we have to make.

The critical distinction on which this finding rests is that between the overall complexity of the acquisition system and the speed of acquisition that can be achieved under particular streamlined acquisition techniques. These two phenomenon are not inconsistent. Indeed the proliferation of a variety of simplified acquisition methods is one of the trends that has made the procurement system as a whole more complex, along with the host of other demands now borne by the acquisition workforce. Whatever improvements the streamlined acquisition methodologies may need—the subject of much of the rest of our report -- we are not questioning here the general efficacy of regimes such as the purchase card, the micro purchase threshold, the simplified acquisition threshold or the commercial item acquisition rules. Instead we want to call attention to the aggregate impact of developments in acquisition over the last few decades on skills and training and mastery required to operate the acquisition system successfully. In addition to the techniques generally intended to streamline the particular acquisitions to which they apply, we must recognize the impact of the development and proliferation of a host of interagency contract mechanisms, the shift to performance-based service contracting, the demands of best value contracting, the burdens of routine performance evaluation, and the special requirements of successful use of commercial items and services. Both the testimony received by the Acquisition Advisory Panel and the experience of our members confirm that the

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complexity of the acquisition system, taken as a whole, has become a major challenge to the acquisition workforce.⁴⁷

Finding #4:

There are substantial problems with the data that are available on the federal acquisition workforce.

Finding #4-1:

- **Data has not been collected in a consistent fashion from year to year or across agencies**

Finding #4-2:

- **The acquisition workforce has been defined differently for DoD and for civilian agencies over the period of the acquisition reforms and the acquisition workforce cutbacks that have occurred in the last 15 years.**

Finding #4-3:

- **A significant policy issue is presented as to how broadly to define the composition of the acquisition workforce—whether to include all of the functions that complement or support the acquisition function? A broad definition is more consistent with modern understanding and commercial practices regarding the acquisition function, but risks overstating acquisition workforce resources.**

Discussion

The basis for these findings is contained in the discussion in the background section of this chapter, entitled “The Problem of Counting the Workforce.”⁴⁸ To recap only briefly the Federal Acquisition Institute has counted the federal procurement workforce using a narrow definition of that workforce limited to traditional procurement specialties. By contrast, the DoD has used two different approaches that recognize the close interrelationships between requirements setting and technical procurement activities and between program and technology management and the work of monitoring contractor performance and managing the legal and economic relationship between the government and the contractor. There is good reason for

⁴⁷ Test. of Eugene Waszily, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 247-48; Test. of Stan Soloway, Professional Services Council, AAP Pub. Meeting (Nov. 18, 2005), Tr. at 14.

⁴⁸ See Report at ____-____.

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recognizing these close relationships, and for rejecting the idea that there should be an adversary or arm's-length relationship between procurement personnel and their "customers." Nonetheless, as explained above, these approaches risk overstating the personnel resources available for acquisition by including personnel whose primary responsibilities lie elsewhere. Moreover, we have documented that the trends affecting the acquisition workforce are significantly different depending on which approach to defining and counting that workforce one employs.⁴⁹ Thus there is indeed a significant policy issue at stake in deciding how broadly to define the acquisition workforce

To see why this issue is complex, rather than one-sided, consider the case of agency personnel responsible for defining agency requirements for goods and services to be secured through the procurement process. Certainly the evidence we have received from commercial organizations supports the conclusion that the procurement function is a critical part of management and should not be isolated from organization components that "consume" or complement the goods and services being acquired.⁵⁰ Accordingly, there are good reasons why personnel with operational responsibility who are in a position to determine and define the government's requirements in contracting should be considered part of the broad acquisition workforce.

On the other hand, however, if we are trying to gauge the personnel available for carrying out the acquisition function, it is equally important to bear in mind that many of the personnel who should play a key role in requirements-definition are not, and should not be, engaged full time in the work of acquisition. This same point is at least equally true of project managers, who play a vital role in the acquisition cycle, but are not and should not be available full time for the work of acquisition. Nor are they interchangeable with those personnel who possess the necessary expertise to negotiate the legal requirements of the process of procurement.

The preference for broader definitions of the acquisition workforce that has developed over the last ten years appears to us to reflect a desirable effort to break down barriers between contracting personnel and those who will work with the goods and services to be acquired. At the same time, it would be a mistake to count the latter groups of personnel as though they are engaged full time in the acquisition process.

In short, both the broad and a narrow approach to defining the acquisition workforce add to an accurate understanding of the resources that are available to meet the different demands faced by the acquisition workforce. Therefore, in recommending that OFPP promulgate a uniform approach to data collection on the federal acquisition workforce, we have specified that that definition should employ a dual approach that tracks both narrow contracting specialties, and a broader conception of the interconnected acquisition workforce.⁵¹

⁴⁹ See Report at ___-___, above.

⁵⁰ Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (March 30, 2005) Tr. at 99-100.

⁵¹ See Recommendations #1-1 and #1-2, and accompanying discussion at pages ___-___.

Finding #5:

The Federal Government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed on it. Because of the absence of human capital planning to date, the Panel cannot definitively conclude whether this is the result of a numbers problem, but has received testimony raising serious concerns about the number, skill sets, deployment, and role in the acquisition process of the acquisition workforce.

- **There were substantial reductions in the acquisition workforce during the decade of the 1990s.⁵²**
- **One result of this is that hiring of new acquisition professionals virtually ceased during this time period.**

Finding #5.1:

- **There were cuts in some agency training budgets in the 1990's that meant the existing workforce was not trained to adapt to the increasingly complex and demanding environment in which they were called upon to function.**
- **Despite recent efforts to devote more attention and funding to workforce training, in many agencies these efforts do not appear to meet the existing and future needs for a trained acquisition workforce**

⁵² In addition to the statistics presented in the Background section of this Chapter, we note the following:

- As of September 30, 1990 the Federal Acquisition Institute reported a total census in 27 “logistics occupations” of 165,739. By September 2000 the comparable statistic had declined to 122,787. Fed. Acquisition Personnel Info. Sys., *Report on the Federal Acquisition Workforce Fiscal Year 1991 2* (September 1992); Fed. Acquisition Personnel Info. Sys., *Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 2000 2* (DATE?). This represents a decline of 25.9%.
- As of September 30, 1991, the Federal Acquisition Institute reported a total “procurement workforce” consisting of 1101s, 1102s, 1104s, 1105s, 1106s, and 1150s numbering 67,546. By September 2000 the comparable figure had declined to 57,150, a decline of 15.4% In the same time period 1102s declined from 31,436 to 26,751, a decline of 14.9%. 1105s declined from 6,754 to 3,414, a drop of 50%. *Report on the Federal Acquisition Workforce Fiscal Year 1991 at 3; Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 2000 at 3*. This represents a decline of
- Using the much more inclusive DoD Acquisition Organization counting methodology (described in the Background section of this chapter , the Dod Acquisition Workforce declined from 460,516 in FY 1990 to 230,556 in FY 1999, a decline of 50%. DOD IG, *DoD Acquisition Workforce Reduction Trends and Impacts*. D-2000-088, 5-6 (2000).

- **Since 1999 the size of the acquisition workforce has remained relatively stable, while the volume and complexity of federal contracting has mushroomed.⁵³**

Finding #5-2:

- **The drought in hiring, the inadequacy of training in some agencies, and the increased demand for contracting have together created a situation in which there is not, in the pipeline, a sufficient cadre of mature acquisition professionals who have the skills and the training to assume responsibility for procurement in today's demanding environment.**
 - **Frequently described as a "bathtub" situation, there appears to be an acute shortage of procurement personnel with between 5 and 15 years of experience.**
 - **Moreover, the relative sufficiency of the senior end of the acquisition workforce is seriously threatened by retirements.**
 - **A key challenge, accordingly, is to retain a high proportion of the senior workforce while development of the mid-level workforce goes forward.**
 - **There is strong competition for a limited and shrinking pool of trained and skilled procurement professionals within the federal government.**
 - **This imbalance between supply and demand is exacerbated by the strong competition that the private sector offers the government in trying to recruit the shrinking pool of talented procurement professionals. The government is losing this competition.**
 - **On the other hand, at least in major metropolitan areas, the government has not been able to compete very successfully for the services of talented procurement professionals who have been working within the private sector. The government does not have a salary structure and career ladders that are likely to attract experienced procurement professionals from the private sectors.**
 - **The slowness of the government's hiring process has also been an obstacle to hiring talented people for the acquisition workforce.**

Finding #5-3:

⁵³ As noted above, in the text accompanying footnotes 20-23, the DoD acquisition workforce continued to decline in this time period, substantially so by some of the available measures. The overall FAI count for the "procurement workforce" government-wide (consisting of 1101s, 1102s, 1105s, 1106s, and 1150s) grew very modestly from 57,784 to 58,161—growth of .6 %. FAI, *Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 1999 3* (DATE); *Report on the Federal Acquisition Workforce, Fiscal Years 2003 and 2004* at 39, tbl. 4-2.

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- **A widely noted result of the inadequacy of Acquisition Workforce personnel resources to meet the demands of procurement government-wide is that scarce resources have been skewed toward contract formation and away from contract management.**

Finding #5-4:

- **The Panel concludes that one important way to improve retention of qualified personnel within the federal acquisition workforce is to expand opportunities for such personnel to secure advancement by moving to different organizations within the federal government.**

Finding #5-5:

- **Inadequacy in the acquisition workforce is, ultimately, “penny wise and pound foolish,” as it seriously undermines the pursuit of good value for the expenditure of public resources.**

Discussion

Witnesses before the panel have confirmed the inadequacy of the existing acquisition workforce. For instance, Shay Assad, Director of Defense Procurement and Acquisition Policy acknowledged that “We've got a crisis within DoD in terms of our people.”⁵⁴ More specifically, he recognized that the problem relates to the age and experience level structure of the existing workforce, with a “huge shortage” of personnel with between 5 and 15 years of experience in acquisition.⁵⁵ Although a much more adequate workforce exists at more senior levels of experience, in the view of Mr. Assad, retirements among this cohort are a major threat to the continuing adequacy of the workforce. As Assad noted, it is essential that retention of this senior cohort be improved because, “we don't have anyone to replace them.”⁵⁶

Other witnesses before the panel also portrayed a crisis as to the adequacy of the existing and future acquisition workforce.⁵⁷ A representative of the DoDIG confirmed: “I think they are understaffed. You know, we had that big cutback a few years ago, and I don't think we've ever

⁵⁴ Test. of Shay Assad, DPAP, AAP Pub. Meeting (June 14, 2006) Tr. at 57.

⁵⁵ *Id.* at 58; *see also* Test. of Ashley Lewis, DHS, AAP Public Meeting (June 14, 2005) Tr. at 327 (“Really, it's the youngsters and the middle people that there seems to be a void, you know. That part is, in my view, that's where we seem to have the deficit.”); Test. of David Sutfin, DoI GovWorks Division, AAP Pub. Meeting (June 14, 2005) Tr. at 336.

⁵⁶ Assad Test. at 58.

⁵⁷ Test. of Terry McKinney, DoD IG, AAP Pub. Meeting (May 17, 2005) Tr. at 177; Test. of Glenn Baer, CSA, AAP Pub. Meeting (May 5, 2005) Tr. at 68-69; Test. of Jan Menker, CSA, AAP Pub. Meeting (DATE) Tr. at 70.

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gotten back to the point where we can handle all the workload.”⁵⁸ The workforce shortcomings are both quantitative and qualitative. A representative of the GSA IG’s office explained: “You have a huge transition in the acquisition work force. . . . [T]here are certainly not as many contracting folks out there today as there were five or 10 years ago, and a lot of the folks who are in the procurement arena now really don’t have as much experience as the ones who have left. And the turnover in acquisition is exceedingly high right now.”⁵⁹

Greg Rothwell, who recently retired as Chief Procurement Officer for the Department of Homeland Security, described the situation confronted by DHS by saying that the acquisition workforce resources had been “guttled.”⁶⁰ He also gave specific examples of acquisition programs that lacked appropriate staffing, including a \$3 billion program that did not have a single full time equivalent employee.⁶¹ The result, described by Mr. Rothwell’s testimony, was that the agency was forced to pass every acquisition to another agency, whether or not that agency had special expertise in the area of the procurement.⁶² Needless to say, he did not believe that this was a sound acquisition practice.⁶³ Mr. Rothwell also reported that prior to Hurricane Katrina FEMA was staffed for acquisition at a level less than one sixth of what had been determined to be an appropriate level.⁶⁴ Mr. Rothwell, who had worked in procurement in ten different federal agencies across the span of a 34 year career in the federal government, summarized his conclusions about the state of the workforce as follows:

It is a huge challenge for our particular time. There are not enough people; they are not well enough trained, and they need to be valued and inspired when you get into the workforce, and again, if you’re in one of those agencies that already does that, that’s great. You know, because I do run into agencies where you do have, you know, sufficient staffing, well trained and things. I’m just suggesting that there are many agencies that are critical to this country where that is not the case.⁶⁵

Thus, although Mr. Rothwell did not paint a monolithic portrait of the state of the federal workforce, he recognized serious shortcomings in many important agencies.

Other basic factual conclusions stated in our findings on workforce adequacy issues are supported by documents that we have reviewed and the testimony that we received. Some key points are as follows:

⁵⁸ McKinney Test., at 177.

⁵⁹ Waszily Test. at 222.

⁶⁰ Test. of Greg Rothwell, DHS, AAP Pub. Meeting (Mar. 17, 2006) Tr. at 215.

⁶¹ *Id.* at 218.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 224.

⁶⁵ *Id.* at 221.

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- There were substantial reductions in the acquisition workforce during the decade of the 1990s.

For instance, the DoD Acquisition Workforce, as measured by the Acquisition Organization Count dropped from 460,516 at the end of FY 1990 to 230,566 at the end of FY 1999.⁶⁶

- The drought in hiring and the inadequacy of training has created a situation in which there is not, in the pipeline, a sufficient cadre of mature acquisition professionals who have the skills and the training to assume responsibility for procurement in today's demanding environment.
- There is strong competition for a limited and shrinking pool of trained and skilled procurement professionals within the federal government.⁶⁷
- This imbalance between supply and demand is exacerbated by the strong competition that the private sector offers the government in trying to recruit the shrinking pool of talented procurement professionals. The government is losing this competition.⁶⁸
- On the other hand, at least in major metropolitan areas, the government has not been able to compete very successfully for the services of talented procurement professionals who have been working within the private sector.⁶⁹ The government does not have a salary structure and career ladders that are likely to attract experienced procurement professionals from the private sectors.⁷⁰
- A widely noted result of the inadequacy of Acquisition Workforce personnel resources to meet the demands of procurement government-wide is that scarce resources have been skewed toward contract formation and away from contract management.⁷¹

This finding is supported by a host of GAO reports that confirm, with depressing regularity, the insufficiency of resources devoted to contract management.⁷² And a number of respected

⁶⁶ U.S. DOD IG, *DoD Acquisition Workforce Reduction Trends and Impacts*, D-2000-088, 4 (2000).

⁶⁷ Test. of Neal Couture, NCMA, AAP Pub. Meeting (July 27, 2005) Tr. at 19, 23, 25.

⁶⁸ Marshall Test. at 48.

⁶⁹ Lewis Test. at 326.

⁷⁰ Test. of William Kovacic, George Washington Univ. Law School, AAP Pub. Meeting (Oct. 27, 2005) Tr. at 146.

⁷¹ Test. of Linda Dearing, U.S. Coast Guard, AAP Pub. Meeting (July 12, 2005) Tr. at 197.

⁷² See note 79, below.

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observers of the federal government acquisition function agree that contract administration has been the most neglected aspect of the acquisition function.⁷³

- The impact of inadequacy in the acquisition workforce is, ultimately, “penny wise and pound foolish” as it seriously undermines the pursuit of good value for the expenditure of public resources.

We cannot emphasize this point too much. As we note in findings #9-1 and #9-2, successful commercial organizations invest in highly credentialed and highly trained business managers to carry out their sourcing, procurement and contract management functions. As explained there, these businesses regard this as a critical investment that contributes significantly to their bottom line. For the federal government, which lacks the profit-making opportunities open to commercial organizations, cost-saving through the efficient management of acquisition should be an even more important priority. Moreover, there is abundant evidence that inadequacy in the acquisition workforce is a consistent cause of suboptimal acquisition outcomes, and waste of government resources.⁷⁴

Finding #6:

Most federal agencies have not engaged systematically in human capital planning for the federal acquisition workforce. Few agencies have systematically assessed their acquisition workforce in the present or for the future.

Discussion

Available information indicates that most agencies have a long way to go establish a reliable and comprehensive process for human capital planning for the acquisition workforce. Although the level of human capital planning activities has improved significantly in some agencies in recent years, much more remains to be done, and comprehensive human capital planning needs to become regularized at every agency.

Specifically, to date, both government-wide and agency-specific efforts to respond to the new challenges of today’s acquisition system have focused on the nature of the skills required for success in today’s contracting environment. They have not ascertained the number of number of personnel possessing those skills that are required given the level of present or future agency

⁷³ Steven Kelman, *Strategic Contracting Management*, in *Market-Based Governance: Supply Side, Demand Side, Upside and Downside* 89-90 (John D. Donahue & Joseph Nye, Jr., eds. 2002); Stephen L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 *Stan. L. & Policy Rev.* 54.9, 560 (2005); Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 *Pub. Con. L.J.* 171, 196 (2006). [This is not a new problem. See Comm’n Report

⁷⁴ See, e.g. GAO-06-622T; U.S. GAO, *Defense Acquisitions: DoD Has Paid Billions in Award and Incentive Fees Regardless of Acquisition Outcomes*, GAO-06-66 (2005); U.S. DOD IG *DoD Acquisition Workforce Reduction Trends and Impacts*, D-2000-088 (2000) Tr. at 16 -19.

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acquisition activity. Among these, for example, are two reports prepared by the Federal Acquisition Institute, a December 2003 report addressing competencies for the federal acquisition workforce generally, and a February 2004 report addressing competencies required in the acquisition workforce specifically for the competitive sourcing process.⁷⁵ These reports endeavor to identify the specific fundamental competencies required for procurement personnel. They *do not*, however, attempt to assess workload demands for these competencies for the future, nor do they attempt to assess the degree to which members of the existing federal procurement workforce possess these capabilities.

Similarly, a pathbreaking study of the Acquisition Workforce done for DoD in 1999, the Acquisition 2005 study,⁷⁶ deliberately excluded issues of appropriate workforce size from its purview,⁷⁷ focusing instead on the qualitative competencies needed for the future workforce. Subsequently, in an April 2002 report,⁷⁸ GAO examined DoD's plans to reshape its acquisition workforce to respond to the October 2000 recommendations of DoD's Acquisition 2005 Task Force. GAO reported that DoD was taking significant steps to address the human capital challenges that it had recognized in making its October 2000 recommendations. But a substantive evaluation of the effectiveness of those measures was not undertaken by GAO, and was viewed as premature.⁷⁹ A comprehensive independent review of the adequacy of human capital planning efforts for the acquisition workforce at DoD as yet has not been performed, it appears.

On the civilian agency side, GAO examined agency human capital planning efforts to meet future needs for the acquisition workforce in a December 2002 Report.⁸⁰ Although GAO concluded that the six particular civilian agencies examined in that December 2002 study were all progressing in human capital planning to address acquisition workforce needs, a wide variety of progress levels was observed. This ranged from the Department of Energy, which reported completion of an analysis of the existing workforce, projection of future needs, and the completion of the requisite gap analysis, to agencies that had only begun analysis of the current workforce, to those that not developed any formal acquisition workforce plan.⁸¹ Significantly, GAO also found that agencies lacked reliable, consistent and complete data on the composition

⁷⁵ FAI, *Report on Competencies for the Federal Acquisition Workforce* (December 2003); FAI, *Report on Competitive Sourcing Competencies* (Feb. 12, 2004).

⁷⁶ DoD Acquisition 2005 Task Force, *Shaping the Civilian Acquisition Workforce of the Future* (Oct. 2000).

⁷⁷ Test. of Joe Johnson, DAU, AAP Pub. Meeting (July 12, 2005) Tr. at 72. Mr. Johnson explained there: "We deliberately ruled out, in view of the short time period . . . [available to produce this study] –we ruled out issues of the size of the workforce. That's a very important thing that you need to know upfront. We felt that if we had to go there, there was no way we could deliver a product [on time] because we would be into some very contentious issues. We limited ourselves to saying, what should the workforce be able to do in 2005?"

⁷⁸ U.S. GAO, *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges*, GAO-02-630 (2002).

⁷⁹ *Id.* at 2.

⁸⁰ U.S. GAO, *Acquisition Workforce: Status of Agency Efforts to Address Future Needs*, GAO-03-55 (2002).

⁸¹ *Id.* at 5-7.

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of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.⁸²

Finding #7:

Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce. Thus we lack accurate information about the extent to which acquisition functions have been and are being carried out with the assistance of contractor personnel.

- **Evidence before the panel and the experience of panel members nonetheless makes clear that many agencies make substantial use of contractor resources to carry out their acquisition functions.**
- **We also lack information with which to determine whether reliance on contractor personnel is saving money.**

Discussion

None of the acquisition workforce counts has included contractor personnel supporting the acquisition function.⁸³ This is true despite the fact that studies by the DoD Inspector General reveal that in the organizations that were sampled contractor personnel form a very large share of the combined employee/contractor acquisition workforce—ranging from 16 to 64% of the acquisition workforce.⁸⁴ Indeed the Inspector General concluded that “DoD should revise Instruction 5000.55 to estimate and track contractor equivalents that support the DoD acquisition workforce, and include the estimates as supplementary DoD reporting data to Congress.”⁸⁵ Moreover, while our own impressions of the practice in various agencies are consistent with the findings of the DoDIG, we lack accurate information about the extent to which acquisition functions have been and are being carried out with the assistance of contractor personnel.

Because we lack information about the extent of the use of contractor support for the acquisition function, a fortiori, we lack information on whether this usage is cost-effective for the federal government. As we discuss further in the Appropriate Role portion of this Report, outside the context of the A-76 competitive sourcing process, there is no information on the extent to which agencies are contracting for services, what services are being outsourced, or whether acquiring services by contract is cost effective.

⁸² *Id.* at 5, 8.

⁸³ Roberts Econom at 194.

⁸⁴ U.S. DOD IG, *Human Capital: Report on the DoD Acquisition Workforce Count*, D-2006-073, 14 (2006).

⁸⁵ *Id.*

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Discussion within our panel made it clear that there are real technical challenges in accurately counting contractor support for the acquisition workforce. In some instances contractor support for acquisition may take the form of personal service contracts under which counting contractor personnel should be relatively straightforward. In other cases, including any performance-based contracts, the linkage between a particular contract and full time equivalent personnel may be less readily ascertainable. For this reason, although our recommendation #2-4 requires that agency human capital strategic plans for the acquisition workforce include assessment of the role planned by contractor personnel in the acquisition workforce, we have not specified in Recommendations #1-1 and #1-2 a particular approach to taking account of the contribution of contractor personnel to the federal acquisition workforce. Nonetheless, we would expect that the OFPP to confront this question, and, if necessary, to establish a working group to arrive at a workable means of gauging the contractor contribution to the acquisition workforce.

