CONFRONTING THE LOOMING CRISIS IN THE FEDERAL ACQUISITION WORKFORCE

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I. Introduction 172
II. The Changing Acquisition Environment 175
A. A New Era of Acquisition Reform 175
1. A Vision for Transforming and Streamlining the Acquisition Process 177
a. Section 800 Panel Report 177
b. National Performance Review (NPR) of 1993 177
c. Secretary of Defense on Acquisition Reform: A Mandate for Change 179
d. Statement of the Deputy Under Secretary of Defense (Acquisition Reform) to Congress on the Administration Agenda for Acquisition Reform 180
2. Landmark Legislation on Acquisition Reform 180
a. Federal Acquisition Streamlining Act (FASA) of 1994 180
b. Federal Acquisition Reform Act (FARA) 181
c. Information Technology Management Reform Act (ITMRA) 181
3. Acquisition Reform Initiatives 181
a. Alternative Dispute Resolution (ADR) 182
b. Advanced Concept Technology Demonstrations (ACTDs) 182
c. Best Value Contracting 183
d. Commercial Items and Practices 183
e. Cost as an Independent Variable (CAIV) 184
f. Evolutionary Acquisition 185
g. Integrated Product and Process Development (IPPD) and Integrated Product Teams (IPTs) 185
h. Military Specifications and Standards Reform 185

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HeinOnline -- 35 Pub. Cont. L.J. 171 2005-2006

i. Other Transactions 186
j. Performance-Based Acquisition (PBA) 187
4. New Demands on the Acquisition Workforce 188
B. Decrease in the Federal Government Workforce 189
C. Human Capital in Federal Procurement—A Crisis in the Making 190
D. Number and Type of Procurement Actions 191
E. Role of the Government in the 21st Century 192
1. The Federal Workforce—An "Illusion of Smallness" 193
2. The Private Contractor Workforce 194
a. The "Shadow of Government" 194
b. The Economics of Outsourcing—Are the Savings Real? 195
c. Capacity to Manage 195
3. The Evolving Nature of Public Service 196
III. Emerging Procurement Trends and Challenges 201
A. Increase in Service Contracting 201
B. Increase in Intragovernmental Acquisitions 204
C. Increase in Use of the Government Purchase Card 211
D. Expanded Use of Performance-Based Acquisitions 214
IV. A Strategic Approach to Meet Acquisition Challenges 215
V. Conclusion 218

I. INTRODUCTION

Federal agencies spend billions of dollars each year on contracts for goods and services to carry out their missions and support their operations.[1] Effec-

1. Federal agencies procured more than $235 billion in goods and services during fiscal year 2001, reflecting an 11 percent increase over the amount spent 5 years earlier . . . [The Department of Defense (DOD)] is the largest agency in terms of contracting dollars spent, accounting for about two-thirds of the government's total spending on goods and services. In fiscal year 2001, DOD contracted for more than $152.6 billion of goods and services, or more than twice the amount spent by the next nine largest federal agencies combined. . . The significance of contracting in the federal government is reflected by the sheer magnitude and the degree to which contracting consumes agencies' discretionary resources. Overall, contracting for goods and services accounted for about 24 percent of the government's discretionary resources in fiscal year 2001. . . DOD's discretionary resources increased by 10 percent from fiscal year 1997 through fiscal year 2001 and totaled $446.3 billion in fiscal year 2001. Over the 5-year period, the proportion of DOD's discretionary resources spent under contracts remained stable at 34 percent.

U.S. GEN. ACCOUNTING OFFICE, GAO-03-443, FEDERAL PROCUREMENT: SPENDING AND WORKFORCE TRENDS, REPORT TO THE COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, AND THE COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE 3, 5–6, 32 (2003), *available at* http://www.gao.gov/new.items/d03443.pdf [hereinafter SPENDING AND WORKFORCE TRENDS]. These numbers have increased even more dramatically since the terrorist attacks of September 11, 2001. In fiscal year 2000, total federal contract actions numbered over 9.8 million and total federal contract dollars spent were over $218 billion; total Department of Defense (DoD) contract actions numbered over 5.4 million and total DoD contract dollars spent were over $142

HeinOnline -- 35 Pub. Cont. L.J. 172 2005-2006

tive acquisition administration, management, and oversight are essential to ensuring requirements are met with high-quality goods and services at fair and reasonable prices in a timely fashion. This result cannot be achieved without a sufficient number of talented and trained acquisition professionals, whose skills and competencies are vital to the very accomplishment of agency strategic goals and missions.

Events over the last two decades have created a changing and challenging acquisition environment in the Federal Government with increased procurement risks. In an effort to reduce government bureaucracy, the legislative and executive branches called for a smaller, more efficient government, one that had a robust capability with a light footprint. The public demanded a government with the same governmental functions. To address this inconsistency, agencies rushed to offload their work to third parties, all the while cutting government personnel positions.

In the federal acquisition arena, agency officials geared aggressive reform initiatives to streamlining government procurement by increasing efficiency, speed, and freedom for contracting officials and commercializing government procurement. Not waiting to see if these reforms made for a more efficient and productive workforce, agencies slashed the number of acquisition personnel.

The cuts to the acquisition workforce have proven too severe. The Government has increased its procurement spending dramatically since the early 1990s, in large part to support the Global War on Terrorism. The few remaining acquisition personnel face more work than they are capable of doing. Acquisition personnel in buying organizations focus on the work immediately before them—awarding contracts—and are able to devote few resources to contract administration and oversight after contracts are signed.[2] This formula for disaster brings increased risk of significant downstream costs and threatens successful contract performance.

Acquisition reforms and ongoing technological innovations also demand a workforce with new knowledge, skills, and abilities; and an increased outsourcing of work to private contractors requires a workforce that is more business manager than technician. The Government, however, cut personnel with no thought given to the skills and experience of those departing versus

billion. FED. PROCUREMENT DATA CTR., OFFICE OF MGMT. & BUDGET, FEDERAL PROCUREMENT REPORT FOR FISCAL YEAR 2000, at 2 (2001), *available at* http://www.fpdc.gov/fpdc/FPR2000a.pdf. In fiscal year 2001, total federal contract actions and dollars were over 11.4 million and $235 billion, respectively; total DoD contract actions and dollars were approximately 7.4 million and $156 billion, respectively. FED. PROCUREMENT DATA CTR., OFFICE OF MGMT. & BUDGET, FEDERAL PROCUREMENT REPORT FOR FISCAL YEAR 2001, at 2 (2002), *available at* http://www.fpdc.gov/fpdc/FPR2001a.pdf. In fiscal year 2003, total federal contract actions and dollars were over 11.5 million and $305 billion, respectively; total DoD contract actions and dollars were over 5.7 million and $208 billion, respectively. FED. PROCUREMENT DATA CTR., OFFICE OF MGMT. & BUDGET, FEDERAL PROCUREMENT REPORT FOR FISCAL YEAR 2003, at 2 (2004), *available at* http://www.fpdc.gov/fpdc/FPR2003a.pdf.

2. *See* Steven Kelman, *Strategic Contracting Management*, *in* MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 88, 89–90 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).

HeinOnline -- 35 Pub. Cont. L.J. 173 2005-2006

those remaining. Federal agencies are now at risk of not having enough of the right people with the right skills to handle the increased contracting workload. In short, federal agencies face a human capital crisis.

Today, federal agencies are unable to perform the tasks entrusted to them by the American people without the support of third-party contractors. Agencies depend upon contractors in carrying out their missions, and successful contracting is a central part of agency success.[3] It is critical, therefore, that agencies consider contracting a core competency of the organization and use strategic contracting management to promote agency goals.[4]

Strategic contracting management requires looking at how the Government does its business—who does the buying, what does it buy, how does it buy, from whom does it buy, and what did it buy.[5] Answers to the first four questions mean nothing if the contractor fails to deliver what it promised the Government it would deliver. The last question cannot be answered without proper contract administration and oversight after the contract has been signed.

Similarly, acquisition management challenges in today's changed environment require correction through a strategic, integrated, and governmentwide approach—one with leadership; increased and improved knowledge; supporting structures, processes, and roles that maximize return; communication; and metrics. In order to meet these challenges, federal agencies must have sufficient acquisition personnel. More importantly, agencies must have the right people with the right skills doing the right job. Contract administration challenges are for the most part human resource challenges. People are the greatest assets of the Federal Government. To have successful contracting, federal agencies must treat the recruitment, development, and retention of the civilian acquisition workforce as investments and not costs.

This article explores legal, policy, and contracting issues raised by the Government's increased reliance on contractors to perform its work and the simultaneous abandonment of contract administration and oversight. At the heart of each issue is the critical need for strategic human capital management within the acquisition workforce. Part II examines the changing government acquisition environment, with special emphasis on the Department of Defense (DoD). The article discusses the new era of acquisition reform, decrease in the federal government workforce, looming human capital crisis in federal procurement, change in the number and type of procurement actions, and role of the Government in the 21st century. Part III reviews emerging procurement trends and challenges, including the following: (1) a shift in acquisition requirements from goods to services; (2) greater reliance on goods and services acquired through contracts awarded and managed by other federal agencies; (3) significant increases in the use of the government purchase card; and (4) only limited success in using performance-based service contracting,

3. *Id.* at 89.

4. *Id.* at 89–90.

5. *See* Jacques S. Gansler, *A Vision of the Government as a World-Class Buyer, in* THE PROCUREMENT REVOLUTION 13 (Mark A. Abramson & Roland S. Harris III eds., 2003); Kelman, *supra* note 2.

HeinOnline -- 35 Pub. Cont. L.J. 174 2005-2006

a key administration initiative.[6] Finally, Part IV sets forth a strategic approach to meeting the acquisition challenges of today.

The first critical step in managing a more complex acquisition environment is recruiting, developing, and maintaining a skilled acquisition workforce.[7] An organization's people are its greatest assets, for without them it will fail. The second critical step is devoting more resources, including a sufficient number of trained and experienced acquisition personnel, to the administration, management, and oversight of contracts. "Whether the government carries out activities with its own employees or by contract, it must have the core capability . . . to properly manage and be accountable for its work."[8]

II. THE CHANGING ACQUISITION ENVIRONMENT

A. *A New Era of Acquisition Reform*[9]

The authority of federal agencies to contract for goods and services dates back to the Constitution and the founding of our country.[10] Numerous attempts at reforming and improving the acquisition system have been made

6. U.S. GEN. ACCOUNTING OFFICE, GAO-03-98, PERFORMANCE AND ACCOUNTABILITY SERIES: MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: DEP'T OF DEF. 64 (2003), *available at* http://www.gao.gov/pas/2003/d0398.pdf [hereinafter GAO-03-98].

7. COMMERCIAL ACTIVITIES PANEL, U.S. GEN. ACCOUNTING OFFICE, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 29 (2002), *available at* http://www.gao.gov/a76panel/dcap0201.pdf [hereinafter COMMERCIAL ACTIVITIES PANEL REPORT].

8. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-11, 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 3 (1991), *available at* http://archive.gao.gov/t2pbat7/145453.pdf [hereinafter GAO/GGD-92-11].

9. "Acquisition reform" was recently defined as:

> An ongoing series of initiatives sponsored by OSD [Office of the Secretary of Defense] (especially USD(AT&L) [Under Secretary of Defense (Acquisition, Technology and Logistics)] and DUSD(AR) [Deputy Under Secretary of Defense (Acquisition Reform)]) to streamline and tailor the acquisition process. Initiatives include statutory and regulatory reform, CAIV [Cost as an Independent Variable], reform of specifications and standards policy, preference for commercial items, electronic data interchange and the use of the IPPD/IPT [Integrated Product and Process Development/Integrated Product Team] management philosophy for systems development and oversight.

DEF. SYS. MGMT. COLL., DEF. ACQUISITION UNIV., U.S. DEP'T OF DEF., GLOSSARY: DEFENSE ACQUISITION ACRONYMS AND TERMS (10th ed. 2001); *see* Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L.J. 429, 430 (2002). The latest edition of this glossary does not define acquisition reform or any similar phrase. *See* DEF. ACQUISITION UNIV., U.S. DEP'T OF DEF., GLOSSARY: DEFENSE ACQUISITION ACRONYMS AND TERMS (11th ed. 2003), *available at* http://www.dau.mil/pubs/glossary/preface.asp [hereinafter DAU GLOSSARY].

10. *See* United States v. Tingey, 30 U.S. 115 (1831).

> The United States has the capacity to enter into contracts. An incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those power are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.

Id.

HeinOnline -- 35 Pub. Cont. L.J. 175 2005-2006

since then, each with its own recommendations. While some recommendations have been adopted, many have not, and few reform efforts have had significant or lasting desirable changes.

The modern era of defense acquisition began with passage of the Armed Services Procurement Act of 1947.[11] This act established the Armed Services Procurement Regulation, a set of standardized rules for all DoD procurement that became the "ground rules for the formal federal procurement process we know today."[12] Almost immediately, commissions and studies[13] in rapid succession identified ways to improve the defense acquisition system.[14] Much of their focus was on improving the efficiency, effectiveness, and fairness of the acquisition process.