Finding #8:

Use of contractor support for acquisition activities may be appropriate, but careful attention must be paid to the potential for organizational conflicts of interest that may be engendered by this practice.

Discussion

Our purpose here is simply to highlight the special potential for organizational conflicts of interest that can arise out of the use of contractor support for acquisition functions. This issue and accompanying recommendation are set forth in the chapter regarding the Appropriate Role of Contractors Supporting the Government.

Finding #9-1

- **Testimony before the Acquisition Advisory Panel by leaders of private sector organizations indicates that sophisticated private sector organizations employ a corps of highly sophisticated, highly credentialed and highly trained business managers to carry out the sourcing, procurement and contract management functions that they undertake.**

Finding #9-2:

- **The government lacks comparable resources for these functions. If we expect the government to take advantage of the practices of successful commercial organizations, we need to close this gap by recruiting, training and retaining sufficient procurement professionals with appropriate capability.**

- **For successful modern businesses, the acquisition function is regarded as a key contributor to the bottom line. Investment in a state-of-the-art acquisition workforce is essential to profitability.**
- **Similarly, investment in a quality federal acquisition workforce is critical to mission success and obtaining best value for the expenditure of public resources.**

Discussion

As stated in our finding here, the testimony before the Acquisition Advisory Panel by leaders of private sector organizations indicates that sophisticated private sector organizations employ a corps of highly sophisticated, highly credentialed and highly trained business managers to carry out the sourcing, procurement and contract management functions that they undertake.⁸⁶ The testimony of Professor Robert Marshall explains why the most successful private sector organizations have invested so substantially in human resources for acquisition: they have built their procurement workforce on the understanding that “buying best is a very important part of their profitability.”⁸⁷

The practices of the private sector certainly corroborate our conclusion (Finding #1) that investment in human capital for the acquisition workforce is likewise critical to the accomplishment of the government’s missions. However, the government lacks staffing for these functions comparable to that of the private sector. Professor (now Federal Trade Commissioner) William Kovacic explained that “the private sector pays its people better, has superior approaches to recruiting and retaining, and that’s the important part, retaining, the requisite human capital and treats procurement as an integral element of the profitability of the enterprise.”⁸⁸

If we expect the government to take advantage of the practices of successful commercial organizations, we need to close this gap by recruiting, training and retaining procurement professionals with appropriate capability.

Finding #10:

The pace of acquisition reform initiatives has outstripped the ability of the federal acquisition workforce to assimilate and master their requirements so as to implement these initiatives in an optimal fashion. An important objective of Acquisition Workforce

⁸⁶ Test. of Ronald Casbon, Bayer Corporate Business Services, & Larry Trowel, General Electric Transportation, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 252-53; Test. of Todd Furniss, The Everest Group, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 114-15.

⁸⁷ Marshall Test. at 46.

⁸⁸ Kovacic Test. at 146.

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initiatives should be to allow the Workforce to catch up with the last twelve years of acquisition reform, as well as to meet additional demands that will be imposed by the recommendations of this panel on non-workforce topics.

- **Insisting that the acquisition workforce be enabled to catch up with the demands of the procurement workload and the transformed demands of procurement reform is not hostile to the cause of procurement reform. Rather, it is an essential step in attempting consistently to achieve good value for the expenditure of public resources.**
- **Investment in the acquisition workforce should therefore yield an extremely rewarding return on that investment.**

Discussion

The last decade or so has been an unusually active era for changes in our procurement system. As noted in Finding #2 and its subfindings, and in Finding #3, a host of changes in the procurement system designed to improve that system, and particularly to make some kinds of procurement faster, have imposed an array of increased demands on the acquisition workforce and produced a significantly more complex system. At the same time, the resources of the acquisition workforce have been cut, while new kinds of skills have been demanded of the government's acquisition workforce in order to achieve success in operating that system.

The point of this last finding is to emphasize the lag that has resulted. The workforce simply needs time to assimilate and master the demands imposed by the last twelve years of changes in the acquisition laws and policies so as to implement these initiatives in a successful fashion.⁸⁹ Accordingly, an important objective of acquisition workforce initiatives recommended by the Panel is to allow the workforce to catch up with the last twelve years of acquisition reform, as well as to meet additional requirements that are imposed by the recommendations of this panel on non-workforce topics. Insisting that the acquisition workforce be allowed to catch up with the expanded demands of the procurement workload and the transformed demands produced by procurement reform is an essential step in attempting to optimize the procurement process in order to consistently achieve good value for the expenditure of public resources.

Acquisition Workforce Recommendations

Recommendation #1-1: Data Collection and Workforce Definition

- **OFPP needs to ensure, going forward, that consistent and sensible definitions of the acquisition workforce are in place, and that accurate data is consistently collected about all of the relevant categories, from year to year and across all agencies.**

⁸⁹ Test. of Kathleen Tighe, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 231.

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- **Data should be collected both about the narrow contracting specialties (along the lines of the current FAI count) and about the broader acquisition-related workforce (along the lines of the current DoD AT&L workforce count methodology).**

Discussion

This recommendation follows directly from Finding #1 and Findings #4 through #4-3. Together these establish:

- first, that the role played by the acquisition workforce is critical to the success of federal acquisition programs and to the ultimate missions of the federal government, and,
- second, that accurate data that can be used as a baseline for human capital planning has not been collected and maintained.

Because of the importance of the federal acquisition workforce, it is essential that we promptly rectify the situation with regard to data collection.

The need for achieving consistency over time in the definition of the acquisition workforce and in associated data collection is readily apparent. Such consistency is essential to accurately depicting and understanding the trends that have affected the acquisition workforce. And it is equally essential to human capital planning for the acquisition workforce that will ensure that we have the capacity to meet the demands placed on the federal acquisition workforce in the future.

The importance of achieving consistency in counting methodology across agencies should also need little explanation. Meaningful comparisons between agencies are not possible without a consistent methodology. Even as we urge that additional human capital resources be made available for the federal acquisition workforce, we have to accept the reality that there will be, for the future, a problem of optimizing the allocation of scarce resources in managing our Nation's acquisition activities. Indeed, we owe it to the Nation's taxpayers to proceed with a strong assumption that acquisition workforce resources must be stretched to achieve optimal efficacy in their deployment. That makes it all the more essential that data about the acquisition workforce be collected using consistent and sensible definitions for all agencies.

Having said that much, we recognize that there are pros and cons to several of the different approaches to workforce definition and counting that have been employed by FAI and by the Defense Department as described in the background section of this chapter.⁹⁰ As noted in Finding # 4-3 and the accompanying discussion, a broad definition of the acquisition workforce accords with the modern understanding that the acquisition function should be divorced from the programs whose operation it is intended to support. To take just one example that arose

⁹⁰ See Pt. I of this Ch., ____-____.

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regularly in our hearings, the task of requirements definition—formulating what it is that the government needs so as provide an operationalizable target for procurement—is a chronic weak spot in the federal acquisition system. Procurement experts cannot hope to accomplish this accurately or efficiently without active and completely engaged partnership with the program personnel the acquisition requirements are intended to support. Insights like this drive us toward a broad understanding of the acquisition workforce.

At the same time, a broad definition of the acquisition workforce should not be permitted to obscure two important countervailing considerations. First, the increased complexity of the procurement function and system (see Findings #2 and 3) makes it imperative that a portion of the acquisition workforce be highly skilled and trained in the technical, legal, and procedural aspects of procurement. This is necessary to enable procuring agencies to choose the optimal procurement vehicle for fulfilling their acquisition needs in every case, and to carry out each procurement as expeditiously as is reasonably possible, in accordance with the procedures required by law for the particular situation.

Second, the broadened conception of the acquisition workforce must not be allowed to obscure the facts that many members of the broadly conceived acquisition workforce --including program managers, etc. -- have substantial non-acquisition responsibilities that will require the overwhelming bulk of their time and energy. Thus if we *only* collect data using the broadened conception of the acquisition workforce, we will not get a realistic picture of the human resources that are available for the work of acquisition.

We ultimately concluded that OFPP, as the appropriate arm of the Office of Management and Budget, should be assigned the central role in prescribing the detailed terms for defining the acquisition workforce and collecting data thereon. In order to assure comparability of workforce data across the federal government, these requirements should be applicable to all federal agencies, both civilian and military. In order to force the pace of action on this recommendation we proposed that OFPP be required to complete this work within a one year deadline from the date of issuance of this report. Finally, in order to ensure consistency and manageability, while ensuring that we collect data that reflects the complexity of the acquisition function and workforce, we recommend that data should be collected pursuant to at least two different definitions of the acquisition workforce. One of these should retain the focus on contracting specialties that characterizes the current FAI methodology and one should employ the broader approach that underlies DoD's AT&L workforce count today. Use of these two benchmarks is not intended to tie the OFPP to the exact approach employed either by FAI or by DoD; these are simply illustrative of the kinds of definitions that OFPP must establish under our recommendation. Accordingly, our Recommendation #1-2 provides:

Recommendation #1-2: Data Collection and Workforce Definition

- **The Office of Federal Procurement Policy should prescribe a consistent definition and a method for measuring the Acquisition Workforce of both civilian and military agencies.**

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- **Definitions and measures should be completed by OFPP within 1 year from the date of this report.**

Recommendation #1-3: Acquisition Workforce Database [Editorial Note: We indefinitely tabled what was originally recommendation 1.3, so probably this recommendation, adopted at 1-4 by the Panel, should now be renumbered as recommendation 1-3]

- **Consistent with recommendations 1-1 and 1-2, OFPP should be responsible for the creation, implementation, and maintenance of a mandatory single government-wide database for members of the Acquisition Workforce**
 - **The database should reflect the following purpose and elements:**
 - **Purpose: To provide information to support effective human capital management of the acquisition workforce**
 - **Elements should include: employment experience, education, training, certifications, grade, pay, career series, and retirement eligibility.**

Discussion

As we have found in Findings #5 through #5-5 the existing federal acquisition workforce falls seriously short of the capacity needed to meet the demands that have been placed on it. For the foreseeable future, these demands will only increase. Indeed, meeting the substantive recommendations of this Report will add to those demands.

In addition, as is discussed in connection with Recommendations #2-1 through #2-5 in this Report, there is an urgent need for comprehensive human capital management of the acquisition workforce across the full range of federal agencies. In order to enable agencies to take maximum advantage of personnel found throughout the acquisition workforce, and their skills, it is essential that each agency's human capital planning be able to take advantage of a comprehensive inventory of the personnel in the federal acquisition workforce.

But there is a more focused justification for this particular recommendation. Our findings make particularly clear that we are faced with a looming crisis of inadequate numbers of experienced acquisition professionals capable of successfully performing our most demanding acquisition tasks. See especially Finding # 5-2. And our recommendations below (#3-3) spotlight how essential it is that we improve retention of senior acquisition workforce by creation and effective use of incentives for experienced personnel to remain in the federal acquisition workforce. Finally, our Finding # 5-4 emphasizes the logical conclusion: that a critical tool for improving retention of such invaluable personnel is "to expand opportunities for such personnel to secure advancement by moving to different organizations within the federal government." The truth is that there is already a growing, competitive market for such personnel. It is just that federal agencies which desperately need to retain precisely these skilled personnel have not been competing successfully with private enterprise in luring these personnel. The government-wide database specified by this recommendation would 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.

Recommendation #2-1: Human Capital Planning for the Acquisition Workforce

- **In each agency, as part of the overall agency Human Capital Management Plan, the Chief Acquisition Officer should be responsible for creating and implementing a distinct Acquisition Workforce Human Capital Strategic Plan designed to assess and meet the agency's needs for acquisition workforce.**

Discussion

It is our considered view that any effective strategy for bringing the federal acquisition workforce in balance with the demands that are made upon it requires both a serious and sustained effort to ascertain the personnel needs of each agency for carrying out its acquisition mission. Although agencies are already required by the Office of Management and Budget to prepare an agency Human Capital Management plan, for most agencies there is no evidence that this has included a systematic effort to assess, much less to meet, the agency's needs for acquisition workforce capabilities.

One vital step toward making effective human capital planning for the federal acquisition workforce a reality is to insist that in each agency the Chief Acquisition Officer be made clearly responsible for the production of an Acquisition Workforce Human Capital Strategic Plan. Because it is our strongly held view that severe lack of capacity in the acquisition workforce is one of the most pressing problems facing our acquisition system, it is imperative that the Chief Acquisition Officer be made directly responsible for this human capital planning process. This is not an activity that can be delegated or diverted to the agency's human resources function, because it is essential that the focus be on acquisition skills.

Recommendation #2-2: Human Capital Planning for the Acquisition Workforce

- **Agency CAOs should be responsible for measuring and predicting, to the extent possible, the agency's needs for procurement personnel.**

Recommendation #2-3: Human Capital Planning for the Acquisition Workforce

- **It is not sufficient simply to try to retain and manage existing personnel resources. Resources needed must be identified and gaps between needed resources and available resources must be forthrightly acknowledged.**

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Unfortunately, in managing our government, agency officials may be confronted with data that reveal unpleasant truths. One such unpleasant truth is a serious gap between the resources available in many agencies for the acquisition mission, and the resources that it would take to secure best value for the taxpayer and out government. Development and enhancement of the acquisition workforce is an investment that will pay handsome returns, if managed effectively. Conversely, as noted in Finding 5-5, muddling through with an inadequate acquisition workforce is “penny wise and pound foolish” in the most dramatic sense.

Accordingly, we state here points that may seem obvious, but which need to be stated so plainly that they cannot be overlooked or ignored. First, effective human capital planning for the acquisition workforce demands that we ascertain the skills, capacities and personnel levels that will enable agencies to perform vital acquisition missions in a fashion that is both timely and cost-effective. This cannot be achieved by simply allocating the resources that happen to be available. Nor should it take a crisis of the magnitude of Hurricane Katrina,⁹¹ or problems in the reconstruction in Iraq revealed by after-the-fact investigations⁹² to wake us up to the need to match the demands of our acquisition process with appropriate human resources. Rather, agencies can reasonably be expected to assess their needs for acquisition personnel on a regular basis and identify areas where there are gaps between needed and available capabilities.

None of this is to suggest that resources are infinitely elastic, or that the need for acquisition personnel does not have to compete with other demands for the resources of the federal government. Rather, we conclude that there is a compelling case that federal acquisition spending would be more cost-effective if we invested the resources necessary to secure good value for the taxpayer and the Government whenever the government uses contractors to supply goods and services for important public purposes. Accordingly, the question is not whether we can afford additional personnel for the acquisition workforce, but whether we are spending our procurement dollars (including both those paid to contractors and those paid to the federal acquisition workforce) as effectively as possible.

Moreover, even where budgetary stringency compels less than optimal funding of the acquisition workforce, we should be making these decisions knowingly, and not by indirection, default, or based on ignorance.

Recommendation #2-4: Human Capital Planning for the Acquisition Workforce

- **Assessment of the role played by contractor personnel in the acquisition workforce should be part of the strategic plan.**
- **The strategic plan should consider whether the current use of contractor personnel to supplement the acquisition workforce is efficient or not.**

⁹¹ As noted above, prior to Hurricane Katrina FEMA was staffed for acquisition at less than one sixth of what had been determined to be the appropriate level of personnel. Rothwell Test. , at 224.

⁹² Special Inspector General for Iraq Reconstruction at 107-09.

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Discussion

The starting point for this recommendation is Finding #7. On the one hand, evidence before the panel, as well as the personal experience of many panel members makes it clear that many agencies are now making substantial use of contractor resources and personnel to assist them in carrying out their acquisition functions. Unfortunately, although we know that this is an important phenomenon, its extent is largely unknown, and our evidence is entirely anecdotal because so far as we can tell, no agency that has been counting contractor personnel that are used to assist, support and augment the federal acquisition workforce.

Some observers have suggested that we do not collect or report this information because “no one wants to know”⁹³ But protracted discussion among the members of the panel revealed that this is, at most, one aspect of the problem. There is considerable difficulty in prescribing a simple and uniform approach to counting the contractor personnel that are assisting the acquisition function. In part this is true because contractors generally are not tasked to provide a discrete number of personnel to assist in acquisition, but are engaged in a variety of service contract functions that are not measured in terms of personnel count. Still, as reflected in our discussion of personal service contracts, prohibitions on contracting for “butts in seats” too often have been honored in the breach rather than the observance.⁹⁴ Accordingly, there surely are cases in which there is a blended workforce of contractors and federal employees working on aspects of the acquisition mission, and the contractor personnel are functionally indistinguishable from the federal employees. At the same time, contractor support for federal acquisition may also frequently take forms that cannot readily be translated into “full time equivalent” acquisition personnel.

Accordingly, we ultimately declined to adopt a recommendation that would have *OFPP mandate a uniform* method of measuring the contribution of contractor personnel to the federal acquisition function in each agency. We conclude that we presently know too little about the varying forms that such contractor support takes, and also that the forms of support are likely to variable to permit a one-size-fits-all approach to this problem. But we are equally convinced that this is a critically important aspect of the evolving problem of the acquisition workforce.

Accordingly we have recommended an approach that allows agencies some latitude in devising approach to the problem of accounting for the role of contractor personnel in carrying out federal acquisition functions. At the same time, we recommend here that each agency be required to measure the role of contractor personnel in its acquisition workforce as part of its Human Capital Plan for the Acquisition Workforce. This means that the agency Human Capital Plan must indicate which functions are performed by contractors, and what skills contractor personnel are relied on to possess, and gauge whether the contractor personnel in fact supply the necessary skills, in the requisite quantities.

⁹³ Roberts Econom at 194.

⁹⁴ Insert cross reference to appropriate section of appropriate role chapter.

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We have also recommended that each agency's Human Capital Strategic Plan for the Acquisition Workforce address the question whether the usage of contractor personnel reflected in the Plan (as described above) represents an efficient solution to the agency's resources needs for carrying out its acquisition responsibilities. Our concern is that agency's should not be using contractor personnel to make up inadequacies in the federal acquisition workforce simply because of the inadequacy of the numbers or skill sets of the acquisition personnel. Rather, subject to some of the considerations noted directly below that call for an even more restrictive approach in special circumstances, contractor personnel should be used to augment the acquisition workforce only when that is the efficient solution as determined through appropriate competitive sourcing procedures.

In undertaking this assessment it will also be important to bear in mind several of our recommendations originating with other working groups whose concerns interface with the issues raised by the use of contractors to supplement the federal acquisition workforce.

- One such recommendation from the Appropriate Role working group concerns the need to ensure that inherently governmental functions are not being performed by contractors.⁹⁵ Functions such as source selection and establishing the government's requirements would ordinarily appear to be the kind of function that should be performed by government.
- A second relevant recommendation, also from our Appropriate Role Working group concerns the safeguards that are necessary to protect against organizational conflicts of interest, a subject addressed in Chapter ___ of this report, addressed to "The Appropriate Role" of contractors.⁹⁶
- A third relevant recommendation, this one from our Commercial Practices Working Group, disfavors use of time and material contracts.⁹⁷

When time and materials contracts are used to augment the federal acquisition workforce, it seems particularly likely that this is not an efficient means of supplementing an inadequate corps of acquisition workforce employees. On the other hand, the Panel's proposed approach toward personal services contracts recommended here, may facilitate the appropriate use of contractor personnel to supplement the acquisition workforce in a cost-effective manner, where such usage does not run afoul of strictures about inherently governmental functions and/or organizational conflicts of interest, and is consistent with competitive sourcing policies and procedures, where applicable..

⁹⁵ See Recommendation ____, discussed at ____

⁹⁶ See Recommendation ____, discussed at ____.

⁹⁷ See Recommendation ____, discussed at ____.

Recommendation #2-5: Qualitative Assessment

- **Agencies' human capital planning for the acquisition workforce needs to address the adequacy of existing resources in meeting each agency's procurement needs throughout the acquisition lifecycle. The standard should be whether the government is able to optimize the contribution of private sector capabilities, secured through the market, to the accomplishment of federal agency missions.**

Discussion

This recommendation is designed to underscore two aspects of the human capital planning process that we mean to institute for the federal acquisition workforce. Taking the second point first, we must emphasize that in ascertaining the desirable level of personnel and resources for the federal acquisition workforce it makes little sense to focus only on the minimum numbers. Rather, a different approach is warranted precisely because of the increasingly important role that acquisition of goods and services by contract plays today—and will play in the future—in achieving critical missions of the federal government. That is, we should be seeking to optimize the contribution that private sector capabilities can make to the successful accomplishment of federal agency missions, not to minimize the federal acquisition workforce.

The first point made in this recommendation is designed to underscore that assessing the needs for federal acquisition personnel must take into account the full lifecycle of federal contracting. As noted in Finding #5-3⁹⁸ one result of inadequate resources in the acquisition workforce is a skewed allocation of those resources. This is sometimes described as a “race to award,” and it produces a corresponding shortage of resources devoted to contract management. While we certainly understand the pressure to enter into contracts for the goods and services that the government needs, it is ultimately self-defeating to do so in a manner that leaves inadequate resources for managing these contracts once the formation process is complete. Among the many reasons for insisting that we not stint on the resources devoted to contract management are these basic ones: to ensure that the government actually receives the goods and services for which it has contracted, that we are in a position to assess what fees have been earned under award fee contracts, that the rights and prerogatives of the government are carefully safeguarded where there has been inadequate contractor performance, and that quality performance by contractors is noted and recorded so that contractors will be credited appropriately for that when future contract awards are made.

The importance of considering the needs of the full contract life cycle is not limited to the contract management phase. For instance, as emphasized in our commercial practices

⁹⁸ See discussion at ____-____.

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recommendations, effective usage of the acquisition system entails thoughtful and careful establishment of federal agency requirements. It also entails mastery of the range of contracting vehicles and techniques available in our ever more complex system of federal contracting.⁹⁹ Accordingly, we emphasize that an acquisition system cannot be considered to be functioning properly simply because contracts for necessary goods and services are entered in a timely fashion.

Recommendation #3: Workforce Improvements Need Prompt Attention

Due to the severe lack of capacity in the acquisition workforce, aggressive action to improve the acquisition workforce must begin immediately. All agencies should begin acquisition workforce human capital planning immediately, if such plans are not already underway. Agencies should complete initial assessment and planning as quickly as possible. If initial human capital planning reveals gaps, agencies should take immediate steps to address such gaps, whether they arise in hiring, allocation of resources, training or otherwise.

Discussion

The purpose of this recommendation is to communicate clearly the urgent attention that should be given to strong measures to improve the acquisition workforce. The factual basis that supports this recommendation for prompt action is found primarily in Findings #5 through #5-5. Some of the specific facets of the workforce problem that make it urgent that efforts to change the situation begin forthwith are as follows:

- First, of course, is our fundamental finding that there is a serious shortage of capacity in the existing federal acquisition workforce to meet the demands that are being placed upon it.
- Second is that fact that there were substantial cuts in the acquisition workforce in the 1990s and the workforce has remained relatively stable since 1999, while the quantitative and qualitative demands made on the workforce have mushroomed, especially since 2001.
- This has produced a “bathtub” profile in the acquisition workforce, with a particularly serious shortage of personnel with between 5 and 15 years of experience, leaving us with an unacceptably thin base on which to create the acquisition leadership for the future.
- Moreover, at the senior end of the acquisition workforce, retirements threaten to sap the existing capacity, making the too thin ranks of our mid-level corps of acquisition personnel –from which their replacements must be drawn-- particularly worrisome.