By the early 1990s, new national security challenges, declining budgets and reduced resources, and the fast pace of commercial technology development required "DoD to design a more flexible, agile, and timely acquisition system capable of meeting unpredictable threats."[15] Although the threat of nuclear war lessened after the collapse of the Soviet Union and the end of the Cold War, DoD played an ever-increasing role in confronting new political, economic, and military security challenges for the United States, including global

11. Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301–2316 (2000).

12. Beryl A. Harman, *From the Constitution to FAStA—Origins of Acquisition Reform*, PROGRAM MANAGER, Sept.–Oct. 1995, at 12, 14.

13. Following are some of the commissions and studies done, with full name (common name in parentheses) and year conducted:

Commission of Organization of the Executive Branch of the Government (The Hoover Commission) (1949 and 1955)
President's Blue Ribbon Defense Panel (The Fitzhugh Commission) (1970)
The 1972 Commission on Government Procurement (1972)
Acquisition Improvement Task Force (The Carlucci Initiatives) (1981)
President's Private Sector Survey on Cost Control (The Grace Commission) (1983)
President's Blue Ribbon Commission on Defense Management (The Packard Commission) (1986)
Defense Management Review of 1989 (The Rittenhouse Report)
Department of Defense Acquisition Law Advisory Panel (The Section 800 Panel) (1993)
Numerous studies of the Defense Science Board

CHARLES L. BECK JR. ET AL., DEF. SYS. MGMT. COLL., A MODEL FOR LEADING CHANGE: MAKING ACQUISITION REFORM WORK ch. 1, at 3 (1997), *available at* http://www.dau.mil/pubs/mfrpts/pdf/res97.pdf.

14. As stated in Department of Defense Directive 5000.1, the Defense Acquisition System

> exists to manage the nation's investments in technologies, programs, and product support necessary to achieve the National Security Strategy and support the United States Armed Forces. The investment strategy of the Department of Defense shall be postured to support not only today's force, but also the next force, and future forces beyond that. The primary objective of Defense acquisition is to acquire quality products that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price.

U.S. DEP'T OF DEF., DIRECTIVE 5000.1, THE DEFENSE ACQUISITION SYSTEM 3 (2003), *available at* http://www.dtic.mil/whs/directives [hereinafter DoDD 5000.1].

15. *Defense Acquisition Reform, Hearing Before the Subcomm. on Acquisition and Technology of the S. Comm. on Armed Servs.*, 105th Cong. (Mar. 19, 1997) (statement of Paul G. Kaminski, Under Secretary of Defense for Acquisition and Technology), *available at* http://www.dscc.dla.mil/Library/Quality_Assurance/QALibrary/DOD_DLA_Policies/Defense_Acquisition_Reform.html [hereinafter Statement of Paul G. Kaminski, 1997].

HeinOnline -- 35 Pub. Cont. L.J. 176 2005-2006

terrorism, regional conflicts and policing actions, information warfare, and illegal drug trafficking.[16]

The Department of Defense required an acquisition system that could "get out in front of these new challenges instead of reacting to them."[17] Bottom line: it needed to acquire goods and services faster, smarter, and cheaper. The current era of DoD acquisition reform began when several key reports and other documents provided a vision for transforming and streamlining the acquisition process to meet this goal.[18] Congress, working with DoD and other federal agencies, soon heeded the recommendations of these key documents and enacted various pieces of landmark legislation. The agencies followed with policy statements and regulatory changes to the Federal Acquisition Regulation (FAR),[19] Defense FAR Supplement (DFARS),[20] and agency supplements, then undertook a number of implementing initiatives.

1. A Vision for Transforming and Streamlining the Acquisition Process

a. Section 800 Panel Report

Section 800 of the National Defense Authorization Act for Fiscal Year 1991 directed the Under Secretary of Defense for Acquisition to establish an advisory panel that would "review the acquisition laws applicable to the Department of Defense with a view toward streamlining the defense acquisition process [and] make any recommendations for the repeal or amendment of such laws that the panel considers necessary, as a result of such review."[21] Reporting its findings to Congress in January 1993, the Section 800 Panel recommended over 400 changes to procurement laws and regulations.[22] Its findings and recommendations were the basis for the Federal Acquisition Streamlining Act of 1994, which Congress passed in October 1993.[23]

b. National Performance Review (NPR) of 1993[24]

On March 3, 1993, President Bill Clinton announced the formation of a national performance review directed by Vice President Al Gore.[25] It was to

16. DEF. ACQUISITION UNIV., INTRODUCTION TO DEFENSE ACQUISITION MANAGEMENT 12 (6th ed. 2003) [hereinafter IDAM].

17. *The Administration Agenda for Acquisition Reform, Hearing Before the Subcomm. on Acquisition and Technology of the S. Comm. on Armed Servs.*, 104th Cong. (Apr. 6, 1995) (statement of Colleen A. Preston, Deputy Under Secretary of Defense for Acquisition Reform), *available at* http://www.defenselink.mil/speeches/1995/t19950406-preston.html [hereinafter Statement of Colleen A. Preston].

18. *See* Edward W. Rogers & Robert P. Birmingham, *A Ten-Year Review of the Vision for Transforming the Defense Acquisition System*, DEF. ACQUISITION REV. J., Jan.–Apr. 2004, at 37.

19. FAR 1–53.

20. DFARS 201–253.

21. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101–510, § 800, 104 Stat. 1485, 1587 (1990).

22. BECK, *supra* note 13, at ch. 2, at 2; IDAM, *supra* note 16, at 12–13.

23. BECK, *supra* note 13, at ch. 2, at 2.

24. The NPR was later renamed the National Partnership for Reinventing Government. For more information regarding the NPR, see http://govinfo.library.unt.edu/npr.

25. President William J. Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993), *available at* http://govinfo.library.unt.edu/npr/library/speeches/030393.html.

HeinOnline -- 35 Pub. Cont. L.J. 177 2005-2006

be an intensive, six-month study of every government agency and was the administration's initiative "to redesign, to reinvent, [and] to reinvigorate the entire National Government."[26] The goal was "to make the entire Federal Government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."[27]

The NPR proved to be "one of the most remarkable reform efforts in American history,"[28] having the support and attention of the president, vice president, and other high-level officials over a wide range of federal agencies and activities for a long period of time.[29] Finding that "[t]he Government is broken . . . [and] [t]he whole way the Government operates is incompatible with the world in which we're living,"[30] a key theme throughout the NPR was that the Government must be radically changed from top to bottom to be effective.[31]

On September 7, 1993, Vice President Gore released the NPR's first report, which contained 384 major recommendations for 27 federal agencies and promised $108 billion in savings and a reduction of the civilian, nonpostal federal workforce by 12 percent, or 252,000, between fiscal years 1995 and 1999.[32] This report and an accompanying report on federal procurement[33] presented a comprehensive agenda for streamlining procurement, with a focus on the following five themes: (1) "move from rigid rules to guiding principles" (encourage innovation); (2) "get bureaucracy out of the way" (raise the simplified acquisition threshold, eliminate or simplify government-unique procurement requirements, enhance programs for small business and small disadvantaged business concerns); (3) "center authority and accountability with line managers" (use purchase cards, focus on customer needs and expectations); (4) "create competitive enterprises" (use government supply schedules); and (5) "foster competition, commercial practices, and excellence in vendor performance" (increase reliance on the commercial marketplace and use of electronic commerce, use best value procurement, evaluate vendor past performance).[34]

26. *Id.*

27. *Id.*

28. Donald F. Kettl, The Brookings Institution, Reinventing Government: A Fifth-Year Report Card, at v (1998).

29. *Id.*

30. President William J. Clinton, Remarks Announcing the Report of the National Performance Review and an Exchange with Reporters (Sept. 7, 1993), *in* Public Papers of the Presidents, 2 William J. Clinton—1993, at 1444, 1446–47, http://www.gpoaccess.gov/wcomp/index.html.

31. *See* Al Gore, Report of the National Performance Review, From Red Tape to Results: Creating a Government That Works Better and Costs Less (1993), *available at* http://govinfo.library.unt.edu/npr/library/nprrpt/annrpt/redtpe93/index.html [hereinafter From Red Tape to Results]; Rogers & Birmingham, *supra* note 18, at 39.

32. From Red Tape to Results, *supra* note 31, at iii; *see* Kettl, *supra* note 28, at 2.

33. Nat'l Performance Review, Reinventing Federal Procurement (1993), *available at* http://govinfo.library.unt.edu/npr/library/nprrpt/annrpt/sysrpt93/reinven.html [hereinafter Reinventing Federal Procurement].

34. *Id.* at 5; *see* From Red Tape to Results, *supra* note 31.

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There was pressure on the Clinton-Gore administration to demonstrate that the NPR was real, not just talk, and that its recommendations would, in fact, yield substantial budget savings. The NPR was a management reform initiative, however, and, although many of its recommendations might save money over time, making accurate savings estimates was difficult.[35] The focus turned to the one recommendation holding the greatest promise for clear and immediate significant budget savings—downsizing the federal workforce. Elimination of federal agency employee positions would eliminate the salaries and fringe benefits of employees in those positions. In theory, these "savings would go on forever, unless of course they were replaced by private contractors."[36] Downsizing quickly became a core feature of NPR and eliminating 252,000 federal employee positions soon became 272,900 positions.[37]

c. Secretary of Defense on Acquisition Reform: A Mandate for Change[38]

Based on the Section 800 Panel recommendations and NPR guidelines, DoD developed a vision to reengineer the entire acquisition system. The Secretary of Defense shared this vision, *Acquisition Reform: A Mandate for Change*, with Congress in February 1994. This document discussed why change was necessary and provided focus areas for a reengineered acquisition system.[39] It viewed these focus areas through the framework of requirements determination and resource allocation (what to buy), the DoD acquisition process (how to buy), and contract terms and conditions. The secretary then outlined the goals for the reengineered system, processes that had to be examined, initiatives to be pursued, problems that had been identified, and pro-

35. KETTL, *supra* note 28, at 3; *see* U.S. GEN. ACCOUNTING OFFICE, GAO/OCG-95-1, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS (1994), *available at* http://www.gao.gov/archive/1995/oc95001.pdf [hereinafter GAO/OCG-95-1].

36. KETTL, *supra* note 28, at 3.

37. *Id.*

38. WILLIAM J. PERRY, U.S. SEC'Y OF DEF., U.S. DEP'T OF DEF., ACQUISITION REFORM: A MANDATE FOR CHANGE (Feb. 9, 1994), *available at* http://www.abm.rda.hq.navy.mil/aosfiles/tools/ipt/html/pdf/11.pdf.

39. Secretary of Defense Perry concluded:

> Acquisition reform shares a common border with many of our most important goals: saving the taxpayer money; reinventing Government; strengthening our military; and improving our economy. To meet these goals in today's environment DoD must:
>
> - Be able to rapidly acquire commercial and other state-of-the art products and technology, from reliable suppliers who utilize the latest manufacturing and management techniques;
> - Assist in the conversion of U.S. defense-unique companies to dual-use production;
> - Aid in the transfer of military technology to the commercial sector;
> - Preserve defense-unique core capabilities (e.g., submarines, armored vehicles, and fighter aircraft);
> - Integrate, broaden, and maintain, a national industrial base sustained primarily by commercial demand but capable of meeting DoD's needs;
> - Be able to adopt business processes characteristic of world class customers and suppliers (including processes that encourage DoD's suppliers to do the same); and
> - Be free to stop applying Government-unique terms and conditions on its contractors to the maximum extent practicable.

Id. at 8–9.

HeinOnline -- 35 Pub. Cont. L.J. 179 2005-2006

posed solutions. To demonstrate the commitment of senior DoD leadership to "ensuring that changes will be accepted and institutionalized," a Deputy Under Secretary of Defense for Acquisition Reform was appointed "to be the focal point for the development and implementation of a coherent and practical step-by-step plan for re-engineering each and every segment of the acquisition system."[40] The secretary's vision was the formal beginning of regulatory acquisition reform in DoD.

d. Statement of the Deputy Under Secretary of Defense (Acquisition Reform) to Congress on the Administration Agenda for Acquisition Reform[41]

Colleen Preston, the first Deputy Under Secretary of Defense for Acquisition Reform, identified five critical elements of DoD's reengineered acquisition system. First and foremost, the acquisition system's mission was to meet the needs of the warfighter. Second, the system had to encourage continuous learning and process improvement in order for DoD to be the "world's smartest buyer."[42] Third, DoD would procure best-value goods and services from a national, not defense-unique, industrial base and use commercial practices to the maximum extent practicable. Fourth, the system had to be timely, flexible, responsive, and efficient, with success "judged on the basis of performance related metrics rather than adherence to regulations."[43] Lastly, DoD had to balance the costs of having government-unique contract terms and conditions with the benefits of socioeconomic objectives and potential risks of abuse, eliminating these terms and conditions where possible.[44] Initiatives begun under her tenure that have endured as acceptable methods of operation include the process action team, integrated product team, and efforts to capture lessons learned for application elsewhere within the system.[45]

2. Landmark Legislation on Acquisition Reform

a. Federal Acquisition Streamlining Act (FASA) of 1994[46]

This act has been "hailed as one of reinventing government's most important accomplishments."[47] It implemented many of the Section 800 Panel recommendations, repealing or substantially modifying over 200 provisions of federal procurement law.[48] The act did the following: (1) streamlined low-dollar, low-risk procurements by setting a simplified acquisition threshold of $100,000 and exempting procurements at or below this level from a number

40. *Id.* at 14.
41. *See* Statement of Colleen A. Preston, *supra* note 17; *see also* Colleen A. Preston, *Acquisition Reform: Making It a Reality*, ACQUISITION REV. Q., Winter 1994, at 6.
42. Statement of Colleen A. Preston, *supra* note 17.
43. *Id.*
44. *Id.*
45. Rogers & Birmingham, *supra* note 18, at 40–41.
46. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103–355, 108 Stat. 3243 (1994).
47. KETTL, *supra* note 28, at 3.
48. IDAM, *supra* note 16, at 13.