⁹⁹ See Findings 2-3, 2-4-1 though 2-4-3, and 3, discussed at ____ - ____.

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- The problem is further exacerbated by the government's inability to compete successfully with the private sector for the services of talented and experience procurement professionals. This means both that the government far too often loses the services of the best personnel in the shrinking pool of experienced acquisition professionals within the government. At the same time the government is unable to compete successfully for experienced and able acquisition personnel already serving within the private sector.

It is clear that this situation, many years in the making, cannot be rectified immediately. But precisely because there can be no overnight "fix" for these workforce shortcomings, efforts to improve the strength of the acquisition workforce must begin as promptly as possible.

Another reason that we must insist here that prompt corrective action is needed is that, in order to proceed confidently on a strong empirical foundation, the process of correction itself requires a process of planning and assessment. It is important to note that our recommendations do not say that most agencies should immediately go out and hire substantial numbers of acquisition professionals. Although many members of the panel are personally confident that substantial additional hiring is needed in many agencies, some of us were less certain that a shortfall in sheer numbers of acquisition personnel is demonstrable for most agencies. We nonetheless reached a broad consensus that the existing acquisition workforce lacks the functional capacity to perform the tasks and meet the demands that face it. Moreover, we were in agreement that the workforce in most agencies does not have the right skill sets, experience levels, and capabilities that are demanded of it.

There are at least three additional reasons why we cannot simply urge an immediate hiring push for the federal acquisition workforce. First is the fact that we have for many years failed to collect data on the federal acquisition workforce in a consistent manner, over time, and across agencies. Second, federal agencies have failed to undertake the kind of need-based human capital planning for the acquisition workforce that is strongly recommended here. Third, we know that contractors are playing a key role in supporting the federal acquisition workforce, but we do not have data regarding how many of them there are or what they are doing. Accordingly, though we are confident that the federal acquisition workforce needs enhancement, the human capital planning process must get underway to guide this process.

We have taken special care to balance this recommendation so as to make clear the urgency of the needs addressed here, while at the same time acknowledging the need for evidence-based measures to improve the acquisition workforce, in the form of a deliberate human capital planning process. We would be troubled if the need for a careful process of human capital planning were used as an excuse not to begin rapid enhancement of the acquisition workforce. Conversely, we would be equally troubled if the workforce improvement project were to go forward without institutionalizing the reforms in workforce accounting and human capital planning that we have recommended here. Adherence to this evidence-based approach

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should insulate the workforce reforms from being buffeted by changing political fortunes or partisan agendas from either side of the political aisle.

In order to strike the right note—we would call it one of “methodical urgency” for improvements—we have recommended a flexible and balanced process of planning and that a flexible relationship be created between the planning process and the actual enhancement of the workforce. Thus our recommendation provides that:

- All agencies should begin human capital planning for the acquisition workforce immediately, if they have not already done so.
- Moreover, an initial phase of the human capital planning effort should be completed as quickly as possible, without awaiting completion of a more comprehensive process.
- In addition, where this initial phase of human capital planning reveals gaps in personnel levels, or training levels or proper allocation of resources, corrective action should commence immediately, again without waiting for the completion of a more comprehensive planning process.

We have thus tried to balance our recommendations to ensure that neither of our priorities, the need for *methodical* human capital planning nor the need for *prompt* action to begin to rectify the most pressing shortcomings in the acquisition workforce, is subordinated to the other priority.

The Need for a Multi-Faceted Approach to Workforce Enhancement: Overview of specific recommendations

In the succeeding section of this report we address the detailed recommendations that we have offered concerning some of the components of a successful human capital planning improvement strategy for the acquisition workforce. Before launching into these components it is important to emphasize that any successful strategy to improve the skillset and composition of the acquisition workforce must proceed along multiple pathways. This is true, in part, because the problem has been a long time in the making, and there is no single step that could immediately eliminate the problem. But it is also true because we seek an enduring solution that will not only address the current shortfall, but which will tend to prevent recurrence of the problem.

One critical aspect of such a strategy must be aimed at attracting highly talented and well-qualified entry level personnel to the field of procurement, and making sure that we are able to offer them jobs promptly enough so that we do not lose them to the private sector, which historically has been able to act more quickly to land such “targets of opportunity.” See Recommendations #3-1 and #3-2. Another critical component to the workforce improvement initiative is to improve retention of qualified personnel already in the system. See

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Recommendation # 3-3. A third element of a viable workforce improvement program will focus on redoubled efforts to train existing personnel to achieve the level of competence, and the range of skill that is necessary for success in the demanding acquisition environments of the present. See Recommendations # 3-4, #3-5, and #3-6. The call for creation and maintenance of a comprehensive database of Acquisition Workforce professionals in Recommendation # 1-3 is also an essential complement to the multipart strategy for enhancement of the federal acquisition workforce.

From a broader perspective, of course, the recommendations made here regarding Data Collection, Human Capital Planning for the Acquisition Workforce, and the need for an acquisition workforce focus in OFPP, are also essential parts of a comprehensive strategy to address workforce shortcomings, for the present, and for the long haul.

Recommendation #3-1: Need to Recruit Talented Entry Level Personnel

- **OFPP should establish a government-wide acquisition internship program to attract first rate entry level personnel into acquisition careers.**

Discussion

As noted above, a multi-part strategy for the upgrading of the acquisition workforce is essential to overall success. It will do limited good to attract good entry level personnel if we cannot retain an increased percentage of those personnel once that have been sufficiently trained and have sufficient experience under their belts to offer real value. That said, it is at least equally important that federal agencies attract talented entry level personnel to the procurement field in sufficient numbers. This recommendation and recommendation # 3-2 are directed at the challenge of entry level hiring.

Internship programs have demonstrated success in DoD components including the Navy and the Air Force, and in civilian agencies such as the Department of the Interior. Outside observers with experience in the federal acquisition sector have independently recognized the value of such internship programs where they have been instituted on an agency by agency basis, and have called for the extension of this approach to a government-wide initiative.¹⁰⁰ As the Procurement Roundtable has observed in its paper on this subject, “[t]he immediate goal of a government-wide program should be to bring highly qualified college graduates into the government and to ensure that they are treated in a manner that induces them to remain in the government for a significant number of years.”¹⁰¹ Such internship programs are particularly valuable because they create opportunities to expose motivated entry level personnel to the

¹⁰⁰ The Procurement Roundtable, *Attracting and Retaining the Right Talent for the Federal 1102 Contracting Workforce* (April 2006).

¹⁰¹ *Id.* at 6.

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challenges and the opportunities of career opportunities in federal acquisition. Internship programs may also capitalize on the increased visibility that the acquisition function enjoys in a post-Katrina world, and in the light of our experience in Iraq, where the role played by contractors has likewise become more visible. But it would be foolhardy to assume that the increased visibility of acquisition programs is sufficient by itself to draw attention to the entry level opportunities that exist in the field of acquisition. Hence, internship programs may find a more receptive audience because of the recent public attention to the importance of the acquisition function, but it is still important that we aggressively market the field of acquisition through initiatives like this government-wide internship program.

It is pertinent to ask why this is envisioned as a government-wide internship program? One obvious reason is that many government agencies have not instituted such programs on their own. Perhaps with the development of a robust human capital planning requirement as recommended here that would ultimately change. But a second reason for advocating a government-wide internship program is to more effectively market the full range of acquisition career opportunities across the face of the federal government. Interested entry level candidates should thus be made aware of the range of choices and the diversity of career opportunities. In addition, like the database for existing acquisition personnel recommended here (Recommendation # 1-3), a government-wide program would help to foster a government wide market for acquisition professionals. Ultimately, the payoff for this would be in encouraging successful acquisition professionals to make a career in federal acquisition, with improved opportunities for promotion and retention within the federal government resulting from increased opportunities for inter-agency mobility.

Recommendation #3-2: Hiring Streamlining Necessary

- **In order to compete effectively for desirable personnel, OFPP and agencies need to identify and eliminate obstacles to speedy hiring of acquisition workforce personnel.**

Discussion

As indicated in our findings, federal agencies increasingly face difficulty in competing with the private sector for recruiting promising young acquisition professionals and those who wish to become acquisition professionals. Although there are a variety of impediments that need to be addressed in order to change this situation, one important area where improvement is needed concerns the hiring process. Federal agencies are seriously handicapped if they cannot act expeditiously to make offers of employment to promising candidates. By the time such offers come through, too often, the candidates are no longer available. This situation needs to be changed.

Recommendation #3-3: Need to Retain Senior Workforce

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- **OFPP and agencies need to create and use incentives for qualified senior, experienced acquisition workforce personnel to remain in the acquisition workforce.**

Discussion

As indicated in Finding #5-2, the cumulative effect of inadequate hiring and inadequate training, juxtaposed with the increased demands on the federal acquisition workforce (see Finding #2 and its subordinate component findings) has been to create the situation in which we lack a sufficient cadre of mature acquisition professionals who have the skills and training necessary to assume responsibility for the federal government's procurement in today's demanding environment. As noted in Finding #5-2, moreover, the shortfall is presently particularly acute at the level of procurement personnel with between 5 and 15 years of experience. With the bathtub profile that was described in our record, there is, for the immediate present, a less acute shortfall at the senior level. But this relative sufficiency is threatened by retirements and by the strong competition that the private sector offers for the services of talented and experienced acquisition professionals.

Accordingly, it is particularly important that OFPP and agencies be prepared to work vigorously to retain mid-level and senior acquisition professionals. As noted above, efforts to build up the acquisition workforce must also have strong components focused on entry-level hiring. But these efforts cannot, no matter how successful, yield the top level leadership that we need for our acquisition workforce over the next few years. Accordingly, it is imperative that we use strong incentives to lengthen the federal acquisition careers of senior and midlevel personnel in the acquisition workforce, while we are recruiting, training, and developing their successors. We need to hold on to the scarce human resources at the middle level so that they can develop into senior acquisition leaders. But at the same time, because of the thin ranks of this mid-level cohort we need also to hold onto senior leadership within the acquisition workforce. At each level we need to "buy time" so that we can develop future leadership from more junior levels.

Recommendation #3-4: Training

- **In order to ensure the availability of sufficient funds to provide training to the Acquisition Workforce OMB should issue guidance directing agencies to:**
 - **Assure that funds in agency budgets identified for Acquisition Workforce training are actually expended for workforce training purposes, by appropriate means including "fencing" of those funds.**
 - **Require Head of Agency approval for use of workforce training funds for any other purpose**
 - **Provide OFPP an annual report on the expenditure of Acquisition Workforce Training Funds identifying any excesses or shortfalls**
- **OFPP should conduct an annual review to determine whether the funds identified by each agency for training of its acquisition workforce are sufficient to meet the**

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agency's needs for acquisition workforce training. Once an agency's human capital strategic plan for the acquisition workforce is in place, that plan should guide this determination. OFPP's review should also ascertain whether funds identified for such training were actually expended for Acquisition Workforce training needs.

- **Congress should reauthorize the SARA Training Fund and provide direct funding/appropriations for the fund.**

Discussion

Our findings make clear the compelling need for vigorous workforce training initiatives. In the 1990s some agencies faced cuts in their training budgets (Finding #5-1). Yet we have made the federal government's acquisition mission more demanding and more mission-critical than ever (see Findings #2 through #2-4-4). The need for strong training programs is further reinforced by the problem of the dearth of midlevel personnel in the acquisition workforce and the threat of substantial retirements at the senior level of the workforce (Finding # 5-2). Training along with effective hiring and promotions is essential to build up the skill set and capacity of the acquisition workforce to meet the demands of the present and the future.

Toward this end, we must make sure that agencies are budgeting appropriate training funds to meet the needs of their own acquisition workforces. The starting point for this systematic effort should be the agency human capital strategic plan for the acquisition workforce. In reviewing agency's human capital plans for the acquisition workforce, OFPP should verify that agencies' training budgets match the needs for enhanced personnel identified in their human capital plans.

An additional area of concern that emerged in our discussions was that even when funds are initially budgeted for training purposes for the acquisition workforce in sufficient amounts, training budgets are too often made the target for diversion to other purposes. In an era of scarce budgetary resources, it is not hard to understand how such training funds might appear to be tempting targets for diversion, but we emphasize that this is an extremely short-sighted practice that should be aggressively controlled by effective institutional measures.

Among these measures are both OMB guidance to the agencies to strongly restrict diversion of training funds, and OFPP monitoring of actual agency performance. Thus:

- Agencies are to be directed to make sure that their training budgets are actually spent on training.
- The head of the agency must personally approve, and thus be responsible for, any diversion of training funds.
- Agencies must report annually to OFPP on any gaps between training needs and available training budgets, and also on any excess training funds.
- OFPP must monitor agencies annually to make sure that training funds have not been diverted.

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- OFPP must monitor agency's human capital plans for the acquisition workforce to make sure that they are budgeting funds for training that match the needs for personnel enhancement identified in those agency human capital plans.

The final component of this recommendation is to support reauthorization of the SARA training fund, and direct appropriations for the fund. Such dedicated funding for acquisition workforce training is both a means of establishing secure and predictable funding for acquisition workforce training and a means of discouraging agencies from diverting training funds to other uses.

Recommendation #3-5: Acquisition Workforce Education & Training Requirements

- **Currently both DAWIA and Clinger-Cohen provide for waivers to Congressionally established education and training requirements. In order to ensure that the government's Acquisition Workforce has both the competencies and skills to manage the life-cycle of the acquisition process**
 - **Agencies should only grant permanent waivers to education and training requirements upon an objective demonstration that the grantee of the waiver possesses the competencies and skills necessary to perform his/her duties.**
 - **Agencies should only grant temporary waivers to allow the grantee of the waiver sufficient time to acquire the lacking education or training**
 - **Agency CAOs (or equivalent) should report annually to OFPP on the agency's usage of waivers to meet statutory training and education requirements, justifying their usage consistent with the foregoing requirements, and reporting on plans to overcome the need to rely excessively on waivers**
 - **OFPP should review these annual reports, and provide annual summary report on the use of waivers of DAWIA and Clinger-Cohen requirements.**

Discussion

The purpose of this recommendation is to attempt to restore an appropriate balance between mandatory education and training benchmarks established by Congress for the federal acquisition workforce and the desire to maintain some level of administrative flexibility that is reflected in the waiver provisions that accompany these statutory mandates.

Congress undertook to prescribe education and training requirements for the defense and defense acquisition workforce in the Defense Acquisition Workforce Improvement Act (DAWIA) and the Clinger-Cohen Act of 1996. The purpose of the statutorily mandated education and training requirements was to recognize that the task of federal acquisition has grown in complexity, demanding skills of the federal acquisition workforce that go far beyond

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what was needed for success in acquisition in earlier time periods. See Findings #2 through #2-4-3, and Finding #3.

So as to provide needed flexibility in implementing these education and training requirements, however, each of these statutes provided authority for the agency to waive the statutory education and training requirements. This compromise, which arose from an understandable desire to ease implementation of the education and training requirements, now threatens the basic purpose of the education and training standards in some agencies. Today, it is widely perceived that many agencies have become excessively dependent on routine and widespread use of their authority to waive these education and training requirements.¹⁰² Plainly this threatens to deprive the education and training requirements of their intended effect in those particular agencies.

We accordingly seek to return the use of waivers to situations and levels that do not threaten the basic purpose of statutory education and training requirements. We propose the following policies to achieve that fundamental end:

- First, recognizing that waivers were intended to be at least primarily a transitional device, we recommend that any permanent waiver be supported by a specific finding that a particular grantee in fact has mastered the competencies and possesses the skills that are necessary for successful performance of his or her duties.
- Any other waiver may only be temporary in nature. Again consistent with the transitional role that was envisaged for the waiver device, these temporary waivers of education and training requirements should only afford those granted them an opportunity to meet the relevant education and training requirements.
- Thus the waiver program must become a means to *achieve* compliance with education and training requirements, not a means to *avoid* having to comply.

In order to make sure that agencies comply with these policies, agency CAOs are mandated to report annually to OFPP on their use of waivers and must demonstrate in these reports that they are in compliance with the policies recommended above to limit and phase out the use of waivers. To the extent that agencies cannot immediately report full compliance with these policies, they are required to set forth in their reports to OFPP their plans to eliminate continuing inappropriate reliance on waivers. OFPP must then review each agency's annual report, and generate a report card for each agency documenting progress achieved, and identifying shortcomings that remain. This is one of the functions that should become the responsibility of the Acquisition Workforce executive within OFPP, the position that is to be established under Recommendation 4, discussed below.

¹⁰² GAO-07-45SP at 11.

Recommendation #3.6: Acquisition Workforce University

- **In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12 month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training.**

Discussion

This recommendation represents a compromise. At present, our federal government maintains two formally discrete organizations devoted to the training of personnel already in the federal acquisition workforce, the Defense Acquisition University and the Federal Acquisition Institute. The question is whether this represents an inefficient duplication of functions, as opposed to a necessary and appropriate recognition of the distinctive needs of defense acquisition practice. At present, we have a compromise in the form of co-location of these two organizations with a mandate for cooperation.

Some of our panel members believe that, given the evolution of modern federal acquisition practice, the differences between military procurement and civilian procurement have become relatively trivial, and thus conclude that a genuinely unified organization should take charge of all federal acquisition workforce training. This first group further believes that a rational and efficient program of *functional specialization* in training would not follow the lines of the divisions between agencies. Other members of the panel were not persuaded that there is a sufficient degree of convergence in the training curriculums appropriate for acquisition personnel in different agencies to make full unification of training responsibility the best solution. This latter group expressed concern that a unified training structure might be insufficiently attentive to the specialized needs of some agencies, including military organizations. In particular, the needs of weapons system buyers for specialized program management training was noted.

Accordingly, we ultimately reached consensus that it is appropriate to study the desirability of unifying responsibility for training of the federal acquisition workforce. We recommend that OFPP convene a 12 month study panel to review and report on this issue.

Recommendation #4: An Acquisition Workforce Focus is Needed in OFPP

- **There should be established in the Office of Federal Procurement Policy a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.**

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- **As part of OMB’s role in reviewing and approving agency Human Capital Plans in conjunction with OPM, OFPP should be delegated responsibility for receiving and reviewing the agency Acquisition Workforce Human Capital Strategic Plans, and for identifying trends, good practices and shortcomings.**

Discussion

This recommendation reflects our basic conclusion that an essential prerequisite for improvement of the federal acquisition system is strengthening our federal acquisition workforce. Based on this conclusion, the federal acquisition workforce must be given the highest level of attention in our nation’s procurement policy initiatives.

We have made an effort throughout our recommendations to identify *where* in the federal government responsibility should be assigned for implementing the specific measures that we have recommended. There was a wide consensus that identifying *who* should take responsibility for particular recommendations was essential to making an effective recommendation; absent a clear assignment of responsibility, these recommendations may amount to little more than wishful thinking. We have followed this approach both in recommendations to be effected at the agency level, and in those that transcend any single agency.

For instance, at the agency level, our recommendations would make agency Chief Acquisition Officers (“CAOs”) responsible for the entire process of Human Capital Planning for the federal Acquisition Workforce.¹⁰³ Establishing a focal point for responsibility for agency action on acquisition workforce issues is an important step forward. But a number of our recommendations clearly require government-wide implementation, in part because of the critical need for uniformity of approach and implementation across the face of diverse agencies that we have described. Among these responsibilities are:

- Creating uniform and appropriate definitions for the Acquisition Workforce (Recommendations ##1-1 and 1-2)
- Creating a government-wide database of members of the Acquisition Workforce (Recommendation # 1-3)
- Establishing a government-wide internship program to attract first-rate entry level personnel to federal career opportunities in acquisition (Recommendation # 3-1)
- Streamlining the federal hiring process for new acquisition personnel (Recommendation #3-2)
- Improving retention of mid-level and senior acquisition personnel (Recommendation # 3-3)
- Monitoring whether agencies are actually spending funds identified in their budgets for Acquisition Workforce training purposes for those

¹⁰³ See Recommendations #2-1 and #2-2, and accompanying discussion.

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purposes, and determining whether agencies have requested funds for training that would enable them to meet their needs for acquisition workforce training as identified in their agency Human Capital strategic plans for the acquisition workforce (Recommendation #3-4)

- Monitoring the agencies' reporting on their use of waivers to meet legislatively established education and training requirements for the acquisition workforce under DAWIA and the Clinger-Cohen Act, and agency adherence to the recommendations limiting reliance on such waivers that are made here (Recommendation # 3-5)
- Coordinating a review of government training efforts for the acquisition workforce to consider whether establishment of a unified federal acquisition university or other kinds of reforms of training programs would most effectively advance efforts to improve the training of the federal acquisition workforce (Recommendation # 3-6).

Plainly it is essential that an appropriate government official outside of the structure of any particular procuring agency take charge of the implementation of these recommendations. The Office of Federal Procurement Policy was the appropriate location for such an official because OFPP is the only agency responsible for federal procurement policy matters government-wide. Moreover, we considered it important not to create superfluous or duplicative organizations or bureaucracy. In that connection we were particularly keen to draw upon the Office of Management and Budget's existing authority over agency management, and to foster the integration of federal acquisition workforce human capital planning with pre-existing programs for human capital management. Hence OFPP was the right place to locate the leadership responsibility for these government-wide responsibilities.

When we were considering these recommendations, at various junctures, some of our members raised concerns that the Office of Federal Procurement Policy was not staffed to be able to respond to these tasks. Accordingly, we decided to confront that problem directly with our Recommendation #4 which requires the establishment within OFPP of a senior executive expressed tasked with responsibility for acquisition workforce policy. This official would be responsible, specifically, for all of the OFPP responsibilities listed in our recommendations. In addition, this official would have an additional role to serve as the point person for acquisition workforce initiatives that cut across the face of federal government agencies. The head Acquisition Workforce executive within OFPP would also be responsible for receiving that Acquisition Workforce Human Capital Strategic Plans that each agency will be required to produce, and reviewing those plans. We note that OMB already has role in reviewing in agency Human Capital plans. The role of this official would be to make sure that agency Human Capital Strategic Plans for the Acquisition Workforce meet the requirements outlined for those plans in these recommendations. Absent such conformity, the agency's Human Capital Plan should not be approved by OMB.

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Recommendation 5 [Editorial note: This recommendation was adopted by the Panel without assignment of a number, and has now been assigned this designation as Recommendation 5.]

- **To the extent that agencies can demonstrate that they have implemented any recommendations (or parts thereof) that require a report to OFPP, the process established by OFPP should include criteria for a waiver from the reporting requirements; any waiver should include a requirement for a sunset.**

Discussion

Recommendation 5 was suggested to make sure that the requirements that we propose to not engender unnecessary paperwork for the agencies that must implement them. In general, reporting requirements imposed on agencies here are designed to be action-forcing and attention-directing. Specific reporting requirements are designed to focus the attention of the agency Chief Acquisition Officer on the specific components of a successful human capital planning effort for the agency's portion of the federal acquisition workforce. These reports are designed in turn to place the OFPP in a position to keep tabs on whether each agency is complying with these procedural mandates, and achieving the substantive benchmarks that are applicable.

Nevertheless, we would not wish to elevate paperwork generation over substantive compliance. Thus, if a particular agency can demonstrate that it has already complied with a functional reporting mandate recommended here, it need not generate a duplicative report. OFPP is directed to respect this rule of non-duplication in generating criteria for waiver of the reporting requirements here. In addition, waivers must contain a sunset provision to make sure that the justification for waiving a particular requirement remains applicable so long as the waiver remains in force.

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CHAPTER 6

APPROPRIATE ROLE OF CONTRACTORS SUPPORTING GOVERNMENT

REPORT OF THE ACQUISITION ADVISORY PANEL

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**Appropriate Role Of Contractors
Supporting The Government**

I. Introduction

Fifteen years ago, the GAO found, “Service contracts are essential for carrying out functions of the government because the government does not have employees in sufficient numbers with all the skills to meet every requirement.”¹ This observation is even more accurate today, as the disparity between the number and complexity of Federal government programs and the number and skill-sets of Federal employees available to implement those programs continues to grow. In the 12 years following issuance of the 1991 GAO Report, the Federal civilian workforce dropped 13.6 percent, from 2.2 million to 1.9 million workers in September 2003.² Meanwhile, during this same period, there was a significant increase in the dollar amount and number of contracts with private sector firms. Between 1990 and 1995 the government began spending more on services than goods.³ Currently, procurement spending on services accounts for more than 60% of total procurement dollars.⁴ Contributing to this trend, Congress has adopted legislation, and several Administrations have implemented policies, that encourage the use of contractors to perform certain functions and activities that have in the past been performed by government employees.⁵

As a result of these developments and others, Federal agencies are increasingly relying on private sector contractors. As the Comptroller General recently stated: “The Government has and is going to increasingly rely on the private sector in general and contractors in particular to be able to deliver a whole range of products and services.”⁶ Some of the reasons for this trend are “to acquire hard to find skills, to save money, to have the private sector do work that is not inherently governmental, to augment capacity on an emergency basis, and to reduce the size of government.”⁷

Currently, acquisition of goods and services from contractors consumes over one-fourth of the Federal government’s discretionary spending, and many Federal agencies rely extensively on contractors in the performance of their basic missions.⁸ In some cases, contractors are solely

¹ U.S. GAO, *Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate*, GAO/GGD-92-11, 6 (1991).

² Office of Personal Management, Workforce Information and Planning Group (year).

³ Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995.

⁴ Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

⁵ See, e.g., Federal Workforce Restructuring Act, Pub. L. No. 103-266 (Mar. 30, 1994); Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. L. No. 105-270 (Oct. 18, 1998).

⁶ Test. of David Walker, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 245.

⁷ Nat’l Academy of Pub. Admin., *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century 2* (Nov. 16, 2005).

⁸ Examples include the Department of Energy, the Centers for Medicare and Medicaid, and the National Aeronautics and Space Administration. See U.S. GAO, *Comptroller General’s Forum: Federal Acquisition Challenges and Opportunities in the 21st Century*, 4 GAO-07-45SP, 1 (2006).

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or predominantly responsible for the performance of mission-critical functions that were traditionally performed by civil servants, such as acquisition program management and procurement, policy analysis, and quality assurance. In many cases contractor personnel work alongside Federal employees in the Federal workspace; often performing identical functions. This type of workplace arrangement has become known as a “blended” or “multisector” workforce.⁹

These developments have created issues with respect to the proper roles of, and relationships between, Federal employees and contractor employees in the multisector workforce.¹⁰ In particular, 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 ambit of OMB Circular A-76. Moreover, as the Federal workforce shrinks, there is a need to assure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions, and manage the performance of their contractors.¹¹ In addition, concerns have been raised regarding the appropriateness of the current prohibition of “personal services contracts.”¹²

Concurrently, the increase in service contracting has raised two separate conflict-of-interest issues. First, questions have been raised as to whether contractor employees working to support Federal agencies should be required to comply with some or all of the ethics rules that apply to Federal employees, particularly in the multisector workforce where contractor employees are working alongside Federal employees and are performing identical functions. Second, the increased participation of contractors in developing projects that are subsequently open to market competition and the increased use of contractors to evaluate contract proposals and to evaluate the performance of other contractors raise important questions about how to address potential organizational conflicts of interest and how to preserve the confidentiality of proprietary information.

⁹ “Multisector workforce” is a term adopted by the National Academy of Public Administration to describe the current mix of personnel working in the government:

The “multisector workforce” is a term we have chosen to describe the federal reality of a mixture of several distinct types of personnel working to carry out the agency’s programs. It is not meant to suggest that such a workforce is unitary. To the contrary, it recognizes that federal, state and local civil servants (whether full- or part-time, temporary or permanent); uniformed personnel; and contractor personnel often work on different elements of program implementation, sometimes in the same workplace, but under substantially different governing laws; different systems for compensation, appointment, discipline, and termination; and different ethical standards.

NAPA Report at 2.

¹⁰ GAO-07-45SP, *supra* note ___, at 8.

¹¹ *Id.*

¹² FAR 37.101 - 37.104.

II. Inherently Governmental Functions

The recognition of a clear-cut dividing line between public and private activity has been problematic since the earliest days of our republic.¹³ One commentator noted “[t]he boundary of the public sector in American life has never been distinct. Our history has not produced any clear tradition allocating some functions to the government and others to the private sphere.”¹⁴ With the growth of the multisector workforce, it has become even more important to specify which functions *can and cannot* legally be performed by the private sector, as well as what functions *ought* to be performed by Federal employees.

In 1966, the Office of Management and Budget (“OMB”) issued Circular A-76, “Performance of Commercial Activities,” recognizing that “[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees.” However, as the GAO found in its 1991 Report, that formulation was too general to provide adequate guidance to Federal agencies. In response to that Report, on September 23, 1992, the Office of Federal Procurement Policy (“OFPP”), issued Policy Letter 92-1, entitled “Inherently Governmental Functions.” While retaining the original A-76 definition, the OFPP Policy Letter provided explanations and examples to help agencies decide whether particular functions could be contracted out. It listed examples of specific functions that are inherently governmental and those that generally are not, but require “closer scrutiny.” OFPP Policy Letter 92-1 was superseded by OMB’s May 29, 2003 revision of Circular A-76. However, the revised A-76 Circular incorporates the provisions of the Policy Letter, without any significant changes.

The Federal Acquisition Regulation (“FAR”) also addresses inherently governmental functions (“IGF”). The term is defined at FAR Section 2.101. FAR Subpart 7.5 implements the policies of OFPP Policy Letter 92-1 and the current version of OMB Circular A-76. FAR Section 7.503(a) prohibits contracting for IGF;¹⁵ Section 7.503(c) lists examples of IGF (derived from Appendix A of Policy Letter 92-1); and Section 7.503(d) lists examples of functions that “approach” being IGF (derived from Appendix B of Policy Letter 92-1).

The Federal Activities Inventory Reform Act of 1998 (“FAIR Act”) was enacted “to provide a process for identifying the functions of the Federal government that are not inherently governmental functions.” The FAIR Act requires Federal executive agencies to prepare annual inventories to identify IGFs and those activities that are not inherently governmental, and to conduct managed competitions to determine who can best perform certain commercial

¹³ See GAO/GGD-92-11, *supra*, at 2 n.1 (“Concern about which federal agency activities are inherently governmental is not new. It goes back as far as the early days of the nation, as evidenced, for example, by the discussions in the *Federalist Papers* among the framers of the Constitution over what functions are appropriate for the federal government to exercise.”).

¹⁴ Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 Tex. L. Rev. 441, 457 (1989).

¹⁵ Such contracts are also prohibited by FAR 37.102(c).

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functions.¹⁶ The FAIR Act retains essentially the same definition of IGF as OFPP Policy Letter 92-1.

Although there has been some degree of inconsistency among agencies in the categorization of various functions under Circular A-76 and the FAIR Act, in part due to the lack of specificity in the appendices, for the most part agencies have been able to identify discrete commercial functions that can and should be competed under the framework specified in A-76. However, there has been little, if any, attention paid to the obverse issue: whether agencies are inappropriately contracting out functions that, while not necessarily inherently governmental in a strict sense, have traditionally been performed by Federal workers and are critical to the performance of the agency's mission.¹⁷

In addition to contracting out significant portions of the acquisition function – as discussed elsewhere in this Report¹⁸ – most, if not all, agencies have contracted out major portions of their information technology and communications functions. Moreover, some agencies have contracted out substantive, mission-critical functions, often without considering the potential adverse implications of such a step for the future. One example of this trend is the growing use of Lead System Integrators (“LSI”). The GAO has described LSIs as “prime contractors with increased program management responsibilities [and] greater involvement in requirements development, design, and source selection of major system and subsystem subcontractors.”¹⁹ Historically, the designs of complex, multiyear programs and projects have been created by Federal employees, but with LSIs that is often not the case. Even more troubling, in some cases the Government no longer has Federal employees with the requisite skills to oversee and manage LSIs.

While in the short run such contracts may appear to be the best – or at least the simplest – way for an agency to implement a particular project or program, they can have serious adverse consequences in the long run. Such consequences include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a

¹⁶ The OMB guidelines for preparing FAIR Act inventories recognizes a non-statutory category of functions, referred to as “commercial A,” which are “commercial activities deemed unsuitable for competition” by an agency. Agencies designating function in this category must provide written justifications each of them. See, in general, OMB Memorandum M-05-12, from David H Safavian, Director of OFPP, regarding 2005 FAIR Act inventories (May 23, 2005), <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-12.pdf>.

¹⁷ This may be due, in part, to the fact that since the early 1980s, OMB has pushed agencies to privatize commercial functions, at times utilizing goals and targets, which were sometimes perceived as informal quotas. Agencies that are reluctant to privatize functions performed by their existing workforce – which could require downsizing and/or reductions in force – are generally more willing to contract out new or expanded functions (since such contracts could give them credit toward meeting OMB's targets), without necessarily considering the long-term implications of such a step.

¹⁸ See Panel Report, Chapter 5, The Federal Acquisition Workforce, Finding 7 and Discussion.

¹⁹ Paul L. Francis, Director, Acquisition and Sourcing Management, testimony before the Subcommittee on Airland, Committee on Armed Services, U.S. Senate, March 2005.

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proper price,²⁰ and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work. If, for example, NASA were to contract out the function of designing and constructing the next generation of satellites, without retaining a core group of Federal workers with knowledge of – and responsibility for – the details of the project, it could permanently lose the capacity to perform one of its critical, core functions.

III. Personal Services Contracts

[W]e have now a definition and a rule based on a ban . . . on personal service contracts that's been with us for years and years and doesn't take proper recognition of where we are as a work force today.²¹

Under the FAR, the Federal Government is prohibited from awarding “personal services contracts” (“PSC”) unless specifically authorized by statute to do so.²² A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be Government employees.²³ The United States Office of Personnel Management (“OPM”) defines PSCs as contracts “that establish an employer-employee relationship between the Government and contractor employees involving close and continual supervision of contractor employees by Government employees rather than general oversight of contractor operations.”²⁴ The key indicator of a personal services contract, according to the FAR and OPM, is whether the Government exercises relatively continuous supervision and control over the contractor personnel performing the contract.²⁵ The FAR also provides a list of other elements that may indicate whether a personal services contract exists.²⁶

A. History of the Prohibition of PSCs

The exact origins of the ban on PSCs are obscure and “cannot be established from a review of the Comptroller General’s decisions.”²⁷ In the nineteenth century, executive branch

²⁰ For example, the Army’s investigation of the Abu Ghraib interrogator scandal in Iraq found that “it is very difficult, if not impossible, to effectively administer a contract when the [Contracting Officer’s Representative] is not on site,” particularly where contractor employees greatly outnumbered the government employees responsible for oversight of the contract. See MG George R. Fay, AR 15-6 *Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade* 50, 52 (2004).

²¹ Test. of William Woods, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 274.

²² FAR 37.104(b).

²³ *Id.*

²⁴ Contracting Branch, OPM, *Competitive Sourcing, Procurement Policy and Procedure* (Jun. 30, 2003), <http://www.opm.gov/procure/pdf/USOPMCompetitiveSourcingPolicy.pdf>.

²⁵ FAR 37.104(c)(2).

²⁶ FAR 37.104(d).

²⁷ Russell N. Fairbanks, *Personal Service Contracts*, 6 Mil. L. Rev. 1, 39 & n. 139 (1959).

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personal services contracts were commonplace,²⁸ and they were exempt from competition under an 1861 statute.²⁹ This statute contemplated that the services to be performed would require a special skill on the part of the party contracted with.³⁰ In 1877, the Attorney General defined a personal services contract as “one by which the individual contracted with renders his personal service to the Government through its agents, thus himself becoming the servant of the Government.”³¹ However, within several years, such contracts fell out of favor. Several rationales for this have been advanced.

Limitations in Appropriations Statutes

In 1882, Congress enacted a statute that prohibited the payment of Government employees from appropriations other than those provided in the law authorizing their employment. That provision is currently codified at 5 U.S.C. § 3103. In an early decision of the Court of Claims, the purpose of the law was described as “to deprive officers of the Government of all authority to employ in any of the Executive Departments at the seat of government or in the subordinate bureaus or offices thereof . . . employees, except such as may be specifically appropriated for by Congress.”³² Under a 1926 Comptroller General decision interpreting that statute, if a civil service Government employee could be utilized or hired to do the work required, then the work could not be obtained by contract.³³

Civil Service Law

During the 1940s, the Comptroller General identified a different rationale for prohibiting contracts for personal services. The Office for Emergency Management had asked whether it could contract for janitorial services in its field offices. The request contained a thorough analysis of prior interpretations of the 1882 statute in which the Comptroller General had identified different standards for procuring services in Washington, D.C., the “seat of government,” and in the field. Rather than maintain divergent standards for prohibiting PSCs under the Appropriations statute rationale, the Comptroller General disapproved the contracts because he concluded that they circumvented civil service laws.³⁴

The decision stated that the “contracts delegate to the contractor the right to select persons to render services for the Government which would be in contravention of [the civil

²⁸ Robert E. Korroch, *Rethinking Government Contracts for Personal Services* 45 (Sep. 30, 1997) (unpublished LLM thesis, The George Washington University Law School) (available at The George Washington University Law Library).

²⁹ Act of Mar. 2, 1861, ch.84, sec. 10, 12 Stat. 220.

³⁰ 15 Op. Atty. Gen. 538 (1876).

³¹ 15 Op. Atty. Gen. 253 (1877).

³² *Plummer v. United States*, 24 Ct. Cl. 517, 520 (1889).

³³ Letter from Comptroller General McCarl to the Director, United States Veterans Bureau, A-16312, 6 Comp. Gen. 364, 365 (Nov. 27, 1926), *recon. denied*, 6 Comp. Gen. 463 (Jan. 11, 1927).

³⁴ Letter from Comptroller General Warren to the Liaison Officer, Office of Emergency Management, B-31,670, 22 Comp. Gen. 700 (Jan. 25, 1943).

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service law], which requires that all appointments of officers and employees be made by the head of the department or agency, or, with respect to field services, by a subordinate officer to whom that duty has been delegated. Also, the services rendered by the contractor's employees would not be subject to direct supervision such as is generally exercised over Federal employees."³⁵ Because the Government provided the contractor with all the necessary cleaning supplies and left "nothing but labor of the individual to be furnished," the Comptroller General concluded that the services had to be performed by Government employees.³⁶ However, the decision noted that if the Government had procured all supplies and equipment as well as services from the contractor, the contract would have been considered non-personal in nature.³⁷

Personnel Ceilings

In a 1952 decision, the Comptroller General identified another rationale for the ban on personal services contracts: the concern that they could be used by Executive Branch agencies to circumvent limits on the number of authorized employees. The Comptroller General recommended termination of a contract for processing of shipping orders and purchase requisitions that had been let by the Army Engineer Supply Office because the personnel ceiling for the Department of Defense had been reached. The Comptroller General explained that "it would be unreasonable to presume that the Congress, while imposing a ceiling on the number of graded civilian employees that could be employed in the Department of Defense, intended to authorize the procurement by contract from outside sources of services which would be performed by the employees of the type involved but for the personnel ceiling."³⁸ The Comptroller General also stated that the contract violated the "long-standing rule that persons performing purely personal services for the Government be placed on Government pay rolls and made subject to its supervision."³⁹ The Comptroller General relied on two factors in defining what constituted "personal services": (1) the Government furnished everything necessary for the performance of the services except the employees, who could have been hired by the Government; and (2) the services were of a type usually performed by classified employees and were of a continuing or indefinite duration.⁴⁰

The Pellerzi-Mondello Opinions

In October 1967, Leo Pellerzi, the General Counsel of the United States Civil Service Commission ("CSC"), issued an opinion that addressed whether several NASA technical support service contracts being utilized at the Goddard Space Center were in violation of applicable personnel statutes. The opinion was issued in response to a referral from the U.S. District Court

³⁵ *Id.* at 701-02 (internal citations omitted).

³⁶ *Id.* at 702.

³⁷ *Id.*

³⁸ Letter from Comptroller General Warren to the Secretary of the Army, B-113,739, 32 Comp. Gen. 427, 430-431 (Apr. 3, 1953).

³⁹ *Id.*

⁴⁰ *Id.*

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in a case challenging the legality of the contracts.⁴¹ The principles identified in the opinion were subsequently incorporated into FAR Part 37.

The opinion identified the appropriate “standards of review to be applied in determining whether or not an employer-employee relationship has been established between [a Government agency] and private contractor employees by the terms and performance of each of the support service contracts.”

In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

- Performance on-site.
- Principal tools and equipment furnished by the Government.
- Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- The need for the type of service provided can reasonably be expected to last beyond one year.
- The inherent nature of the service or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
 - To adequately protect the Government's interest or
 - To retain control of the function involved, or
 - To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Applying these standards, the contracts under review and all like them are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

In August 1958, Mr. Pellerzi’s successor as General Counsel of the CSC, Anthony L. Mondello, issued a supplemental opinion that linked the criteria for judging the relationship between the Government and the employees of a contractor to the definition of “employee” expressed in 5 U.S.C. § 2105(a). This opinion emphasized that the “touchstone of legality under

⁴¹ *Lodge 1858 Am. Fed. of Gov't Emp. v. Adm'r NASA*, 424 F. Supp. 186 (D.D.C. 1976), *aff'd in part, vacated in part*, 580 F.2d 496 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

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the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the government and the employee of the contractor.”⁴²

The Mondello supplement noted that the six elements of the Pellerzi opinion “relate principally to the third statutory criterion concerning supervision of a contractor employee by a Federal officer or employee. If the contract terms permit such supervision, or if in the actual performance of the contract such supervision is conducted, the test is met.” In other words, under the Pellerzi and Mondello opinions, a contract that, by its terms or administration, involves supervision of a contract employee by a Government employee would be contrary to the civil service laws.

In upholding the CSC’s conclusion that the specific contracts at issue were valid, the Court of Appeals found that NASA had authority to enter into the contracts and that the contractor personnel were not Federal employees. The primary basis for the latter determination was that the Government’s supervision of contractor personnel under the contract did not create an employer-employee relationship or the appearance of such a relationship.

B. The Existing FAR Prohibition

Following the rationale of the Pellerzi-Mondello opinions, as the opinions collectively came to be known, the FAR prohibition of PSCs focuses on the concern that Government supervision of contractor personnel would act to create an employer-employee relationship between the Government and the contractor’s personnel. However, a review of case law reveals that the FAR PSC prohibition is not needed to prevent this from occurring because a contract cannot confer employee status upon such personnel in the absence of an appointment to the Federal service.

The law governing appointments begins with the United States Constitution. Article II, Section 2, Clause 2 provides that the President shall appoint all officers of the United States unless Congress vests such authority in the department heads or courts.⁴³ While the Constitution speaks only of officers and inferior officers, and not of employees, in 1980, the Court of Claims, in deciding *Baker v. United States*, a case involving a claim for annuity credit, found “these terms are, in practice, synonymous.”⁴⁴ The Court of Claims cited as support an early twentieth century Supreme Court case which had considered the differences between a government officer and an employee and how they obtain their respective positions.⁴⁵ There, the Supreme Court held, “[t]he term ‘employ’ . . . is used as the equivalent of appoint. The distinction between officer and employee . . . does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. *Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the*

⁴² See *Lodge 1858*, *supra*, 580 F.2d at 507.

⁴³ U.S. Const., art. II § 2, cl. 2.

⁴⁴ *Baker v. United States*, 614 F.2d 263, 267 (Ct. Cl. 1980).

⁴⁵ *Burnap v. United States*, 252 U.S. 512, 515-16 (1920).

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creation of the several positions, their duties and appointment thereto."⁴⁶ The Court of Claims held, "The Supreme Court has recognized that the primary difference between a government officer and a government employee is determined by how their respective positions are created and that, in any event, an appointment to a government position, whether it be as an officer or employee, is necessary before a person can hold a government job and receive the salary and perquisites pertaining thereto."⁴⁷ Well before *Baker*, over 100 years ago, the Supreme Court confirmed the necessity of appointment to a Government position before a person can be deemed to be an "officer" of the Government.⁴⁸

A year after *Baker*, in *Costner v. United States*,⁴⁹ another Court of Claims case involving a claim for annuity credit, the plaintiff had been employed by a contractor performing work for the Air Force for several years before accepting a permanent civil service position with the agency. Upon retirement, he submitted a claim for annuity credit for his years of work under the contract, claiming that he was a Federal employee during that period. However, the court concluded that he was not a Federal employee during that time by applying the three part test contained in the statutory definition of a Federal employee, 5 U.S.C. § 2105(a).⁵⁰ The court stated, "It is obvious from the statutory language that there are three elements to the definition – appointment by an authorized federal employee or officer, performance of a federal function, and supervision by a federal employee of officer – and that they are cumulative."⁵¹ Therefore, "if [the plaintiff] did not have a federal appointment, it will not be necessary to consider the other two requirements, as it is well settled that all three tests must be met by an individual before he can be a federal employee. . . . *An abundance of federal function and supervision will not make up for the lack of an appointment.*"⁵²

Also, in *United States v. Testan*, the Supreme Court stated, "The established rule is that one is not entitled to the benefit of a [Government] position until he has been duly appointed to

⁴⁶ *Id.*

⁴⁷ *Baker, supra*, 614 F.2d at 268.

⁴⁸ *See, e.g., United States v. Smith*, 124 U.S. 525, 531-32 (1888); *United States v. Mouat*, 124 U.S. 303, 307 (1888).

⁴⁹ 665 F.2d 1016 (Ct. Cl. 1981).

⁵⁰ 5 U.S.C. § 2105(a) states:

- (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, *means an officer and an individual* who is--
- (1) appointed in the civil service by one of the following acting in an official capacity--
 - (A) the President;
 - (B) a Member or Members of Congress, or the Congress;
 - (C) a member of a uniformed service;
 - (D) an individual who is an employee under this section;
 - (E) the head of a Government controlled corporation; or
 - (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
 - (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
 - (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

⁵¹ *Costner, supra*, 665 F.2d at 1020.

⁵² *Id.* (emphasis added).