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of statutory requirements; (2) established preferences for commercial items; (3) promoted electronic commerce; (4) provided relief from the Truth in Negotiations Act (TINA), setting forth circumstances when cost or pricing data are not required; (5) added requirements for notice of awards and debriefings; and (6) provided for greater uniformity and efficiency in the procurement practices of the various federal agencies.[49]

b. Federal Acquisition Reform Act (FARA)[50]

A follow-up to FASA, FARA set forth design-build selection procedures for the construction of public buildings, exempted commercial item acquisitions from TINA and Cost Accounting Standards requirements, further simplified procedures for commercial item procurement, revised procurement integrity restrictions, and eliminated certain contractor certification requirements.

c. Information Technology Management Reform Act (ITMRA)[51]

This act governs the acquisition of information technology by federal agencies. It repealed the Brooks Act,[52] which had given to the General Services Administration (GSA) the authority for purchasing federal information technology and to the General Services Board of Contract Appeals the authority to hear protests of such acquisitions.

3. Acquisition Reform Initiatives

A priority of defense acquisition reform is continuous improvement of acquisition business practices to meet the objective of acquiring goods and services faster, smarter, and cheaper—"essential capabilities for this country to maintain the world's best warfighting forces."[53] The following are a sampling of important initiatives in this area.

49. FASA, Pub. L. No. 103–355, 108 Stat. 3243; *see FY 1997 DoD Acquisition and Technology Program, Hearing Before the Subcomm. on Acquisition and Technology of the S. Comm. on Armed Servs.*, 104th Cong. (Mar. 20, 1996) (statement of Paul G. Kaminski, Under Secretary of Defense for Acquisition and Technology), *available at* http://www.acq.osd.mil/gansler_archives/testimonies/97acq_t_prg.doc [hereinafter Statement of Paul G. Kaminski, 1996]; RALPH C. NASH JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 237 (2d ed. 1998).

50. Federal Acquisition Reform Act (FARA), Pub. L. No. 104–106, §§ 4001–4402, 110 Stat. 186, 642–79 (1996). FARA was Division D, "Federal Acquisition Reform," of the National Defense Authorization Act for Fiscal Year 1996.

51. Information Technology Management Reform Act (ITMRA), Pub. L. No. 104–106, §§ 5001–5703, 110 Stat. 186, 679–703 (1996). ITMRA was Division E, "Information Technology Management Reform," of the National Defense Authorization Act for Fiscal Year 1996. The Omnibus Consolidated Appropriations Act for Fiscal Year 1997 renamed FARA and ITMRA the Clinger-Cohen Act in honor of their congressional sponsors, Representative William Clinger and Senator William Cohen. Omnibus Consolidated Appropriations Act, Pub. L. No. 104–208, § 808, 110 Stat. 3009, 3009–393 (1996).

52. Brooks Automatic Data Processing Act (Brooks Act), Pub. L. No. 89–306, 79 Stat. 1127 (codified as amended at 40 U.S.C. § 759 (1965)), *repealed by* ITMRA, Pub. L. No. 104–106, § 5101, 110 Stat. 186, 680 (1996).

53. IDAM, *supra* note 16, at 16.

HeinOnline -- 35 Pub. Cont. L.J. 181 2005-2006

a. Alternative Dispute Resolution (ADR)

Resolution of contract disputes before the courts and boards had become increasingly formal, costly, and time-consuming. Congress sought to provide alternative means of resolving disputes with passage of The Contract Disputes Act of 1978,[54] Administrative Dispute Resolution Act of 1990,[55] and Administrative Dispute Resolution Act of 1996.[56] Alternative means of dispute resolution are defined broadly to include "conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof."[57] These techniques rely upon the participation of a neutral third party. If traditional negotiations fail, ADR allows for settlement of disputes without the disruption and high costs of litigation. It is now the Federal Government's policy to try to resolve all controversies between the Government and contractor by mutual agreement at the contracting officer's level. The policy also encourages agencies to use ADR procedures to the maximum extent practicable.[58]

b. Advanced Concept Technology Demonstrations (ACTDs)[59]

The ACTD process permits evaluation of maturing concepts and technologies for meeting the warfighter's critical needs before acquisition decisions are made. Potential ACTDs must be "affordable, interoperable, sustainable, and capable of being evolved as the technologies and threats change."[60] The technologies are incorporated into fieldable prototypes, which are placed in the hands of the intended user for evaluation and determination of military utility. If the demonstration is successful and the capability responds adequately to the warfighter's need, the capability may be transitioned into the formal acquisition process. Use of prototypes permits the warfighter "an opportunity to use before we choose" and leaves a residual system with the warfighter for limited operational capability.[61]

54. Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613 (2000). The CDA required agency boards of contract appeals to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e).

55. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101–552, 104 Stat. 2736 (1990).

56. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320, 110 Stat. 3870 (codified as amended at 5 U.S.C. §§ 571–584 (2000)).

57. 5 U.S.C. § 571(3) (2000).

58. FAR 33.204. Within DoD, each component must establish ADR policies and programs and use ADR techniques whenever appropriate. U.S. Dep't of Def., Directive No. 5145.5, Alternative Dispute Resolution (ADR) (1996), *available at* http://www.dtic.mil/whs/directives.

59. For more information on advanced concept technology demonstrations (ACTDs), see the Department of Defense ACTD website at http://www.acq.osd.mil/actd. *See also* Chair of the Joint Chiefs of Staff, U.S. Dep't of Def., Instruction (CJCSI) 3170.01E, Joint Capabilities Integration and Development System (2005) (establishes policies and procedures for the Joint Capabilities Integration and Development System (JCIDS) and requires ACTDs to comply with the JCIDS process as the ACTDs transition into the acquisition process).