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it.”⁵³ And, in *Goutos v. United States*, the Court held “[i]t is settled law that a Government employee is entitled only to the rights and salary of the position to which he was *appointed* by one having the proper authority to do so.”⁵⁴

Summarizing the decisions of the Supreme Court and the Court of Claims, it is clear that an individual cannot hold a position as a Government employee (and thus be a party to an employer-employee relationship) unless he or she has been appointed to such a position by a person authorized to make the appointment.⁵⁵

Moreover, appointment as a Federal employee requires “a significant degree of formality” and “evidence that definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a).”⁵⁶ Indicia of appointment include whether the person’s compensation and benefits are paid and funded by the civil service system, whether a SF-50 or other appointive document was executed, and whether the oath of office was administered.⁵⁷

C. Exception for Temporary Expert and Consultant Services Contracts

The FAR prohibition explicitly does not apply where a statute authorizes PSCs. One such statute is 5 U.S.C. § 3109 which authorizes agencies to acquire temporary consultants or experts. This authority originated in section 15 of the Administrative Expenses Act of 1946, which authorized executive departments to procure temporary services of experts or consultants by contract.⁵⁸ The statute was designed as an exception to the prohibition against PSCs for contracts that do not exceed one year in duration, and its use is conditioned upon the existence of explicit language in an appropriation act or other statute. However, the list of statutes authorizing such use has become so voluminous that this restriction has little effect.⁵⁹

Under the statute, agencies may “contract” for both individual consultants and for organizations of consultants.⁶⁰ However, different rules apply to the different types of contractors. When “procuring by contract,” the services of an *individual* under the authority of this statute, the agency actually temporarily appoints the person into the civil service

⁵³ 424 U.S. 392, 402 (1976) (internal citations omitted).

⁵⁴ 552 F.2d 922, 924 (1976) (internal citations omitted) (emphasis in original); *accord*, *Bielic v. United States*, 456 F.2d 690 (1972); *Dianish v. United States*, 183 Ct. Cl. 702 (1968).

⁵⁵ *Baker, supra*, 614 F.2d at 268.

⁵⁶ *Horner v. Acosta*, 803 F.2d 687, 692-93 (1986).

⁵⁷ *Id.* at 694.

⁵⁸ 60 Stat. 810 (codified as 41 U.S.C. § 5).

⁵⁹ The list of cross references at 31 U.S.C. § 3109 contains 161 statutory provisions authorizing temporary hires under this section.

⁶⁰ Letter from Comptroller General Warren to the Comm’r, United States Section, Int’l Boundary and Water Comm., United States & Mexico, 27 Comp. Gen. 695, 695-98 (May 17, 1948).

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notwithstanding the provisions of civil service appointment procedures.⁶¹ This temporary appointment makes the individual a government employee who thereby has many, but not all, of the same protections and rights, and is subject to the same duties, as any other Federal government employee who is hired into the excepted service.⁶² In contrast, when an agency hires a *contractor* (organization) under the authority of this section, the contractor's employees do not become government employees. The organization's employees remain employees of the contractor.⁶³

On January 25, 1989, the OPM promulgated regulations allowing agencies to utilize private sector temporaries.⁶⁴ In the preamble to those regulations, OPM confirmed that “[r]ecent case law interpreting 5 U.S.C. 2105 makes clear that Federal employment cannot exist in the absence of a formal appointment.”⁶⁵

OPM acknowledged the new regulation was not consistent with prior pronouncements:

There is no statutory prohibition. The guidance and opinions of the past (best known as the Pellerzi-Mondello opinions after the two General Counsels of the former Civil Service Commission who prepared them), which placed the use of temporary help services under the general ban against contracting for personal services, must give way to a new interpretation based on court decisions, the statutory definition of a Federal Supervisor, evolving experience, and the now established role which temporary help services perform. This rule reflects that new interpretation and it amends the Pellerzi-Mondello opinions with respect to the use of temporary help services.⁶⁶

OPM further concluded that temporary hires under the new rule would not be “supervised” by Federal employees, relying upon the broad span of control over government employees included in the statutory definition of “supervisor.”⁶⁷

⁶¹ “Procuring by contract” is an inapt term here, because the contractor actually becomes a temporary federal government employee. See Letter from Comptroller General Warren to R. L. Harlow, Federal Security Agency, 27 Comp. Gen. 66, 48 (July 31, 1947).

⁶² Letter from Comptroller General Warren, *supra*, note ___, at 697.

⁶³ For a more in-depth discussion of this topic, see Jeffrey Lovitky, *The Problems of Government Contracting for Consulting Services*, 14 Pub. Cont. L.J. 332 (1984).

⁶⁴ 5 CFR 300.501-300.507, adopted at 54 Fed. Reg. 3762 (Jan. 25, 1989); see also FAR 37.112.

⁶⁵ 54 Fed. Reg. at 3763.

⁶⁶ 54 Fed. Reg. at 3762.

⁶⁷ “Supervisor” means “an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.” 5 U.S.C. § 7103(a)(10).

D. Conclusion

For the reasons stated above, the existing FAR prohibition on PSCs, which focuses upon the type of supervision provided to contractor personnel in an effort to preclude the creation of an employer-employee relationship, is more constraining than needed under applicable statutes and case law. Under the statutory definitions of a Federal employee and supervisor, as that language has been interpreted by the courts, many activities that are currently barred as PSCs by the FAR would not create such an employer-employee relationship. And the PSC prohibition, to the extent it is observed in practice, often creates inefficiencies and adds to costs.

IV. Organizational Conflicts Of Interest

Over the last two decades, a number of factors have led to an increasing probability of – and a increasing need to protect against – organizational conflicts of interest (OCI).⁶⁸ Three industry trends appear to be responsible for the increase in OCIs.⁶⁹ First, the government is buying more services that involve the exercise of judgment, such as evaluating technical platforms or assessing the goods or services provided by contractors. Second, industry consolidation has resulted in fewer and larger firms, which results in more opportunities for conflicts. Third, use of contract vehicles such as indefinite-delivery, indefinite-quantity (IDIQ) umbrella contracts result in awards of tasks to a limited pool of contractors in the area of the IDIQ.

A. Existing Regulations

Under the FAR, an OCI occurs when

because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage.⁷⁰

The term “person” in this definition includes companies and other contracting entities.⁷¹

FAR 9.5 addresses OCIs. The regulation states that the Government is concerned with both actual conflicts as well as the *appearance* of conflicts, both in current and future

⁶⁸ See generally, Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25 (Fall 2005); Michael R. Golden, *Organizational Conflicts of Interest*, PowerPoint presentation to 4th Annual U.S. Missile Defense Conference, at 5.

⁶⁹ For a description of the industry trends driving the increase in OCIs, see Gordon, *supra* note ___, at 27-29. See also Golden, *supra* note ___, at 5.

⁷⁰ FAR 2.101. For a detailed description of the elements of an OCI, see Gordon, *supra* note ___, at 30-32.

⁷¹ *Id.* at 31.

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acquisitions.⁷² The principles guiding the Government's efforts to avoid such conflicts are: (1) preventing the existence of conflicting roles that might bias a contractor's judgment; and (2) preventing unfair competitive advantage.⁷³ As such, the FAR directs contracting agencies to take measures to detect and mitigate actual and potential OCIs.⁷⁴ Contracting officers must "identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible" and "avoid, neutralize, or mitigate significant potential conflicts before contract award."⁷⁵ However, the FAR provides no detailed guidance to contracting officers regarding how they should accomplish these tasks.⁷⁶ In practice, it appears that contracting officers and agencies have occasionally encountered difficulties implementing appropriate OCI avoidance and mitigation measures.

B. Types of OCIs

In order to ascertain whether the existing FAR guidance provided sufficient direction for the contracting community, the Panel reviewed the various types of OCIs and how contracting agencies, GAO, and the Court of Federal Claims view contracting officers' efforts to detect and mitigate OCIs. There are three general types of OCIs:

- Unequal Access to Information – A firm has access to nonpublic information as part of its performance of government contract responsibilities, and that information might provide the firm a competitive advantage in a future competition (these are also known as "unfair competitive advantage" OCIs).⁷⁷
- Biased Ground Rules – A firm, as part of its performance of government contract responsibilities, has set the ground rules for another government contract by, for example, writing the statement of work or defining the specifications. The firm that drafted the ground rules might have a competitive advantage in a future competition governed by those rules.⁷⁸
- Impaired Objectivity – A firm's work under one government contract could entail evaluating its own work or that of a competitor, either through an assessment of performance under

⁷² FAR 9.502(d).

⁷³ FAR 9.505(a), (b).

⁷⁴ FAR 9.504.

⁷⁵ FAR 9.504(a)(1), (a)(2).

⁷⁶ *Id.* (guidance is limited to the "general rules, procedures, and examples" in FAR 9.5).

⁷⁷ FAR 9.505-4.

⁷⁸ FAR 9.505-1 and 9.505-2.

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another government contract or through an evaluation of proposals.⁷⁹

Although the case law has discussed a number of conflicts that arise with increasing frequency in each of these categories, the examples provided in the FAR do not appear to address adequately the range of possible conflicts that can arise in modern Government contracting.

C. Case Law

The GAO discussed the various categories of OCIs in *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397, et al., Jul. 27, 1995, 95-2 CPD ¶ 129 at 8-10. The Court of Federal Claims began citing the *Aetna* decision and description of OCIs in *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003). These decisions, along with others, address methods of identification and mitigation of OCIs. The GAO and the Court of Federal Claims have denied protests where an agency both recognized actual or potential OCIs and either avoided, neutralized, or mitigated the OCI in a reasonable manner.⁸⁰ However, protests were upheld where it was concluded that the contracting officers and/or agencies did not go far enough in recognizing or mitigating OCIs.⁸¹

D. Consequences and Possible Improvements

The public expects there to be no preferential treatment for particular contractors, no self-interest in the decision making process, and no hidden agenda impacting contractor selections. Moreover, the cost and delay associated with resolving potential OCIs after-the-fact adversely affects agency programs and the public interest. Yet, “the more we integrate non-Federal employees, contractors or call them blended workforce, into the actual governing and

⁷⁹ FAR 9.505-3.

⁸⁰ See, e.g., *Deutsche Bank*, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (proposed use of subcontractor to perform tasks where prime contractor had potential conflict due to prior work for the agency was deemed acceptable mitigation); *LEADS Corp.*, B-292465, Sep. 26, 2003, 2003 CPD ¶ 197 (protest denied because mitigation plan – agency consideration of potential OCI and decision to assign work carefully to avoid the appearance of impropriety – was sufficient). Compare *Sci. Applications Int'l Corp.*, B-293601, et al., May 3, 2004, 2004 CPD ¶ 96 (protest sustained for lack of consideration to potential OCI) with *Sci. Applications Int'l Corp.*, B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 (corrective actions remedied prior OCI, making award possible).

⁸¹ See, e.g., *Alion Sci. & Tech. Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (protest sustained where agency assessment that a “maximum potential” for OCI of 15 percent of tasks was sufficiently low to permit award was fundamentally flawed; further, the agency’s assessment of possible impacts of OCI was inadequate and understated the potential for conflicts); *Greenleaf Constr. Co., Inc.*, B-293105.18, .19, Jan. 17, 2006, 2006 CPD ¶ 19 (protest sustained where agency failed to reasonably consider or evaluate potential OCI due to financial arrangement between contractor and evaluator); *Celadon Labs., Inc.*, B-298533, Nov. 1, 2006, ___ CPD ¶ ___ (protest sustained where agency failed to evaluate impact of contractors performing technical evaluation being employed by firms that promote competing technologies); *PURVIS Sys., Inc.*, B-293807.3, .4, Aug. 16, 2004, 2004 CPD ¶ 177 (protest sustained where agency failed to reasonably consider or evaluate potential OCI created by awardee’s participation in evaluation of its own work – and the work of its direct competitors – on undersea warfare systems).

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administration of our agencies, the larger the gap we have and the more difficult it is for us to insure the integrity of Government decision making.”⁸² Much of the difficulty arises when contractor personnel have substantial responsibilities in selecting systems or contractors for award, sometimes effectively making evaluation and/or award decisions for agencies, even if they do not themselves actually make the formal award.

Although FAR 9.5 provides considerable leeway to contracting officers and agencies for considering avenues to address actual or potential OCIs, lack of guidance regarding identification and mitigation of conflicts – particularly for the increasingly common unfair competitive advantage or impaired objectivity conflicts – leads to variable results and inconsistent application of the regulations. Uniform regulations providing guidance to contracting officers and contracting agencies could help to reduce the frequency of failures to identify and mitigate OCIs.

V. Personal Conflicts Of Interest

With the growth of the multisector workforce, in which contractor employees are working alongside Federal employees and are performing identical functions, questions have been raised as to whether contractor employees working to support Federal agencies should be required to comply with some or all of the ethics rules that apply to Federal employees.⁸³

There are numerous statutory and regulatory provisions applicable to Federal employees that seek to protect against conflicts of interest and promote the integrity of the government’s decision-making process. These provisions are intended to avoid preferential treatment, self-dealing, and hidden agendas, and to ensure that persons entrusted to act for the government are acting in the best interest of the government. In short, the rules address the basic obligation of public service. This obligation is described as:

[The] responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in [5 CFR Part 2635].⁸⁴

⁸² Test. of Steve Epstein, Director of Standards of Conduct, Department of Defense, AAP Pub. Meeting (May 18, 2006) Tr. at 90.

⁸³ *Id.* See also Test. of Marilyn Glynn, U.S. Office of Gov’t. Ethics, AAP Pub. Meeting (May 17, 2005) Tr. at 78, 107.

⁸⁴ 5 CFR 2635.101(a).

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A. Criminal Statutes in Title 18 of the U.S. Code

Several criminal conflict of interest statutes in Title 18 of the U.S. Code address Federal employees' (1) representational activities before the Federal government; (2) post-employment activities; (3) participation in matters in which they have financial interests; and (4) receipt of supplementation of salary as compensation for their official services.

18 U.S.C. § 205 is intended to prohibit current Federal employees from misusing their offices and influence by prohibiting them from participating in claims against the Government on behalf of private interests, whether or not for pay. Section 205 applies to all employees, regardless of their level of responsibility or the scope of their duties, and to all particular matters regardless of whether those matters are related to the employee's position or duties. 18 U.S.C. § 203 addresses similar considerations, but it only applies to compensated representational activities. It prohibits an individual from sharing in compensation for representational services performed by someone else, such as a business partner, if those services were provided at a time when the individual was still a Government employee.

18 U.S.C. § 207 prohibits former employees from engaging in certain activities on behalf of persons or entities other than the United States. Some restrictions apply to all employees, regardless of level of position or subject matter.⁸⁵ Other restrictions apply only to employees holding positions at certain levels of authority or pay.⁸⁶ Some restrictions are subject matter-specific or client-specific,⁸⁷ while others apply only to persons that held positions in certain agencies or employees in certain programs.⁸⁸ The applicable durations of the various restrictions also vary.⁸⁹ Most of the restrictions, including those that affect the most employees, are limited to representational communications and appearances, but three narrowly applicable provisions also cover behind-the-scenes activities, thus adding an additional layer of complexity.⁹⁰

18 U.S.C. § 208 has been called the cornerstone of the executive branch ethics program.⁹¹ The section prohibits an employee from participating personally and substantially in any particular matter in which he has a financial interest, or in which certain others with whom he is associated, such as family members, have a financial interest. The policy behind the law is promotion of public confidence in Governmental processes by barring employees from

⁸⁵ 18 U.S.C. § 207(a)(1).

⁸⁶ Subsections 207(a)(2) (supervisory employees), 207(c) (senior employees), 207(d) (very senior employees), and 207(f) (senior and very senior employees).

⁸⁷ Subsections 207(b) (trade agreement and treaty matters), and 207(f) (foreign entity clients).

⁸⁸ Subsections 207(f)(2) (special lifetime restrictions for the U.S. Trade Representative and Deputy), and 207(l) (special restriction applicable to Information Technology Exchange Program assignees).

⁸⁹ Subsections 207(a)(1) (life of the matter), 207(a)(2) (two years), 207(b) (one year), 207(c) (one year), 207(d) (one year), 207(f) (one year, except lifetime for the United States Trade Representative and Deputy), and 207(l) (one year).

⁹⁰ Subsections 207(b), 207(f), and 207(i).

⁹¹ U.S. Office of Gov't Ethics, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* (Jan. 2006) at 28, http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf.

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participating in Government matters that would have beneficial or adverse financial effects on them.

18 U.S.C. § 209 prohibits Federal employees from receiving any salary or supplementation of their salary from private sources as compensation for their services to the Government. This ban on outside compensation for Government work is designed to prohibit an executive branch employee from serving two masters in the performance of his or her official duties.⁹²

18 U.S.C. § 201(b) prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his or her official duty. This section is commonly referred to as the prohibition on bribery, and it is one of the few statutes in this area that apply to contractor personnel as well as to Government employees.⁹³

B. Non-Criminal Ethics Statutes

Congress has also enacted non-criminal statutes that impose limitations on outside earned income and employment;⁹⁴ impose limitations on the acceptance of travel and related expenses from non-Federal sources;⁹⁵ impose limitations on the acceptance of gifts and travel generally;⁹⁶ and impose restrictions on partisan political activities.⁹⁷

Other statutes authorize and direct agencies to collect financial information from certain officials and employees in order to monitor for and prevent financial conflicts of interest.⁹⁸ The extent of the information required from a particular employee and whether that information will be made public or not depends upon the seniority of the employee.

C. The Procurement Integrity Act

Under the Procurement Integrity Act, additional ethics provisions apply to employees who participate in the award or administration of Federal contracts, 41 U.S.C. § 423. Such employees are prohibited from accepting compensation from the awardee of a contract on which they had participated for a period of one year after the employee's involvement.⁹⁹ The statute

⁹² See OGE Report, *supra* note __, at 34.

⁹³ Epstein Test., *supra* note __, at 92-93. A separate statute, 5 U.S.C. § 1352, prohibits recipients of Federal funds, including contractors, from using any of those funds to attempt to influence Federal officials.

⁹⁴ 5 U.S.C. App. §§ 501-505.

⁹⁵ 31 U.S.C. § 1353.

⁹⁶ 5 U.S.C. § 7301.

⁹⁷ 5 U.S.C. §§ 7321-7326, known as the Hatch Act.

⁹⁸ 5 U.S.C. App. §§ 101-111, 401-408, 501-505; *see also* 5 CFR Part 2634.

⁹⁹ 41 U.S.C. § 423(d).

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also prohibits the disclosure of non-public, privileged or sensitive information,¹⁰⁰ and it requires procurement officers to take certain actions when contacted regarding potential non-Federal employment.¹⁰¹ Violations are punishable by both civil and criminal penalties.¹⁰²

D. Office of Government Ethics

Under the authority of the Ethics in Government Act, 5 U.S.C. App. §§ 401-407, the United States Office of Government Ethics (“OGE”) has promulgated “Standards of Ethical Conduct for Employees of the Executive Branch,” 5 CFR Part 2635. These detailed standards implement, and in some cases expand upon, the ethics statutes contained in various titles of the United States Code. For example, 5 CFR 2635.502, sometimes known as the “impartiality regulation,” expands upon 18 U.S.C. § 208 by requiring Federal employees to disqualify themselves from particular matters in which a reasonable person with knowledge of the relevant facts would question the employee’s impartiality. In addition, many Federal agencies have supplemented the OGE regulations with regulations of their own.¹⁰³

OGE exercises leadership in the Executive Branch to prevent conflicts of interest on the part of Government employees, and to resolve those conflicts of interest that do occur. It has provided extensive written guidance to Federal employees in its Standards of Conduct, in memoranda addressing particular questions (sometimes referred to as “DAEOGrams”), and in pamphlets handed out at orientation sessions for new Federal employees. These resources provide detailed guidance, with examples, on subjects including gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities. The OGE also trains agency ethics officers regarding the standards of conduct requirements.¹⁰⁴

E. Applicability to Contractor Personnel

With the growth of Federal contracting for services, contractors are, and will increasingly continue to be, performing some of the Government’s most sensitive and important work, including, but not limited to, acquisition functions. However, contractor personnel are not subject to the foregoing comprehensive set of statutory and regulatory ethics rules, even though in some cases they are working alongside Government employees in the Federal workplace and

¹⁰⁰ Subsections 423(a) and (b).

¹⁰¹ Subsection 423(c).

¹⁰² Subsection 423(e). Concerns about conflicts of interest in the area of Government contracting have been a particular focus in the enforcement of Federal ethics laws. In the 2005 OGE survey of prosecutions involving the conflict of interest criminal statutes, nine of the twelve reported prosecutions involved contract-related misconduct. See Memorandum from Robert I. Cusick, OGE Director (Aug. 9, 2006), http://www.usoge.gov/pages/daeograms/dgr_files/2006/do06023.pdf.

¹⁰³ For example, the Department of Transportation has adopted 49 CFR Part 98, “Enforcement of Restrictions on Post-Employment Activities,” and 49 CFR Part 99, “Employee Responsibilities and Conduct.”

¹⁰⁴ A full description of OGE’s responsibilities and activities can be found on its website: <http://www.usoge.gov>.

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may appear to the public to be Government employees.¹⁰⁵ Some observers, including the Acting Director of OGE, have suggested that current laws, regulations, and policies may be inadequate to prevent certain kinds of ethical violations on the part of contractors and their personnel.¹⁰⁶

In testimony to the Panel, Ms. Marilyn Glynn, who at the time was the Acting Director of OGE, expressed her concern regarding personal conflicts of interest in the following contractual circumstances: (1) advisory and assistance services contracts, especially those where contractor personnel regularly perform in the Government workplace and participate in deliberative and decision-making processes along with Government employees; (2) management and operations (M&O) contracts involving large research facilities and laboratories, military bases, and other major programs; (3) contracts resulting from the competitive sourcing process (under OMB Circular A-76), particularly where the services had been performed previously by Government employees and are now being performed by former Government employees who have exercised rights of first refusal; and (4) large indefinite delivery or umbrella contracts that involve the decentralized ordering and delivery of services at multiple agencies or offices.¹⁰⁷ Ms. Glynn stated that several situations involving the conduct of individual contractor employees in these contexts have been identified by public sector ethics officials. Such problems primarily relate to financial conflicts of interest, impaired impartiality, misuse of information, misuse of authority, and misuse of Government property.¹⁰⁸ If the conduct that Ms. Glynn described had been performed by a Federal employee, it would be a violation of statute and/or regulation punishable by criminal or civil penalties or both.

Ms. Glynn testified that although OGE has received expressions of concern in this area from agency ethics officials, it has not recommended that any of the criminal conflict of interest statutes be amended to apply to contractor personnel. Instead it has deferred answering such a question to “others with more knowledge of procurement policies and practices.”¹⁰⁹ An alternative approach was identified by Steve Epstein of the Department of Defense, who suggested that the FAR Council should consider “some model language, or instruction [to] Government agencies to include these provisions within contracts.”¹¹⁰

F. Contractor Ethics Programs

The Defense Federal Acquisition Regulation Supplement (DFARS) imposes certain ethics requirements upon contractors doing business with the Department of Defense.¹¹¹ In general, such contractors must “conduct themselves with the highest degree of integrity and honesty.” More specifically, the regulations require contractors to maintain specific standards of conduct and internal control systems, including: (1) a written code of ethics and a training

¹⁰⁵ Walker Test., *supra* note ____, at 276.

¹⁰⁶ See Letter from Marilyn L. Glynn, Acting Director, U.S. Office of Gov’t Ethics, to the AAP (Feb. 8, 2005).