60. Deputy Under Sec'y of Def. for Advanced Sys. & Concepts, U.S. Dep't of Def., ACTD Guidelines: Formulation, Selection, and Initiation, http://www.acq.osd.mil/actd/formulat.htm (last visited Aug. 1, 2005).

61. Statement of Paul G. Kaminski, 1997, *supra* note 15; *see* Statement of Paul G. Kaminski, 1996, *supra* note 49.

HeinOnline -- 35 Pub. Cont. L.J. 182 2005-2006

c. Best Value Contracting

Before the current era of acquisition reform, the Government awarded the majority of government contracts to the lowest-cost, technically acceptable offeror. Now the emphasis is on best-value contracting where the Government seeks to award contracts based on the best overall value to the Government.[62] It determines best value by examining the strengths and weaknesses of all relevant factors, such as cost, performance, quality, and schedule, and making trade-offs between cost and noncost factors.[63]

Confidence in the ability of a prospective contractor to provide high-quality goods and services that are on schedule and within cost is an important factor in making a best-value source selection decision.[64] One way to gain this confidence is to collect and evaluate past performance information (PPI) on each prospective contractor.[65] Those with a good past performance record are more likely to perform satisfactorily or better than those with a poor record. Collection and use of PPI also motivates contractors to perform well on current contracts given the potential use of the information for future contracts. Use of past performance expanded with acquisition reform, and the FAR was subsequently amended to require evaluation of past performance on all major negotiated acquisitions.[66]

d. Commercial Items and Practices

Procurement reforms such as FASA established preferences for buying commercial items whenever possible to save money and reduce acquisition time, rather than paying contractors to develop government-unique items.[67] Because competitive market forces help maintain fair and reasonable prices for commercial items, FAR part 12 provides for streamlined solicitation and

62. *See* FAR 2.101; FAR pt. 15.

63. IDAM, *supra* note 16, at 14–15. For an example of a best-value source selection decision in which the Government considered a technical superiority of approximately 15 percent more important than an additional $500 million in cost, see Lockheed Missiles and Space Co., Inc. v. Bentsen, 4 F.3d 955 (Fed. Cir. 1993). Affirming the decision of the General Services Board of Contract Appeals denying the protest, the court held that price was a factor in the Government's award decision and that the Government did not abuse its discretion by skewing the importance of technical subfactors in its final decision.

64. Office of the Under Sec'y of Def. for Acquisition, Tech. & Logistics, U.S. Dep't of Def., A Guide to Collection and Use of Past Performance Information 1 (2003), *available at* http://www.acq.osd.mil/dpap/Docs/PPI_Guide_2003_final.pdf [hereinafter PPI Guide].

65. *See id.;* Memorandum from Jacques S. Gansler, Under Secretary of Defense, Department of Defense, to various departments, offices, commands, and agencies throughout DoD, Collection of Past Performance Information in the Department of Defense (Nov. 20, 1997), http://www.acq.osd.mil/dpap/Docs/collect.pdf. FAR pts. 9, 15, 19, 36, and 42 set forth policies and requirements for collecting and using past performance information (PPI). For a discussion of the collection, use, and benefits of past performance information, see Nathanael P. Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 Pub. Cont. L.J. 637 (2000). *But see* Ross W. Branstetter, *Acquisition Reform: All Sail and No Rudder*, Army Law., Mar. 1998, at 3, 8 (questioning the value of collecting PPI and viewing it as complicating, rather than streamlining, the acquisition process).

66. FAR 15.304(c)(3).

67. Spending and Workforce Trends, *supra* note 1, at 17.

HeinOnline -- 35 Pub. Cont. L.J. 183 2005-2006

evaluation procedures to procure commercial items.[68] Overall, agency usage of FAR part 12 procedures increased 148 percent between fiscal years 1997 and 2001, going from $16.7 billion to $41.4 billion.[69] Defense Department usage increased 127 percent between fiscal years 1997 and 2001, going from $11.6 billion to $26.4 billion.[70]

A related initiative is DoD's dual-use strategy on leveraging commercial sector technology innovation and moving to an integrated national industrial base. Commercial investment in research and development surpassed that of DoD in 1965, and the margin between the two has grown wider each year.[71] Through its dual-use strategy, DoD hopes to enhance military capability by taking advantage of the rapid advances in commercial technology and products and lower life cycle costs.[72] The primary goals are (1) leverage the commercial sector's research, technology, products, and processes for DoD's benefit; (2) integrate military and commercial production so that military and commercial items are made on the same production lines; and (3) insert commercial technology and components into military systems.[73]

e. Cost as an Independent Variable (CAIV)

The defense acquisition process set performance levels in the past to meet the threat and adjusted cost and schedule accordingly. Today, "[a]ll participants in the acquisition system shall recognize the reality of fiscal constraints. They shall view cost as an independent variable, and . . . shall plan programs based on realistic projections of the dollars and manpower likely to be available in future years."[74] Each defense program or system now has three primary, interdependent variables: performance that satisfies operational needs, affordable life-cycle costs,[75] and delivery according to schedule.[76] Goals and objectives are set for each; however, trade-offs among the three are inevitable in a resource-constrained environment.[77] The overall goal is to obtain and maintain a superior yet affordable warfighting capability.

68. These procedures, for example, allow contracting personnel to combine synopsis and solicitation requirements, use streamlined evaluation techniques, and eliminate some administrative requirements. *See* FAR pt. 12.

69. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 18.

70. *Id.*

71. Statement of Paul G. Kaminski, 1996, *supra* note 49.

72. Gansler, *supra* note 5, at 21–22.

73. *See* Statement of Paul G. Kaminski, 1997, *supra* note 15; Statement of Paul G. Kaminski, 1996, *supra* note 49.

74. DoDD 5000.1, *supra* note 14, at ¶ E1.1.4.

75. Life-cycle cost is the "total cost to the Government of acquisition and ownership of a system over its useful life. It includes the cost of development, acquisition, support, and disposal." U.S. DEP'T OF DEF., DEFENSE ACQUISITION GUIDEBOOK ¶ 5.1.3.5 (2004), *at* http://akss.dau.mil/dag (Oct. 17, 2004) [hereinafter DAG].

76. BECK, *supra* note 13, at ch. 2, at 8.

77. A formal cost as an independent variable (CAIV) plan should set cost goals, provide for trade-off studies, establish a cost performance integrated product team, provide incentives to the contractor that support the plan, and establish metrics to track progress and achievement of goals and objectives. DAG, *supra* note 75, at ¶ 3.2.4.