¹⁰⁷ Glynn Test., *supra* note ____, at 80-81.

¹⁰⁸ *Id.* at 82-85.

¹⁰⁹ *Id.* at 92.

¹¹⁰ Epstein Test., *supra* note ____, at 129.

¹¹¹ DFARS 203.7000.

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program; (2) periodic reviews of company practices and internal controls; (3) a reporting hotline; (4) audits; (5) disciplinary actions for improper conduct; (6) timely reporting to the Government of any suspected or possible violation of law in connection with a Government contract; and (7) full cooperation with any Government investigation or corrective action.¹¹²

In the mid 1980s, a group of major defense contractors voluntarily committed themselves to a program of self-governance in the ethics arena. The program, named the Defense Industry Initiative (DII), requires participants to: (1) adopt a written code of ethical conduct; (2) train employees on the performance expected under the code; (3) encourage employees to report violations of the code without fear of retribution; (4) implement systems to monitor compliance procedures and to disclose violations to the Government; and (5) share best practices with other firms in the program.¹¹³ To a great extent, the DII was a response to the findings and recommendations of the President's Blue Ribbon Commission on Defense Management (the Packard Commission).¹¹⁴ The Packard Commission found that public confidence had been eroded by reported instances of waste, fraud and abuse within both the industry and the Defense Department, and it concluded that the defense acquisition process, the defense business environment, and confidence in the defense industry could be improved by placing greater emphasis on corporate self-governance.¹¹⁵

The DII conducts an annual Best Practices Forum that provides an opportunity for industry and government to discuss best practices and emerging issues relating to ethics programs and how contractors can meet those challenges.¹¹⁶ Another significant element of the DII program is that member companies have committed to make themselves accountable to the public through disclosures and reports on business ethics and conduct.¹¹⁷ The DII also issues an Annual Report, which covers a wide variety of subjects, including, *inter alia*, conflicts of interest, procurement integrity, kickbacks, inside information, and voluntary disclosure to the Government.¹¹⁸

The Sarbanes-Oxley Act of 2002¹¹⁹ ("SOX") also impacts the ethics programs of publicly traded government contractors.¹²⁰ SOX requires the establishment of an "audit committee" to establish procedures for receiving, examining, and resolving complaints relating to financial

¹¹² DFARS 203.7001(a).

¹¹³ Test. of Patricia Ellis, Raytheon Corp., AAP Pub. Meeting (May 17, 2005) Tr. at 247. *See also The Defense Industry Initiative on Business Ethics and Conduct, 2005 Annual Report to the Public* (Feb. 22, 2006) at 9, http://www.dii.org/annual/2005/DII-2005_AnnualReport.pdf.

¹¹⁴ Test. of Richard Bednar, National Coordinator for DII, AAP Pub. Meeting (May 17, 2005) Tr. at 260-261.

¹¹⁵ President's Blue Ribbon Comm'n on Defense, *A Quest for Excellence. Final Report to the President* (Jun. 1986).

¹¹⁶ Ellis Test., *supra* note ____, at 247; Bednar Test., *supra* note ____, at 284.

¹¹⁷ *Id.* at 262.

¹¹⁸ *Id.* at 294. The report also includes the compiled responses to a detailed annual survey of member company CEOs.

¹¹⁹ Pub. L. No. 107-204, 116 Stat. 745 (2002).

¹²⁰ Non-public companies may choose to comply with the SOX standards, though compliance is not required by law.

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controls and ethics concerns.¹²¹ SOX also places significant responsibility on attorneys representing public companies.¹²² Among other things, attorneys must report directly to the chief legal counsel or chief executive officer evidence of breach of fiduciary duty by any employee, officer, or agent of the company.¹²³ SOX also enhances protections for whistleblowers who report items of concern such as, but not limited to, perceived fraud and conflicts of interest.¹²⁴

The Federal Sentencing Guidelines¹²⁵ also provide incentives for companies to create, maintain, and staff appropriate ethics programs. Convicted companies that have met these criteria are eligible for a variety of downward departures from the general Sentencing Guidelines.¹²⁶ The Guidelines include criteria for determining whether companies have instituted “effective compliance and ethics program[s]” that not only prevent and detect criminal conduct, but also promote ethical corporate cultures.¹²⁷ Corporate directors must be knowledgeable about and receive training on their companies’ programs,¹²⁸ while high-level personnel are tasked with ensuring the effectiveness of the program.¹²⁹ Companies are asked to institute a system for reporting potential ethical violations, communicate this system and the underlying ethical rules to employees, employ compliance personnel with adequate resources and direct reporting access to the Board, institute incentive and disciplinary procedures to ensure compliance, and periodically evaluate the program’s effectiveness.¹³⁰ In addition, establishing effective compliance programs can also help companies escape indictment in the first instance, since Federal prosecutors consider similar criteria when determining whether to indict companies for the crimes of their employees.¹³¹

G. Next Steps

The Panel heard testimony that emphasized the importance of culture in a successful ethics program. For example, DII considers a values-based code of ethics a best practice, stating that culture is at least as important as, and perhaps even more important than, rules.¹³² The OGE

¹²¹ See SOX § 204. Audit committee members are “independent” members of the board, meaning they have no other financial relationship with the company other than their service on the board. The audit committee members’ independence encourages unbiased analysis of auditor reports and information, and prompt recognition of conflicts of interest or other improper activity.

¹²² SOX § 307.

¹²³ *Id.*

¹²⁴ SOX § 806.

¹²⁵ United States Sentencing Commission, *Guidelines Manual* (Nov. 2006).

¹²⁶ *Id.* §§ 8C2.5(b), (f) & 8C4.11.

¹²⁷ *Id.* § 8B2.1(a).

¹²⁸ *Id.* § 8B2.1(b)(2)(A), (b)(4).

¹²⁹ *Id.* § 8B2.1(b)(2)(B).

¹³⁰ *Id.* § 8B2.1(b)(4)-(6).

¹³¹ See *Principles of Federal Prosecution of Business Organizations*, Memorandum from Larry D. Thompson, Deputy Atty. Gen., to Heads of Dep’t Components 6-7 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

¹³² Ellis Test. *supra* note ____, at 252-254, 257.

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is concerned with leadership commitment to ethics programs and referenced academic research that shows that the tone at the top is the most important thing in an ethics program.¹³³ DII's National Coordinator asserted that values-based self-governance should be the preferred model for all companies that deal with the Federal Government, and suggested that the DFARS regulatory scheme be elevated to the FAR.¹³⁴

The Panel has concluded that, in view of the wide variety of circumstances that can implicate personal conflicts of interest on the part of contractor personnel, the wide variety of Federal contracts for services, and the differences in size and sophistication among Federal contractors, there is no single set of ethics requirements that would be appropriate in all contexts. The regime of ethics regulation applicable to Federal employees is quite complex, and the Panel is not aware of anyone with experience in this field that has contended that the full range of Federal statutory and regulatory provisions ought to be applied to all contractors and their personnel.

VI. Findings

Finding 1: Several developments have led Federal agencies to increase the use of contractors as service providers, including: (1) limitations on the number of authorized civil service positions, (2) unavailability of certain capabilities and expertise among Federal employees, (3) desire for operational flexibility, and (4) the need for “surge” capacity.

There are many reasons for the increase in the use of contractors by the Federal government, including those listed in this finding. However, aside from the importance of recognizing what forces brought about the current circumstances involving the pervasive use of contractors to support the work of government, the reality is that in many cases the Federal government could not accomplish its mission today but for the contractor workforce. Private sector actors have become an essential partner in delivering government services. The National Commission on the Public Service, in its 2003 study recommending reorganization of the Federal government, found that additional contracting for services “may be needed, for example, to acquire additional skills, to augment capacity on an emergency or temporary basis, and to save money on goods and services that are not inherently governmental.”¹³⁵

The past fifty years has seen a global transformation in public administration from government to governance, whereby our Federal government has increasingly come to rely on non-governmental actors to perform core “governmental” activities, and the achievement of

¹³³ Glynn Test., *supra* note ___, at 104.

¹³⁴ Bednar Test., *supra* note ___, at 263-264.

¹³⁵ Report of the Nat'l Comm'n on the Pub. Serv. *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, 31 (Jun. 2003).

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public goals has been accomplished by a mix of “state, market and civil society actors.”¹³⁶ This development has presented a challenge to the ability of Federal government officials to retain the capacity to supervise and evaluate the work of the government, whether such work is performed by contractors or Federal employees. During the same period, civil service personnel ceilings have been imposed, which has ensured that as the government has grown, reliance on contractors has also increased.¹³⁷ To compound the challenge, many agencies have been unable to recruit and retain an adequate number of skilled professionals to be able to do the complex types of work that are now part of their missions.¹³⁸ This problem has also affected the acquisition workforce, which has faced new challenges as the quantity and complexity of Federal contracting has grown.¹³⁹

Finding 2: The existence of a multisector workforce, where contractor employees are co-located and work side-by-side with Federal employees, has blurred the lines between: (1) functions that are considered governmental and functions that are considered commercial; and (2) personal and non-personal services.

As early as 1962, a Cabinet-level report to President Kennedy on government contracting practices (known as the “Bell Report”) concluded that reliance on third parties to perform the work of government “blurred the traditional dividing line between the public and private sectors.”¹⁴⁰ As one commentator has pointed out, such blurring was not an accident; in that the architects of this change acknowledged that it would challenge traditional notions of official accountability for work performed by non-government actors.¹⁴¹

Finding 3: Agencies must retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors.

It is axiomatic that Federal government officials need to maintain the skills and competencies required to manage and implement all of the government’s work – including that performed by the growing contractor workforce.¹⁴² However, as discussed above, there is reason

¹³⁶ Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub. Cont. L.J. 321, 322-23 (2004).

¹³⁷ *Id.* at 323.

¹³⁸ See, e.g., Testimony of Barney Klehman, Director of Contracting, Missile Defense Agency, AAP Pub. Meeting (March 29, 2006) Tr. at 144-147, 153-154.

¹³⁹ *Id.* See also, David M. Walker, *The Future of Competitive Sourcing*, 33 Pub. Cont. L.J. 299, 301 (2004).

¹⁴⁰ *Report to the President on Government Contracting for Research and Development in Systems Development and Management: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives*, 87th Cong. 191-263 app. I (1966).

¹⁴¹ Guttman, *supra* note ____, at 330.

¹⁴² Bell Report, *supra* note ____.

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to question whether the government has retained adequate personnel with such skills and competencies.¹⁴³

Finding 4a: Some agencies have had difficulty in determining strategically which functions needs to stay within government and those that may be performed by contractors.

Finding 4b: The term “Inherently Governmental” is inconsistently applied across government agencies.

The impossibility of drawing a bright line between governmental and non-governmental functions has inevitably led to inconsistent application of the competitive sourcing policy across the government. As David Walker, Comptroller General of the United States, stated in 2003, “[t]he Commercial Activities Panel heard complaints from all sides with regard to the lack of clarity, transparency, and consistent application in the current A-76 process.”¹⁴⁴

There are acknowledged difficulties in determining exactly what functions are inherently governmental.¹⁴⁵ Such difficulties are not new. GAO stated in 1991 that it was unable to definitively conclude whether service contractors were performing inherently governmental activities “[b]ecause of the difficulty in defining governmental functions.”¹⁴⁶ Faced with the FAIR Act mandate to classify all of its positions, agencies may turn to other factors – such as whether there are Federal employee authorizations or sufficient skill sets in the government workforce – to determine whether a function is classified as commercial or inherently governmental.¹⁴⁷ Functions that are considered appropriate for commercial competition by one agency may not be considered so by another.

Finding 5: The degree to which contractors are used and the functions that they perform vary widely both within agencies and across agencies.

As discussed above, there has been a marked shift in the willingness of agencies to allow contractors to perform mission critical functions. One example of this has been the growth of Lead System Integrator contracts.¹⁴⁸ Moreover, in recent years, the military has become dependent upon contractor support for transportation, shelter, food, and “unprecedented levels of battlefield and weaponry operation, support, and maintenance.”¹⁴⁹ Additionally, the DoD has

¹⁴³ See, e.g., U.S. GAO, *High Risk Series: An Update* (2005).

¹⁴⁴ Walker, *supra* note ___, at 305.

¹⁴⁵ Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 272 (2004).

¹⁴⁶ GAO/GGD-92-11, *supra* note ___, at 2.

¹⁴⁷ *Id.* at 4.

¹⁴⁸ See note ___ and accompanying text.

¹⁴⁹ Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STANFORD L. & POLICY REV. 549, 554 (2005).

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“encouraged the procurement of complex defense systems under contracts requiring ongoing contractor support throughout the systems’ lifecycle.”¹⁵⁰

The degree to which contractors are performing functions that were previously performed by government employees, and the specific functions that are being performed by those contractors varies both agency to agency and within agencies. Some agencies use contractors sparingly, while some rely on contractors for the vast majority of the work the agency accomplishes. Furthermore, the functions that are considered core or inherently governmental at some agencies have been performed by contractors for decades at other agencies.

There is currently no way to accurately quantify this trend. OMB Circular A-76 and the Fair Act focus on traditional commercial activities and therefore do not account for the tremendous increase in the “shadow” workforce of contractors who are stepping into positions that were traditionally held by Government employees.

While the FAIR Act requires agencies to produce inventories of the functions they consider commercial and those that are considered inherently governmental, along with the numbers of positions in the agency that fall under those designated functions, these inventories do not reveal the number of contractor personnel performing various functions, particularly those functions that were generally performed by government employees in the past. Moreover, because the categories of functions are broadly stated in the FAIR Act inventories, those inventories do not provide the level of detail required to do the type of agency-by-agency analysis that will render meaningful results in determining how the government is applying the inherently governmental standard. Neither would the available information provide sufficient data to determine how many contractors are performing work that probably would have been performed by government employees in the past.

Finding 6: The use of contractor employees to perform functions previously performed by government employees combined with consolidation in many sectors of the contractor community has increased the potential for organizational conflicts of interest.

As explained above, the potential for OCIs has increased significantly in recent years. The contracting community needs more expansive and detailed guidance for identifying, evaluating, and mitigating OCIs. The current FAR language provides significant leeway to contracting officers to address OCIs, but recent decisions by the GAO and the courts indicate that, in many instances, appropriate investigation and/or analysis is not performed. This has created a substantial, negative impact on agency performance and on the public’s impression of the procurement process.

¹⁵⁰ Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 374 (2004).

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Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the Government's decision-making processes.

Just as the trend toward more reliance on contractors poses a threat to the government's long-term ability to perform its mission, the trend raises the possibility that the government's decision-making processes can be undermined.

For example, it is now commonplace for agencies to utilize contractors to perform activities historically performed by Federal contract specialists. Although these contractors are not authorized to obligate the United States,¹⁵¹ they provide, among other things, analysis, market research, and other acquisition support to the Federal decision makers. Unless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made. Commenting on this topic, David Walker, Comptroller General of the United States, recently offered the following advice:

We have to keep in mind that there are certain things that you can privatize, but there is one thing you can never privatize. You can never privatize the duty of loyalty to the greater good. The duty of loyalty to the collective best interest of all, rather than the narrow interest of a few: that is what public service is all about; that is what public servants are all about.¹⁵²

Finding 8: There are numerous statutory and regulatory provisions that control the activities of government employees. These measures are designed to protect the integrity of the government's decision-making process. Recent, highly publicized violations of these laws and regulations by government employees were adequately dealt with through existing legal remedies and administrative processes. Additional laws or regulations controlling government employee conduct are not needed at this time.

The Panel finds that the existing system of statutes and regulations governing the conduct of Federal government employees is adequate to effectively deal with ethical violations. Adding new prohibitions or increasing the already severe penalties available to punish violators would be unlikely to provide additional deterrence.

Finding 9: Most of the statutory and regulatory provisions that apply to Federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with Federal employees and are performing similar functions.

¹⁵¹ Such authority has always been considered an inherently governmental function reserved to Federal employees.

¹⁵² Walker, *The Future of Competitive Sourcing*, *supra* note ___, at 303-04.

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As described above, contractor personnel are not subject to the comprehensive set of statutory and regulatory ethics rules applicable to Federal employees, even though in some cases they are working alongside Federal employees in Federal offices, are performing work that in the past was performed by Federal employees, and may appear to the public to be Federal employees.

Finding 10: A blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management.

Federal agencies cannot directly impose ethics requirements upon contractor employees or discipline those employees for the violation of Federal ethical standards and requirements. However, they do have the authority to impose ethics requirements upon the entities with which they contract through contract provisions that hold contractors accountable for their employees' behavior. And Congress has the authority to enact new statutes, or amend the existing statutes that apply to Federal employees, to criminalize violations of ethical requirements by contractor personnel. However, the Panel is not aware of any evidence that suggests that the imposition of criminal liability upon contractor personnel would yield significant benefits, and it could have serious adverse consequences.

Government contractors, particularly large contractors, generally have internal ethics programs. Application of the specific Federal employee ethics requirements to contractor personnel would require additional training, monitoring, and enforcement, and the cost of these efforts would be passed on to the Government. If the imposition of such requirements would significantly improve the ethical behavior of contractors and their employees, such costs would be justified. However, if it merely replaced one set of effective rules with another set of rules, without a significant effect upon contractor behavior, the costs would not be justified. Further analysis of the costs and benefits of applying the various specific ethics provisions to contractor personnel is needed before taking such steps.

Finding 11: The current prohibition on personal services contracts has forced agencies to create unwieldy procedural safeguards and guidelines to avoid entering into personal service contracts, some of which may cause the administration of the resulting "non-personal" contracts to be inefficient.

The Panel did not identify specific instances of agency violations of the prohibition on personal services contracts. However, anecdotal evidence suggests that the lines have been blurred to such a degree that the prohibition may have become a mere formality observed during contract formation. In other words, contracts for professional services that are formed as "non-personal," are often performed with close contact between Federal government and contractor employees that approaches, and perhaps crosses, the line between personal and non-personal services under the broad FAR definition.

Some agencies have expended significant resources prescribing policies and guidance designed to help avoid the sorts of "employer-employee relationships" identified in the FAR. For example, the Air Force has issued a "*Guide for the Government-Contractor Relationship*" to

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address “the distinctions between government employees and contractor personnel.”¹⁵³ This guide addresses a wide range of topics that arise in the multisector workforce, including among others, personal services vs. non-personal services contracts, proper identification of contractor personnel, use of government resources, and time management. The Missile Defense Agency, which is staffed in large part by contractor employees, has also identified procedures to avoid the creation of an employer-employee relationship with contractor personnel.¹⁵⁴

Such policies generally prohibit Federal employees working side-by-side with contractor employees from reviewing and directing the work of those contractor employees; and require the involvement of the contractor supervisor in day-to-day operations. Agencies would obviously prefer to avoid such inefficiencies, which cost them time and money. Removing the FAR prohibition would simplify the process and ease pressure on an overburdened Federal workforce. It is likely that it would also enable contractors to realize cost savings because they would be able to remove a layer of on-site management. Such cost savings should then flow to the Government and the taxpayer.

VII. Recommendations

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.

In view of the fact that 15 years have passed since the OFPP’s last comprehensive analysis of what constitutes an inherently government function, and the fact that there have been numerous changes in the way the Government operates and the way that contractors are utilized since that time, the Panel concluded that it would be appropriate for OFPP to consider the current governmental and contractor landscape and adopt a set of general principles and best practices for identifying those functions that should be performed by civil servants.

Those principles would then be applied on an individualized, agency-by-agency basis, consistent with each agency’s missions and the need to retain the capability to perform those missions. In those instances where an agency is relying on contractors for assistance, the Panel believes that it is critical for the agency to have adequate and knowledgeable staff to establish appropriate requirements for its contracts and to manage contractor performance.

The Panel did not believe that there was any need for OFPP to adopt a new formal definition of what constitutes an IGF. In the Panel’s view, it does not matter whether a particular function is considered to be “Inherently Governmental” or whether – to use the terminology utilized in FAIR Act inventories – it is considered “Commercial Category A.” What is important in this context is whether a given function ought to be performed by Federal employees. Unfortunately, agencies do not always analyze their personnel needs or their acquisition of

¹⁵³ Air Force Materiel Command, *Guide for the Government-Contractor Relationship* (May 2005).

¹⁵⁴ Test. of Barney Klehman, *supra* note ____, at 180.

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services with the objective of maintaining agency capability to perform core functions. There is no reason to be less attentive to these issues in a reduction in force situation, or in deciding whether to perform new projects or programs with Federal employees or through a contract.

The Panel expressly stated that it is not recommending that OMB revise A-76, but it recognized that OMB might conclude that it would be appropriate to do so to better assure the agencies' ability to perform their core functions.

Recommendation 2: Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with Federal employees.

Once an agency determines that certain of its functions should be performed by Government employees, it must assure that it has sufficient qualified employees to actually perform those functions. Agencies must focus on these issues when they are reducing their personnel levels, whether through a formal reduction in force or otherwise. The same is true when contracting for services. Agencies must not simply take the easy way out by contracting for critical functions because they have had difficulty recruiting and retaining qualified employees in certain areas. The Panel emphasized that this recommendation would not require any revision in agency practices in complying with A-76 or in preparing their FAIR Act inventories.

The Panel decided not to make any recommendation with respect to the issue of whether OMB should make agency compliance with these principles mandatory, or whether OMB should impose reporting requirements upon the agencies. OMB should analyze the services for which agencies are contracting (other than through A-76) in determining how to structure these principles and whether to make them mandatory.

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.

The Panel recognized that, despite the existing prohibition of PSCs in the FAR, many (if not all) agencies have contractors performing activities that fit within the prohibition as it is currently defined, in part because it would be very inefficient to structure the workplace to preclude direct instructions to contractor personnel. When service contractor personnel and Federal employees are working together on a program or project, there is no good reason to prohibit the Federal employee in charge from giving directions or assignments directly to contractor personnel so they can work as a true team. For example, contractors and agency

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personnel routinely work in integrated project teams in technical areas. It is unrealistic to expect that in such situations, Government employees will not provide technical direction, and it would be inefficient to impose such a prohibition.

Even apart from efficiency concerns, it is antithetical to good government practices to have regulations in place that cannot realistically be complied with and thus are routinely violated and not enforced.

Under the Panel's recommendation, Federal employees would still be precluded from involvement in personnel decisions regarding contractor employees, such as hiring, promotions, bonuses, and performance ratings.

Although there is no express statutory prohibition, the prohibition has been in place for so long, and there have been so many rationales for it, the Panel concluded that Congress should clearly and unambiguously resolve the issue through statute, rather than await a regulatory revision.

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.

The Panel recognized that it was possible that some types of service contracts should still be prohibited; therefore, it recommended that OFPP provide specific guidance to agencies, consistent of course with whatever limitations Congress might impose.

For example, an agency Inspector General or CFO should not be able to direct the performance of a contractor hired to audit the agency's records and practices. And in a performance-based contract, the contractor should have full authority to determine how best to achieve the required performance. And there are circumstances in which it would not be appropriate for Government managers to micro-manage contractor activities.

The Panel also recognized that not every Federal employee should be authorized to provide direction to contractor personnel.

Since the recommended changes in this area would reverse prohibitions that had been in place for decades, the Panel concluded that GAO should conduct a study within five years after the adoption of the recommended OFPP guidance in which it would identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

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.