HeinOnline -- 35 Pub. Cont. L.J. 184 2005-2006

f. Evolutionary Acquisition

This method of acquisition is the "preferred DoD strategy for rapid acquisition of mature technology for the user."[78] The objective is to "put capability into the hands of the user quickly,"[79] balancing user needs, resources, and available capability. An evolutionary acquisition approach recognizes the need for future capability development and, as requirements are further defined/refined and technologies mature, delivers the capability in militarily useful increments.[80]

g. Integrated Product and Process Development (IPPD) and Integrated Product Teams (IPTs)[81]

Integrated product and process development and integrated product teams have become an integral part of the defense acquisition oversight and review process. The use of IPTs is based upon IPPD, a "management technique that simultaneously integrates all essential acquisition activities through the use of multidisciplinary teams to optimize the design, manufacturing, and supportability processes."[82] The IPTs are made up of key players in the acquisition process (*e.g.*, operational user, capability needs, acquisition, and financial communities, and other stakeholders) who work together to facilitate decision making with sound and timely recommendations, identify and resolve issues, and, ultimately, build successful programs.[83]

h. Military Specifications and Standards Reform

In the past, the majority of defense contract specifications and standards were detailed in their direction and unique to the Government or military. As DoD began to rely more on the commercial marketplace for goods and services, these unique requirements meant increased costs and schedule delays that presented barriers to DoD in accessing state-of-the-art commercial technology and an expanded industrial base.[84] In June 1994, the Secretary of De-

78. U.S. DEP'T OF DEF., INSTRUCTION 5000.2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM ¶ 3.3 (2003), *available at* http://www.dtic.mil/whs/directives.

79. *Id.*

80. *Id.* The thought behind evolutionary acquisition is that it is better to give the warfighter an 80 percent solution for his requirement now than to give nothing at all and wait for technology to catch up to the requirement. The remaining 20 percent comes with technology maturation and with refinement of the requirement through use of the 80 percent solution. Each future increment provides the user the best possible capability.

81. *See* DoDD 5000.1, *supra* note 14; UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS & ASSISTANT SEC'Y OF DEF. FOR COMMAND, CONTROL, COMMUNICATIONS AND INTELLIGENCE, U.S. DEP'T OF DEF., RULES OF THE ROAD: A GUIDE FOR LEADING SUCCESSFUL INTEGRATED PRODUCT TEAMS (1999), *available at* http://www.acq.osd.mil/ara/am/21oct99rulesoftheroad.doc [hereinafter IPT RULES OF THE ROAD].

82. DAU GLOSSARY, *supra* note 9.

83. *See* DoDD 5000.1, *supra* note 14; IPT RULES OF THE ROAD, *supra* note 81, at 11.

84. *See* Statement of Paul G. Kaminski, 1997, *supra* note 15 ("The objective of military specification and standard reform is to break down those barriers in order to achieve three primary goals: save money; remove impediments to getting state-of-the-art technology into our weapon systems; and facilitate the integration of our defense commercial industrial bases.").

HeinOnline -- 35 Pub. Cont. L.J. 185 2005-2006

fense directed the use of performance[85] or commercial specifications and industrywide practices to the maximum extent practicable.[86] Design-specific military specifications could still be used but only as a last resort and only when justified.

Although DoD made progress in applying this principle to new contracts, military specifications on existing contracts prevented it from "realizing the full benefits of these changes by requiring, in a single facility, multiple management and manufacturing systems designed to accomplish the same purpose."[87] In December 1995, the Secretary of Defense revised his June 1994 memorandum, directing "block changes to the management and manufacturing requirements of existing contracts be made on a facility-wide basis, to unify management and manufacturing requirements within a facility, wherever such changes are technically acceptable to the government."[88] Known as the single process initiative, these block modifications eliminated costly multiple processes within common contractor facilities.[89]

i. Other Transactions

The term "other transactions" (OTs) generally refers to the 10 U.S.C. § 2371 authority to enter into transactions other than contracts, grants, or cooperative agreements.[90] There are two types of OTs used within DoD: (1) OTs for "prototype projects that are directly relevant to weapons or weapon systems to be acquired or developed by the Department of Defense, or to improvement of weapons or weapon systems in use by the Armed Forces"[91] and (2) OTs for "basic, applied, or advanced research projects."[92] Other transaction authority provides for an acquisition instrument with more flexibility than traditional procurement contracts because OTs generally are not subject to federal laws and regulations governing contracts, to include the

85. With a performance specification, DoD describes the desired end state, but the contractor determines how to get there.

86. Memorandum from William J. Perry, Secretary of Defense, Department of Defense, to various departments, offices, commands, and agencies throughout DoD, Specifications and Standards: A New Way of Doing Business (June 29, 1994), *available at* http://www.stsc.hill.af.mil/crosstalk/1994/09/DoDPolic.asp.

87. Memorandum from William J. Perry, Secretary of Defense, Department of Defense, to various departments, offices, commands, and agencies throughout DoD, Common System/ISO-9000/Expedited Block Changes (Dec. 6, 1995), *available at* http://www.dscc.dla.mil/Library/Quality_Assurance/QALibrary/DoD_and_DLA_Quality_Issues/ISO_DoD_9000_and_Expedited_Block_Changes.doc.

88. *Id.; see* Statement of Paul G. Kaminski, 1997, *supra* note 15; Statement of Paul G. Kaminski, 1996, *supra* note 49; Memorandum from Paul G. Kaminski, Under Secretary of Defense for Acquisition and Technology, Department of Defense, to various departments, offices, commands, and agencies throughout DoD, Single Process Initiative (Dec. 8, 1995), *available at* http://www.acq.osd.mil/dpap/Docs/8dec.pdf.

89. Statement of Paul G. Kaminski, 1997, *supra* note 15.

90. 10 U.S.C. § 2371 (2000).

91. 10 U.S.C. § 2371 note; *see* Office of the Under Sec'y of Def. for Acquisition, Tech. & Logistics, "Other Transactions" (OT) Guide for Prototype Projects (2001), *available at* http://www.acq.osd.mil/dpap/Docs/otguide.doc [hereinafter OT Guide].

92. 10 U.S.C. § 2371(a).

HeinOnline -- 35 Pub. Cont. L.J. 186 2005-2006

FAR and its supplements.[93] The use of OT authority has enabled DoD to access commercial technology providers who would otherwise not do business with the Government under normal contracting conditions.

j. Performance-Based Acquisition (PBA)

Although the Federal Government has used performance-based contracts for decades, they have received more attention in recent years as the Government has increased its spending on contracts for goods and services. Law, regulation, policy, and guidance now establish a preference for PBA and mandate that federal agencies comply with performance-based requirements and guidelines.[94]

Performance-based acquisition involves strategies, methods, and techniques where federal agencies state their needs and requirements in terms of a desired end state with measurable outputs and outcomes.[95] Then, instead of micro-

93. OT GUIDE, *supra* note 91, at 8; *see* Holly E. Svetz, *DoD's Guide for Prototype Other Transactions—Walking the Line Between Flexibility and Accountability*, 43 GOV'T CONTRACTOR ¶ 75 (2001).