With respect to all of the sub-recommendations in this category, the Panel recognized that numerous agencies have considered these issues, and in many cases agencies have identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council was the appropriate organization to perform this task. The Panel anticipated that the FAR Council would not have to start from scratch on most, if not all, of these issues, but would be able to select from among existing strategies.

Recommendation 5-1: Organizational 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.

The Panel recognized that a single OCI clause would probably not fit all circumstances, so it suggested that the FAR Council consider whether it would be better to set forth a set of such clauses from which procurement officials could select.

The Panel noted that OCIs could arise in various time frames (before, during, and after the award of a contract), and that they could arise in a variety of contexts. Among other possibilities, the Panel identified potential financial conflicts (e.g., attempting to steer business to an affiliate); unfair competitive advantage (e.g., using information learned as a contractor to enhance the contractor's ability to receive a future contract); and impaired objectivity (e.g., reviewing the performance of an affiliate or of a potential competitor for a future contract).

The Panel emphasized that whatever clauses were adopted should "flow down" to the employees, affiliates, and subcontractors of the contractor.

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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.

The Panel concluded that, in view of the tremendous of Federal contracting for services, and particularly in the context of the multisector workforce, additional measures to protect against PCIs by contractor personnel were needed. However, the Panel believes that PCI issues are more critical for certain types of contracts than for others, primarily for service contracts. It concluded that the FAR Council should initially identify those types of contracts where the potential for PCIs raises a concern.

The Panel believes that achieving greater government-wide consistency in protecting against PCIs would be beneficial, in that it would allow agencies to implement best practices, and it would also help to assure that all bidders on Federal contracts – whether successful or not – are aware of their responsibilities and that they structure their operations knowing what was expected of them. On the other hand, given the wide variation in the types of Federal contracts and in the types of entities that perform those contracts, the Panel believes that it would not be appropriate to impose a single set of requirements on all contracts and all contractors.

The Panel concluded that it was not necessary to adopt any new Federal statutes to impose additional requirements upon contractors or their personnel. Rather, the obligations should be imposed – where appropriate – through contract clauses. Such clauses would not necessarily impose specific prohibitions upon contractors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct on the part of contractors and their employees by developing general ethical guidelines and principles and/or by requiring disclosure of potential PCIs.

The Panel does not believe that the requirements imposed on contractors and their personnel – through the contract and solicitation clauses or otherwise – should incorporate the extensive and complex requirements imposed on Federal employees by existing statutes and by the regulatory standards and advisory opinions promulgated by the Office of Government Ethics.

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The Panel was concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government. In part for that reason, it struck from the recommendation draft language that would have required all PCI-related obligations on prime contractors to necessarily “flow down” to all subcontractors.

The Panel recognized the benefits that have been achieved through voluntary agreements, as epitomized by the Defense Industry Initiative (DII), noting it as a model that should be considered by the FAR Council. In addition, the FAR Council should consider the DII suggestions that (1) values-based self-governance should be the preferred model for all Federal contractors, and (2) the DFARS regulatory scheme should be incorporated into the FAR. To the extent that the FAR Council adopts these suggestions, it should also decide the appropriate scope and applicability of such provisions.

The Panel recognized that many companies already have extensive – and effective – ethics policies and programs, and in many cases such companies also do business with non-government entities. It would be inefficient – and confusing to their workforce – to make them create a separate program applicable to their work with the Federal government. Therefore, where existing standards of conduct, codes of ethics, etc. satisfy the principles of the Federal government’s ethics system, those internal rules would not need to be revised. However, the contractors would have to be held accountable – through appropriate clauses in the contract – for enforcing them.

The Panel had initially proposed a sub-recommendation under which the FAR Council would have been directed to analyze existing statutes and regulations to determine if they provide sufficient tools to deter – and to appropriately hold contractors accountable for – violations of PCI and OCI requirements, or whether additional tools are needed. However, the Panel determined that this sub-recommendation was unnecessary, since it concluded that if the FAR Council identified a regulatory or statutory gap, it would make appropriate recommendations through the appropriate channels.

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.

The Panel is aware that many agencies have addressed the issue of how best to protect confidential and/or proprietary information from release or from improper use by competitors. However, others have not. The Panel concluded that substantial benefits could be achieved through the development of standardized, government-wide guidance and contract clauses that could be implemented by agencies, rather than having to develop such clauses individually.

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Uniformity would also be helpful in those ever more common situations where a given contractor doing work for one agency obtains access to information that had been provided to another agency.

The Panel urged the FAR Council to identify and, if possible, standardize the ways in which contractors and/or agencies would be able to enforce violations of non-disclosure agreements.

The Panel contemplated that the clauses and principles identified by the FAR Council would be included in the FAR.

The Panel emphasized that it was not seeking to address long-standing issues related to appropriate use of the intellectual property of the Government or of another contractor. Rather, the issue is what can be done to prevent the improper disclosure of proprietary information, particularly since in many cases contractors are required under the contract to share such information with the Government and with other contractors.

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.

The Panel noted that in many instances a salutary policy is promulgated, but it is not effectively implemented because the individuals who have the responsibility are not trained on how to implement it.

There would be two aspects to the recommended training: first, to educate procurement personnel so that they are sensitized to the issues and are aware that something ought to be done to address potential OCIs, PCIs, and disclosure issues; and second, to provide uniform guidance on how to respond to such issues so these officials do not have to reinvent the wheel.

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.

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Although the Panel recognized that contractor personnel who work alongside civil servants would generally not be subject to all of the same ethics rules, it thought that it would be helpful if they understood the rules applicable to the Federal workers with whom they work. For example, it would be a good idea if contractor personnel understood why a co-worker could not accept an expensive lunch or gift.

However, the Panel only recommended that agencies consider implementing such a training program for their contractor personnel, as opposed to recommending that all agencies be required to do so. In addition, the scope and content of whatever training was offered would be decided on an agency-by-agency basis.

The Panel found that the costs associated with such training would be minimal, since the contractor personnel could simply attend training already being provided to Government employees, or – in some agencies – would receive the training at their convenience over the Internet.

An agency could enforce a requirement that contractor personnel attend the Federal training the same way it enforces other training requirements, such as safety training.

The Panel considered recommending the converse to this recommendation (i.e., to require Federal employees in a blended workforce environment to attend ethics training sessions given to contractor personnel), but it decided not to adopt such a recommendation, in part because it would be unwieldy in circumstances where a Federal employee worked alongside personnel from several different contractors.

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.

The Panel emphasized that contractors need to be held accountable for complying with ethical standards and principles identified in Recommendation No. 5, so there need to be consequences attached to any such violations.

The Panel concluded that the enforcement tools that currently exist (e.g., suspension and debarment) are sufficient – if they are properly utilized – and that there is no need for Congress to adopt additional statutory remedies. However, the Panel also concluded that additional training in when and how to use these remedies is important.

The Panel emphasized that in addition to protecting the Government's interests directly, it was also important to assure that unethical entities do not have an unfair competitive advantage over ethical companies.

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The Panel considered whether to recommend an amendment to existing law that would expressly authorize the imposition of a lifetime ban upon repeated violators, but it decided not to do so.

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CHAPTER 7

REPORT ON FEDERAL PROCUREMENT DATA

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

Report on Federal Procurement Data

PART I – Background

Government Efforts to Track Contract Spending

A. Introduction

The Panel's decision to develop findings and recommendations related to the government's procurement data was the result of its efforts to obtain such data in support of the various working groups of the Panel. The Federal Procurement Data System – Next Generation (FPDS-NG) is the only governmentwide system that tracks federal procurement spending. The system does not track any other kind of federal expenditures such as grants or loans. The Panel's results with obtaining usable data were mixed. Based on these experiences, we believed we might be able to identify some opportunities to improve the reliability and transparency of data on procurement spending. While the Panel has attempted to address the accuracy of data in general and the transparency of it in particular, this report is not a full scale review of FPDS-NG, but rather the result of the Panel's targeted requests for data.

And despite some frustration, the Panel recognizes that the FPDS-NG system was newly implemented in 2004, achieving a remarkable migration of 10 million transactions from the legacy system, and, as such, should not be subject to blanket criticism. The Panel has, after all, obtained important insights through this data, bringing to light the prescience of Congress in directing this Panel to review interagency contracts and which supports GAO's inclusion of these contracts on its High Risk series in 2005. However, the Panel did meet with some significant frustrations that it has attempted to address.

B. History of the Federal Procurement Data System

In 1972, the Commission on Government Procurement reported that no single Government organization was responsible for collecting and reporting on what executive agencies were buying or the total value of those purchases.¹ The Commission found that

- The Congress needs this basic information to make informed decisions on matters of broad public policy relating to procurement programs.
- The executive branch needs this information to determine the policy necessary for managing the procurement process.
- Interagency support activities need this information to develop and improve the services offered.

¹ Final Report of the Commission on Government Procurement, Part D, *Acquisition of Commercial Products*, Ch. 2 (December 1972).

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- Suppliers need this information to develop programs to service the Federal market. Full information creates a more competitive market place and provides a better opportunity for individual suppliers to compete.

To meet these needs, the Commission recommended establishing a system for collecting and disseminating procurement statistics. Congress passed the Office of Federal Procurement Policy Act (Public Law 93-400) in August 1974, which, in part, required the Administrator of the Office of Federal Procurement Policy (OFPP) to establish such a system.

A committee, representing twelve agencies, studied the existing procurement management systems of the Department of Defense, National Aeronautics and Space Administration, and the Department of Health, Education and Welfare. The committee's July 1975 report stated that the new system should be designated as the Federal Procurement Data System (FPDS) and reports issued by the system should answer the following questions:

- Who are the agencies doing the procuring?
- What products or services are procured?
- What contractor is providing the products or services?
- When were the procurements awarded?
- Where is the place of performance?
- How was the product or service procured (e.g., negotiation authority, pricing provisions, extent of competition, and set asides).

In February 1978, the Administrator of OFPP issued a memorandum that established the system and advised the Departments and agencies that DoD would act as executive agency for OFPP and manage both the system and the Federal Procurement Data (FPDC). The memorandum also established a Policy Advisory Board chaired by OFPP and issued a manual on reporting procedures. The first data was to be reported to FPDC in February 1979 beginning with data collected for the first quarter of fiscal year 1979. In 1982, this responsibility was transferred to the General Services Administration (GSA), where it remains today.

The initial reporting requirements covered 27 data elements reported on each individual procurement (or modification) in excess of \$10,000. These reports were to be uniform, showing the same 27 data elements for each procurement then forwarded to the FPDC responsible for consolidating the information for each agency and reporting to Congress, the Executive branch and industry. The Federal Procurement Report has been published every year since.

C. Technology

The original FPDS was maintained on an IBM mainframe computer. The system used numerous COBOL programs and stored the data on magnetic tape. Processing the data required more than one hundred steps. Maintaining COBOL programming and still residing on a mainframe computer, the second generation was released in 1987. The third generation saw the

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system move in-house and was based on an Oracle relational database management system. It allowed for online data entry and provided hourly batch processing. But it relied on agency feeder systems that were responsible for some variances between the actual agency award data and FPDS data. These systems also had hidden costs, often requiring contracted support for each change to the data collection system. The time and resources involved with modifying these feeder systems meant that changes to the data collection requirements could only be made once a year. And the system also did not permit user retrieval of data. Requests for data that fell outside of the information in the yearly Federal Procurement Report had to be specially processed by FPDC staff.

In 2000, leadership from OFPP, DoD, and GSA decided to employ the ongoing initiatives of the Change Management Center (CMC) under the leadership of the Deputy Under Secretary of Defense (Acquisition Reform) to innovate the FPDS. The CMC used a “Rapid Improvement Methodology” that brought together stakeholders to identify and implement process improvement. A Rapid Implementation Team (RIT) was tasked to develop a business case and outcomes for a reengineered FPDS. This RIT conducted meetings in the summer of 2000 and included participation from OFPP as well as

Secretary of Defense (OSD)
Military Services
Veterans Affairs
GSA (including the FPDC)
Department of Education
Department of Transportation
Environmental Protection Agency
Small Business Administration
Internal Revenue Service
Department of Commerce
Department of Treasury
Small Agency Council

The efforts of this team eventually resulted in a solicitation to acquire a new governmentwide electronic data collection and management information system, to be known as the Federal Procurement Data System – Next Generation (FPDS-NG). The overall goal of the acquisition was to

“...reduce the overall cost of data collection and to provide a timely and accurate management information by implementing a system that interoperates with agency electronic procurement systems that report data into the Government’s central database and other electronic commerce systems.”²

² FPDS-NG solicitation, GS00M02PDR0008, October 29, 2002, pg. C-4

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The contract was competed and awarded to Global Computer Enterprises, Inc. in April 2003. The system became operational in October 2003, entering into a transition period lasting two years, during which time the contractor was to work with federal agencies to ensure data transfer and integrate contract writing systems with the new FPDS-NG.³

D. A History of Criticism – Accuracy of Agency Reporting Questioned

From its inception, the Federal Procurement Data System has been plagued with claims that the data itself is inaccurate. These claims have often been misinterpreted as a *system* failure when, in fact, the GAO has been abundantly clear that the failure is largely one of inaccurate or untimely data input by the agencies responsible for reporting. The Government Accountability Office (GAO) performed its first review of the system in 1980, the first year a report was issued on governmentwide data from the system. At that time, only 27 data elements were required on each procurement action in excess of \$10,000. The GAO found that it was "...unlikely that accurate and complete Government-wide data for fiscal year 1979 will be available in the near future."⁴ The GAO cited the number of agencies late in reporting their data to the Federal Procurement Data Center (FPDC) and with respect to accuracy said

"Furthermore, we noted that, once fully operational and debugged, the system will still have limitations. For example, the system relies on the integrity of many individuals to prepare the individual Contract Action Reports and to prepare them correctly. If for some reason a report is not prepared, the data on the contract award will not enter the system. The Center has no means of knowing whether data is reported for all contracts.

The Center has developed a comprehensive edit program to enhance the accuracy of the data received. This edit program will detect inconsistencies and omission, such as identifying failure to complete or fill in any of the items shown on the reporting form. Nevertheless, errors can go undetected in certain instances. For example, if the wrong dollar amount or type of contract is reported, the Center would have no way of discovering the errors."⁵

³ U.S. General Accounting Office, *Improvements Needed to the Federal Procurement Data System – Next Generation*, GAO-05-960R (Washington, D.C.: September 27, 2005), pg. 1

⁴ PSAD-80-33, "The Federal Procurement Data System-Making It Work Better," page ii, Comptroller General's Report To The Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service House of Representatives, April 18, 1980.

⁵ PSAD-80-33, "The Federal Procurement Data System-Making It Work Better," page ii, Comptroller General's Report To The Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service House of Representatives, April 18, 1980, pg. 9

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Section 10 of the OFPP Act Amendments of 1988 (P.L. 100-679) required OFPP, in consultation with the Comptroller General, to conduct a study and report to Congress on the extent to which the data collected by the FPDS were adequate for the management, oversight, and evaluation of Federal procurement. The study was based on public comment, interviews with stakeholders, and responses to questionnaires from agencies, industry, and congressional staffs. For instance, the House Information Systems (HIS) Office told OFPP that they believed that greater attention was needed to improve accuracy and timeliness of the existing data rather than expansion of the number and types of data elements collected.⁶ Industry also expressed concerns. The Professional Services Council (PSC) was critical of the system design, the classification system for professional and technical services, and accuracy in general. On the latter, OFPP reported PSC as stating

“PSC’s informal review of the FPDS file revealed errors in a number of the data fields, most obviously in the dollar obligations for contract activities. PSC strongly urges the application of professional quality-control standards to all aspects of FPDS data collection, coding, editing, and processing. No user of the FPDS is served well by erroneous data.”⁷

In a 1994 GAO letter to the Administrator of OFPP, GAO stated that

“...the Center does not have standards detailing the appropriate levels of accuracy and completeness of FPDS data. We also found that some users perceive that FPDS data could be more accurate and complete. These users have identified instances where contractor names and dollar amounts were erroneous. We believe developing standards for FPDS data accuracy and completeness, then initiating a process to ensure that these standards are met, would improve data accuracy and completeness.”⁸

In an October 2001 review of the Historically Underutilized Business Zone (HUBZone) program, GAO found that

“Reported HUBZone program achievements for fiscal year 2000 were significantly inaccurate. We found that the value of contracts awarded to HUBZone firms could be hundreds of millions of dollars different than the reported achievements...The inaccuracies resulted from data entry errors and insufficient guidance on how to

⁶ OFPP Report to the Congress, Study of the Federal Procurement Data System (FPDS) June 1989, pg. 39 (Appendix 4).

⁷ OFPP Report to the Congress, Study of the Federal Procurement Data System (FPDS) June 1989, pg. 35 (Appendix 4).

⁸ GAO Letter, AIMD-94-178R, OMB and GSA: FPDS Improvements

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report agency data. FPDC includes the inaccurate data in its annual report on federal procurement activities. As a result of data problems, the Congress and federal agencies cannot use this data to gauge the program's success or to ensure that the program is working as intended."

...hundreds of millions of dollars different than reported. Although the Federal Procurement Data Center (FPDC) caught some of the errors through inconsistencies flagged through their edit checks, FPDS officials said that they had neither the knowledge to correct the data nor the authority to require agencies to correct them."⁹

The GAO August 2003 review of task and delivery orders resulted in yet more criticism, identifying errors and noting

"...we identified numerous other FPDS data errors during the course of our review. We, therefore, limited our use of FPDS data to identifying general multiple-award contract trends, as shown in figure 1, and to selecting our sample. We will be providing additional information on FPDS errors in a separate letter."¹⁰

And more of the same followed in September 2003, with a GAO review of yet another program:

Because the Federal Procurement Data System contains unreliable data about the simplified acquisition test program, GAO was unable to determine the extent to which federal executive agencies – including DOD – have used the test program and have realized any benefits. Specifically, the database indicated that the Departments of Treasury, Defense, and Justice were the three largest dollar-value users of the test program in fiscal year 2001 (the latest year with complete data available). But GAO found that FPDS either overstated or understated use of the test program by millions of dollars.¹¹

But significantly, GAO found these problems were perpetuated in FPDS through inaccurate agency reporting. For instance, after reviewing their files, two DoD buying agencies

⁹ U.S. General Accounting Office, *Small Business: HUBZone Program Suffers from Reporting and Implementation Difficulties*, [GAO-02-57](#) (Washington D.C.: Oct. 26, 2001), page 1.

¹⁰ U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Deliver Order Regulations*, [GAO-03-983](#) (Washington D.C.: Aug. 29, 2003).

¹¹ U.S. General Accounting Office, *Contract Management: No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program*, [GAO-03-1068](#) (Washington D.C.: Sept. 30, 2003).

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that reported a combined \$146 million in test program transactions, said that, in fact, *none* of the reviewed actions, a large dollar sampling of all actions they reported, were done under the test program. Other agencies were found to have similar reporting inaccuracies.¹²

In a December 2003 letter to OMB, GAO related these long-standing concerns stating that their letter "...conveys our serious and continuing concerns with the reliability of the data contained in the Federal Procurement Data System (FPDS)..."¹³ The letter goes on to express GAO's optimism about the new FPDS-NG system but cautioned that the

"Information in FPDS-NG can only be as reliable as the information agencies enter through their own systems. In the long term, data reliability should improve as agencies fund and implement electronic contract writing systems."¹⁴

The following summer, OMB issued a letter to agencies and the President's Management Council addressing these GAO concerns and laying out a series of steps for agencies to take to prepare for effective interface with the new FPDS-NG. These steps included a documented quality assurance program and assigning the resources and funds to ensure that major buying activities had contract writing systems capable of transferring data to the new system.

GAO again sent a letter to OMB in September of 2005 addressing its concerns that the largest contracting agency, DoD, representing 60 percent of the contracting actions, had yet to accomplish a machine-to-machine interface with FPDS-NG and had twice delayed its plans to do so. The delay, said GAO, would impact the ability of FPDS-NG to report accurate and timely data. This letter also raised questions about the system's ability to capture information on interagency contracting transactions stating that their attempts to do so had been unsuccessful. While recognizing that full implementation had not been accomplished, GAO provided some recommendations for improvement including working with DoD and other agencies to ensure full electronic interface, easing the use of the Standard and Ad-Hoc reporting tools added to the system, and, finally, to assess whether FPDS-NG was the appropriate tool to collect interagency contracting data.¹⁵ In response to GAO's letter, OMB and GSA officials concurred with the recommendations and said it was a top priority to ensure DoD connected its contract writing system to FPDS-NG. OMB advised that FPDS-NG had a limited role in reporting on interagency contracting and GSA cautioned that FPDS-NG was never intended to collect and report information regarding financial transactions between government agencies.

¹² U.S. General Accounting Office, *Contract Management: No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program*, GAO-03-1068 (Washington D.C.: Sept. 30, 2003), pg. 6

¹³ U.S. General Accounting Office, *Reliability of Federal Procurement Data*, GAO-04-295R (Washington, D.C.: Dec. 30, 2003), pg. 1

¹⁴ U.S. General Accounting Office, *Reliability of Federal Procurement Data*, GAO-04-295R (Washington, D.C.: Dec. 30, 2003), pg. 3

¹⁵ U.S. General Accounting Office, *Improvements Needed to the Federal Procurement Data System – Next Generation*, GAO-05-960R (Washington, D.C.: September 27, 2005), pg. 5

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Since the time of this letter, OFPP and GSA have worked closely with DoD and a fully operational interface is expected by December 2006. The Panel notes that, unlike GAO, the Panel staff did not have difficulty accessing and obtaining data from the Standard Reports template. However, much like GAO, Panel staff was not prepared to effectively use the Ad-Hoc reporting function of FPDS-NG even after training. This may well have been because the Panel's data requests have been quite complex. GSA has since upgraded that tool to provide a more user-friendly experience. And while the Findings section of this report will address the problems encountered in obtaining certain interagency contract information, the Panel was able to obtain basic, high level information about interagency contracting from FPDS-NG.

On September 26, 2006, nearly a month after the Panel's last public meeting, the President signed the Federal Funding Accountability and Transparency Act of 2006, a bipartisan sponsored Senate bill that would require OMB to oversee the development and maintenance of a single online and easily searchable web site, free to the public, that would provide disclosure of information related to the entities and organizations that received federal funds. Clearly, while this is out of the scope of FPDS-NG, it would seem that the nearly 25 years of findings on the inaccuracy of data have taken their toll. In the Senate Committee Report, a discussion of the available systems provide part of the data, states:

“There are a number of weaknesses with FPDS that make it ineffective for providing timely, accurate information on procurement actions: first, not every agency is required to report to FPDS, meaning that the only way to gain an accurate count of procurement spending is to ask each agency individually. Second, the database is undependable, often providing data that is unusable or unreliable.”¹⁶

¹⁶ S. Homeland Security and Governmental Affairs, Comm., Federal Funding and Accountability Transparency Act of 2006, S. Comm. Print, 109-329 (2006)

PART II – Findings

What the Panel Learned from and about FPDS-NG

A. Introduction

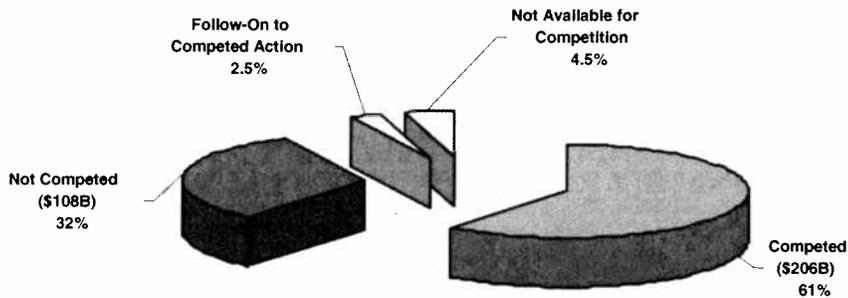
FPDS has collected a significant amount of data over the years. The Federal Procurement Reports that have been published each year for a quarter of a century provide tremendous insight into the changing nature of federal procurement. And the government and public thirst for more data has resulted in an increase from collecting information on 27 data elements for each award in excess of \$10,000 in 1979 to the collection of 150 data elements for each award over \$3,000 today.

Given the Panel's charter, its attention was quickly drawn to the newly available information on interagency contracts, data recently added to the collection requirements. But because there were many ongoing orders and contracts, it is not possible at this time to conduct trend analysis. This is an inherent problem when adding new reporting requirements to procurements that have already been reported using old requirements. But what the Panel learned was quite astonishing. In fiscal year 2004, the government spent 40% of its procurement dollars under interagency contracts.

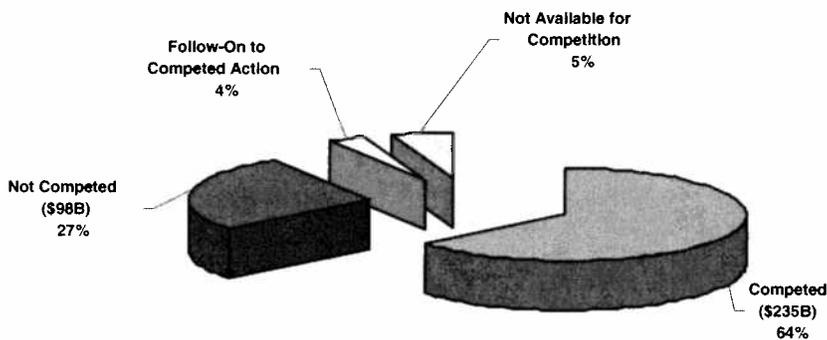
In general, the Panel found that FPDS-NG data at the highest level provides significant insight. However, the reliability of that data, especially on these new reporting elements, begins to degrade at the more granular level due to data specificity on elements for which those reporting may have less familiarity and training.

The following charts provide high level data based on the standard report currently available at <http://www.fpds.gov>. Standard reports allow the public to obtain data on certain elements of federal procurement spending based on time periods defined by the user. The following information was based on the standard competition report for fiscal years 2004 and 2005. The total obligations for these standard reports is calculated on a base that is different from total obligations reflected elsewhere in the Panel's report.

**FPDS-NG FY 2004 Competition Report -
Supplies and Services (Total Obligations =
\$338B)**

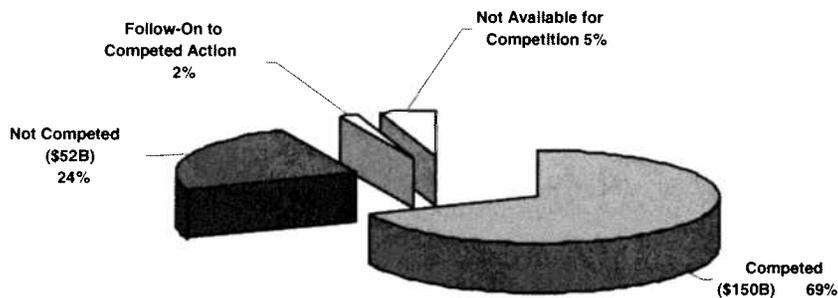


**FPDS-NG FY 2005 Competition Report - Supplies
and Services (Total Obligations = \$365B)**



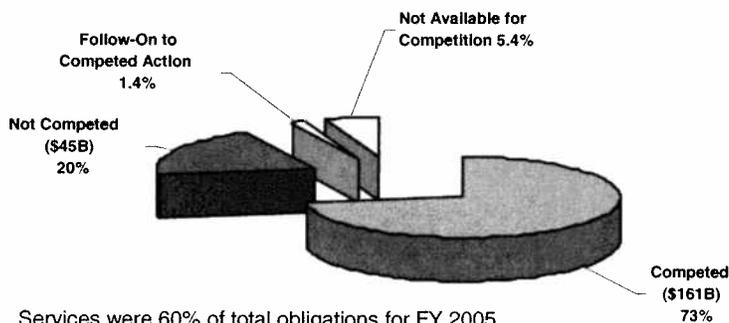
The following charts are based on data that is not available through a standard report and was provided by FPDC in response to a Panel request:

**FPDS-NG FY 2004 Total Services by Extent
Competed (Total Obligations = \$216B)**

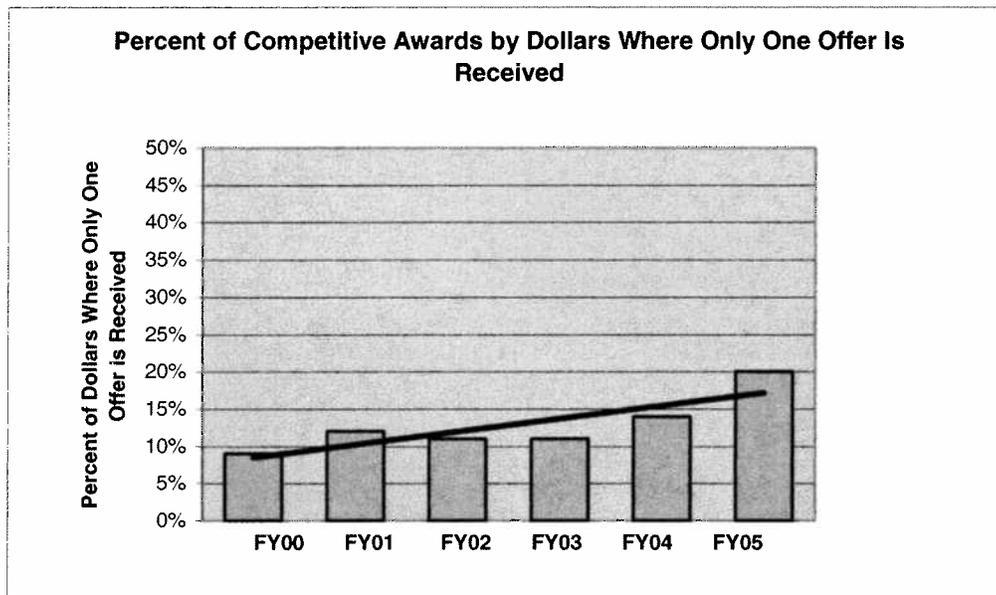


Services were 64% of total obligations for FY 2004 based on comparison with Standard Report "Competition Report."

**FPDS-NG FY 2005 Total Services by Extent
(Total Obligations = \$220B)**



Services were 60% of total obligations for FY 2005 based on comparison with Standard Report



Many other requests for data were provided by the FPDC and reported elsewhere in this report, including the amount of procurement dollars spent under interagency contracts (40% or \$142 billion) and the breakout of that spend between services (62%) and products (38%). This information was very helpful to the Panel. However, below this level of specificity, the Panel faced a frustrating reality.

B. Findings

1. Competition data on orders under Interagency Contracts is unreliable

Initial reports provided to the Panel indicated that orders under these interagency contracts were achieving high levels of competition. But closer inspection revealed a troubling fact. The “extent competed” element for the overwhelming majority of orders was reported as “Full and Open Competition.” This terminology should not apply at the order level where fair opportunity is the yardstick of competition. A review of the data system and the user’s manual indicated that the appropriate distinctions were being made during the collection of the data, namely, the selection of either competitive or non-competitive delivery order and, if the latter, the system was designed to force the selection of a fair opportunity exception. So why were the reports showing less than 1% of awarded value as competitive or non-competitive orders with the majority of orders being reported as “Full and Open Competition?” FPDC staff began to investigate and discovered a few underlying causes.

First, validation rules for competition changed in the new FPDS-NG and again in the second year of the system. Civilian agencies developed data conversion rules in this transition. Prior to December 2004, the legacy FPDS User Manual instructed agencies to use the same

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“extent competed” options as were available on definitive contracts (e.g., full and open competition). In December 2004 this policy was changed to allow for a clear choice at the order level, competitive or non-competitive delivery order, with an accompanying validation rule that would require the selection of an exception to fair opportunity for non-competitive delivery orders. While this was implemented, the validation rules are not functioning as intended. Second, all DoD Federal Supply Schedule orders are automatically coded by DoD as “full and open competition.” Finally, most of the other orders derived their extent competed from the master contract.

2. Current value and estimated value of orders under Interagency Contracts is not available from migrated data

The legacy FPDS system collected a single “Dollars Obligated” field. Although the benefit of the estimated, current and ultimate value was identified, at the time of migration, existing legacy systems did not capture or collect this data as part of the business process. As with all the additional elements, they were only collected on new transactions.

3. Current value and estimated value of orders under Interagency Contracts is not entered correctly by agencies

The instructions for reporting were unclear until the posting of a new user’s manual with guidance and specific examples. The system is designed to do the math. Agency personnel were supposed to enter only the value of a modification, such as an option. The system would then add that value to any previously entered value to arrive at the value-to-date. But agency personnel were inputting the cumulative value with the modification. The system would then add that to the previous value to arrive at a highly overstated current value. It was this problem that forced the Panel to use only transactional data.

4. Inaccurate user data entry compromises the usefulness of data

Finding 3 above illustrates this point. Without the current and projected value of orders, the dollars associated with these contracts cannot be understood. But this was certainly not the only example of inaccurate user data found. DoD confirmed that they were surprised that the Department had spent \$185 million in soybean farming between fiscal years 2000 and 2005. Department officials thought a more likely explanation could be found in looking at the long NAICS code list. The NAICS code for soybean farming is listed first suggesting that it is simply selected to avoid going through the entire list. This impacts the government’s understanding of its spending behavior while preventing contractors from using the system for market research. DoD’s automatic coding of GSA Federal Supply Schedule orders obfuscates the actual competitive nature of potentially billions of dollars in public expenditure. Impossible pairings of Supply and NAICS codes were uncovered, billions of dollars of GSA Federal Supply Schedule orders were identified as non-commercial, another \$10 billion was either not reported by agencies or mischaracterized as something other than a GSA schedule order. Frequently,

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agencies failed to accurately identify the type of interagency contract their order fell under with schedule orders identified as GWACs or other multiple award contract.

When the Panel attempted to identify the amount of commercial vs. non-commercial spending, it found that billions of dollars in GSA Federal Supply Schedule orders had been, curiously enough, coded as non-commercial, despite the fact that all schedule offerings are, by definition, commercial. And finally, the Panel's own survey of PBA contracts and orders revealed that of the randomly selected files, a full 42% were clearly not PBA. Several agencies admitted to mistakes or erroneous coding of the transaction in FPDS-NG.

5. The OFPP Act does not currently assign responsibility for accurate and timely data reporting within the agency except for a general description of the files to be maintained by "Executive Agencies" and transmitted to FPDS.

6. Data on interagency contract ordering trends is not readily available for analysis

FPDS-NG has dozens of standard reports and an ad-hoc query capability but the data needed for this type of interagency contract analysis had to be specially created. The data element is new and there was little familiarity with it initially. Previously the interagency contracts were not entered into the FPDS legacy system because that system only tracked dollars obligated, so now the base contract data for orders reported in FPDS-NG is not available for older contracts and must be derived from orders. Logic for new transactions and reports was not focused on this data.

7. FPDS was not designed to provide sufficient granularity for spend analysis and strategic decisions

Product and Service Codes (PSC) and NAICS codes are generally too broad for this type of analysis in support of strategic decisions. And while there is a "Description of Requirement" element, it is a free form text field, which doesn't lend itself to the analysis of large amounts of data. There are additional classifications used in two on-line ordering systems (GSA Advantage! and the DoD Email) but these are not passed on to agency contracting or finance systems. Both these on-line systems use the UN Standard Product Service Codes (UNSPSC).

8. FPDS-NG relies on voluntary contributions from the Agencies for operational and enhancement funding.

FPDS-NG is part of the Integrated Acquisition Environment (IAE) funded by agencies. IAE is part of the E-Gov initiatives aimed at integrating and leveraging the investments in automation across agencies and move toward a shared services environment. All cross agency common systems such as FedBizOps, Central Contactor Registration and FPDS-NG are funded and governed by agencies to ensure buy-in and consistency.

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9. a) FPDS data only pertains to use of taxpayer funds in acquisition of products and services. A substantial amount of taxpayer funds are provided by federal agencies to entities for products and services through grants, cooperative agreements, Other Transactions and inter-agency service support agreements (ISSAs).

b) Taxpayers should be provided the maximum level of transparency on the use of their tax dollars through contracts, grants, cooperative agreements, and inter-agency service support agreements (ISSAs). Transparency can be greatly enhanced by providing a single, integrated, web-accessible database for search by the public on the use of grants, contracts, cooperative agreements, Other Transactions and ISSAs. Such a data system should, at the least, allow the public to search for net awards of taxpayer funds to specific companies, organizations, or governmental entities.

PART III – Recommendations

What the Panel Learned from and about FPDS-NG

A. Introduction

B. Recommendations

1. OFPP shall ensure that FPDS-NG corrects the reporting rules for competition immediately.

The unavailability of competition data at the order level combined with the current status of interagency contracts on the GAO High Risk series erodes the public trust in a critical acquisition tool for streamlining. Therefore, it is imperative that the data reflect the actual level of competition on the order, not on the master contract level. With 40% of procurement dollars awarded under these orders, ensuring they are awarded using an appropriate level of competition to ensure the taxpayer reaps the benefits of competition.

2. OFPP shall ensure that validations apply equally to all agencies unless there is a statutory reason to differ.

During the Panel's review of the reports on competition of orders under interagency contracts, the Panel was perplexed as to why there were so many differences in the way civilian and DoD agencies capture this information. While the rules are the same, for instance, on the use of fair opportunity, the structure of the collection of this information differs for civilian and DoD agencies, with DoD maintaining separate reporting instructions and requiring separate maintenance and then harmonization of the data for governmentwide reporting purposes. This is inefficient given that the data itself is the same for both DoD and the civilian agencies. Both methods are acceptable for determining the level of competition at the order level and either would work for both DoD and the civilian agencies. The Panel recommends that for efficiency, a single uniform approach should be employed unless there is a statutory reason to differ.

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3. An Independent Verification and Validation (IV&V) should be undertaken to ensure all other validation rules are working properly in FPDS-NG.

The Panel recognizes that there is a cost associated with IV&V that was not anticipated in the fiscal year 2007 budget. This may mean already scheduled priorities might be delayed. However, ensuring that the system is functioning as intended is essential given the volume of transactions entered into the system in a single year, over 10 million in fiscal year 2004.¹⁷

4. Congress should revise the OFPP Act to assign responsibility for timely and accurate data reporting to FPDS-NG or successor system to the Head of Executive Agency

The Panel recognizes the value that increasing integration between the various agency contract writing systems and FPDS-NG offers. But given the Panel's findings and the depressingly long history of criticism launched by the GAO at agency data accuracy, the Panel believes that accountability must be instituted at all levels of the organizational structure. This is an ingredient in ensuring that accuracy and timeliness is elevated through the mechanism of leadership to the field. Only assigning specific responsibility at a leadership level will encourage the elevation of accuracy to those entering data. The Panel provides specific amendatory language at Appendix A.

5. Agencies shall ensure that their workforce is trained to accurately report required contract data. The training should address the purpose and objectives of data reporting to include:

- a. Improving the public trust through increased transparency
- b. Providing a tool for sound policy-making and strategic acquisition decisions

While system validation rules, addressed in recommendation 3, are an efficient means of ensuring accuracy, these rules can only identify omissions and eliminate internal reporting contradictions. The GAO's first review of FPDS, quoted in the background section above, accurately identified the limits of such system rules, noting that the system relies on the integrity of many individuals for correct reporting.¹⁸ We note that the current FPDS-NG User's Manual is nearly 100 pages covering approximately 150 data elements. The Panel's recommendation on training includes an emphasis on the purpose and objectives of data reporting. Reinforcing these may help to ensure that those who enter data understand the value of what they are doing.

¹⁷ Testimony of Teresa Sorrenti, Program Manager of the Integrated Acquisition Environment, February 23, 2006 pg. 248

¹⁸ PSAD-80-33, "The Federal Procurement Data System-Making It Work Better," page ii, Comptroller General's Report To The Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service House of Representatives, April 18, 1980, pg. 9

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6. OMB should establish, within 90 days of this report, a standard operating procedure that ensures sufficient and appropriate Department and Agency personnel are made available for testing changes in FPDS-NG and participating on the Change Control Board

The Panel believes it is essential for the continued maintenance of the system that the Departments and Agencies provide both operational and policy expertise as warranted. Full testing suffers if agencies are not sufficiently bound to participate. The problem identified with the validation rule might have been caught earlier if there were more robust testing. The Panel heard from one FPDC staff member that there are times when only one individual is available to test large numbers of changes.

7. Agency internal reviews (e.g., Procurement Management Reviews, Inspector General audits) should include sampling files to compare FPDS-NG data to the official contract/order file

To reinforce the need for greater accuracy, the Panel recommends that internal agency Procurement Management Reviews and IG audits include a comparison of FPDS-NG data to the official contract/order file. This should not be a stand-alone audit of the accuracy of this data, but rather a standard element considered, on an on-going basis, during any review the agency undertakes to provide consistent oversight in this area.

8. The OFPP Interagency Contracting Working Group should address data entry responsibility as part of the creation and continuation process for interagency and enterprise-wide contracts.

This recommendation addresses the concerns expressed by the GAO when reviewing interagency contracts and determining that there is not always a clear delineation of the roles and responsibilities between ordering agencies, contract holders, and the user.

9. The Government Accountability Office (GAO) should perform an audit that covers not only the quality of FPDS-NG data but agency compliance in providing accurate and timely data.

During its review of data concerns, the Panel spoke with GAO officials who told us that they intended to perform another audit of FPDS-NG. The Panel recommends that this audit cover agency compliance in providing accurate and timely data as an integral element to assessing the quality of FPDS-NG data.

10. OFPP should ensure that FPDS-NG reports data on orders under interagency and enterprise-wide contracts, making this data publicly available (i.e., standard report(s)).

The OFPP Interagency Contracting Working group shall provide the specific guidelines consistent with the reports requested by the Panel to include competition information at the order

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level sufficient to answer, at a minimum: Who is buying how much of what using what type of indefinite delivery vehicle and if not buying it competitively, what exception to fair opportunity applies? Other considerations, such as pricing arrangements, socio-economic status, number of offers received, fee information, and PBA should be considered when designing the report.

11. The FPDS-NG report provided to the Panel that shows the dollar transactions by Agency and by type of interagency vehicle (e.g., FSS, GWAC, BPA, BOA, other IDCs) and Product or Service Code should be made available to the public in the short term.

While the information contained in these reports does not provide the level of insight the Panel eventually seeks and recommends under recommendation 10 above, these reports do provide some transparency and they should be made available to the public. The Panel believes that transparency imparts positive pressure that may elevate the need to improve and expand the data to meet the standard of transparency warranted by the \$142 billion spent on these contracts. The FPDC is working to post these reports now. They will be available at their website at <http://www.fpds.gov>.

12. OFPP should devise a method and study the cost-benefit of implementing additional data reporting requirements sufficient to perform strategic sourcing and market research within and across agencies.

13. OFPP should seek agency and industry perspective to determine if the UNSPSC classification or some other classification system is feasible as a new data element if the scope of data collection is expanded.

During its public deliberations, there was significant debate on the recommendation regarding granularity. One point of view was that the Panel's recommendation must direct OFPP to develop requirements that would result in the government being able to determine exactly what goods and services it buys. This perspective notes that without this direction, the government will continue to collect data but it will not be sufficient to leverage the government's buying power to make strategic sourcing decisions. Others were concerned with the volume of work this would create for buying organizations to identify and report this level of specificity and their concerns with how this could be accomplished especially with regard to services. While all agreed that the current system was not intended nor designed to provide the level of granularity necessary for spend analysis and strategic sourcing, the Panel could not agree to direct this level of granularity. Instead, it recommends two interim steps beginning with a cost-benefit analysis and including industry input on the feasibility of identifying such data if the scope of data collection were expanded to collect it.

14. OMB shall ensure that Agencies provide sufficient funds to ensure that these systems are financed as a shared service based on levels agreed to by the CAO Council and OFPP sufficient to support the objectives of the systems

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Again, there was significant debate regarding the funding of FPDS-NG. Some members were concerned that there should be a sustained source of funding through an appropriation arguing that there is a cost to doing business and if collecting and reporting on what the government buys is of value, then the government should recognize this and fund it. This point of view believed that collecting the money from agencies via a “pass the hat” process put FPDS-NG in an unstable funding position with too many other competing interests at the agency level. But those favoring the “pass the hat” method said it is currently working to support the needs of the Integrated Acquisition Environment, including FPDS-NG. However they recommended that those agencies that budget for the IAE need to also ensure they actually provide those funds when the time comes. Therefore, the Panel generally settled on a recommendation which would have OMB ensure that the funds agencies provide are sufficient to ensure that the systems are financed as a shared service and sufficient to meet the objectives of the system.

15. Within one year, OMB shall conduct a feasibility and funding study of integrating data on awards of contracts, grants, cooperative agreements, inter-agency service support agreements (ISSAs) and Other Transactions through a single, integrated and web-accessible database searchable by the public.

The Panel acknowledging that FPDS-NG is only intended to provide data on expenditures through contracts, recognized the ongoing discussion in Congress of a bipartisan sponsored bill that would provide visibility into the volume of monies expended through grants, cooperative agreements, ISSAs and Other Transactions as well as contracts. The Panel recommended a feasibility and funding study as an interim step.¹⁹

¹⁹ This recommendation has been overtaken by events. In August 2006, the Congressional Budget Office (CBO) released an estimate of \$15 million for implementing S. 2590, the Federal Funding and Accountability Transparency Act of 2006. The President signed the bill into law on September 26, 2006 and OMB is currently working towards implementation.

Appendix A - DRAFT STATUTORY REVISION FOR RECOMMENDATION #4:

41 U.S.C. § 417

United States Code Annotated Currentness

Title 41. Public Contracts
Chapter 7. Office of Federal Procurement Policy (Refs & Annos)
§ 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include--

(1) with respect to each procurement carried out using competitive procedures--

(A) the date of contract award;

(B) information identifying the source to whom the contract was awarded;

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures--

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under section 253(c) of this title or section 2304(c) of Title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures".

(d) Transmission and data system entry of information

Heads of Executive Agencies shall ensure the timely and accurate transmission of the information included in the record established and maintained under subsection (a) of this

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section ~~shall be transmitted~~ to the General Services Administration **for entry** and ~~shall be entered~~ into the Federal Procurement Data System or successor system referred to in section 405(d)(4) of this title.