94. *See, e.g.*, Clinger-Cohen Act, *supra* notes 50–51; FASA, Pub. L. No. 103–355, 108 Stat. 3243; Government Performance and Results Act of 1993, Pub. L. No. 103–62, 107 Stat. 285; FAR 1.102, 2.101; FAR pts. 7, 10, 11, 37, 46; INTERAGENCY TASK FORCE ON PERFORMANCE-BASED SERVICE ACQUISITION, OFFICE OF MGMT. & BUDGET, PERFORMANCE-BASED SERVICE ACQUISITION: CONTRACTING FOR THE FUTURE (2003), http://www.acqnet.gov/Notes/0703pbsa.pdf, http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/library/OFPPpbsa_july.pdf, http://www.whitehouse.gov/omb/procurement/0703pbsat.pdf; Memorandum from Robert A. Burton, Associate Administrator, Office of Federal Procurement Policy, to Chief Acquisition Officers and Senior Procurement Executives, Increasing the Use of Performance-Based Service Acquisition (Sept. 7, 2004) ("Agencies should apply PBSA methods on 40 percent of eligible service actions over $25,000, to include contracts, task orders, modifications, and options, awarded in fiscal year (FY) 2005, as measured in dollars."), http://www.acqnet.gov; Policy Letter from Steven Kelman, Administrator, Office of Federal Procurement Policy, to the Heads of Executive Departments and Establishments, No. 93–1 (Reissued), Management Oversight of Service Contracting (May 18, 1994), http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/library/OFPP_management-oversight.pdf. For DoD-specific guidance, see Memorandum from Jacques S. Gansler, Under Secretary of Defense for Acquisition and Technology, to Secretaries of the Military Departments, Directors of Defense Agencies, and Director of Defense Logistic Agency, Performance-Based Services Acquisition (PBSA) (Apr. 5, 2000) ("50 percent of service acquisitions, measured both in dollars and actions, are to be performance-based by the year 2005."), http://www.acq.osd.mil/dpap/Docs/ganslerpbsa.pdf, http://www.acqnet.gov/Library/OFPP/BestPractices/pbsc/library/DODmem-pbsa.pdf; OFFICE OF THE DEPUTY UNDER SEC'Y OF DEF. FOR ACQUISITION REFORM, U.S. DEP'T OF DEF., GUIDEBOOK FOR PERFORMANCE-BASED SERVICE ACQUISITION IN THE DEPARTMENT OF DEFENSE (2001), *at* http://www.acq.osd.mil/dpap/Docs/pbsaguide010201.pdf, http://www.dau.mil/pubs/misc/PBSA_GUIDEBOOK.pdf (last visited Aug. 1, 2005).

95. *See* FAR 2.101; FAR subpt. 37.6. There are seven steps to PBA: (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 or statement of objectives"; (5) "decide how to measure and manage performance"; (6) "select the right contractor"; and (7) "manage performance." OFFICE OF FED. PROCUREMENT POLICY, SEVEN STEPS TO PERFORMANCE-BASED SERVICES ACQUISITION GUIDE, http://www.acqnet.gov/Library/OFPP/BestPractices/pbsc/home.html, http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/home.html (last visited Aug. 1, 2005) [hereinafter SEVEN STEPS TO PBSA]. Outputs measure "the quantity and quality of services provided" and outcomes measure "the quantity and quality of the results the outputs produce." KETTL, *supra* note 28, at 47. Performance-based management relies on both. For further discussion of performance-based management utilizing both outputs and outcomes, see GAO/OCG-95–1, *supra* note 35; Gansler, *supra* note 5; KETTL, *supra* note 28, at 38–55.

HeinOnline -- 35 Pub. Cont. L.J. 187 2005-2006

managing the details of how the contractor operates, the Government gives the contractor the freedom and flexibility to determine how to meet the stated objectives. What was once a we/they situation, with the Government pitted against the contractor and focused on contract compliance, has become a win/win solution, with collaborative, performance-oriented teamwork between the Government, contractor, and its subcontractors and with contractor interests aligned with agency goals.[96]

4. New Demands on the Acquisition Workforce

These and other reforms and initiatives have brought about cultural shifts in the defense acquisition process. Today, the emphasis has changed from many to fewer new defense systems and more reliance on modified legacy systems, from a focus on nuclear to conventional warfare, from technology-driven to affordability-driven systems, from service-specific to joint programs, from military-unique to commercial and dual-use technology, and from technology development to technology insertion.[97]

Acquisition reformers thought streamlined acquisition procedures would improve the efficiency of contracting operations, increase flexibility, reduce administrative burdens, lower transaction costs, and offset the effects of workforce reductions.[98] These reforms, however, also have placed new demands on those remaining in the acquisition workforce. Acquisition personnel must have a "greater knowledge of market conditions, industry trends, and the technical details of the commodities and services they procure."[99]

Remaining acquisition personnel have had to deal with increased workloads[100] and have not received training necessary to learn the new skills required by acquisition reforms. Implementation of acquisition reforms has suffered as

96. For recent articles on PBA, see Lawrence L. Martin, *Making Performance-Based Contracting Perform: What the Federal Government Can Learn from State and Local Governments*, *in* THE PROCUREMENT REVOLUTION 87 (Mark A. Abramson & Roland S. Harris III eds., 2003); Gregory A. Garrett, *Performance-Based Acquisition: The Real Essential Elements*, CONT. MGMT., May 2005, at 42; Kimberly Palmer, *Consultant Urges Performance-Based Contracting*, GOVEXEC.COM DAILY BRIEFING, Apr. 4, 2005, http://www.govexec.com/dailyfed/0405/040405k1.htm.

97. IDAM, *supra* note 16, at 16.

98. *Contract Management: Trends and Challenges in Acquiring Services, Testimony Before the Subcomm. on Technology and Procurement Policy of the H. Comm. on Government Reform*, GAO-01-753T, at 8 (May 22, 2001) (statement of David E. Cooper, Director of Acquisition and Sourcing Management), http://www.gao.gov/new.items/d01753t.pdf [hereinafter Statement of David E. Cooper]; SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 24. At the time, however, "little (and arguably no) empirical evidence supported the procurement personnel reductions." Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 PUB. CONT. L.J. 263, 285 (2004).

99. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 20.

100. When downsizing reduced the government workforce, federal agencies outsourced work once done by government personnel in order to accomplish their missions. Outsourcing work resulted in an increased number of contracts, especially service contracts. As will be discussed later, contracting for services is different than contracting for goods or construction, having its own "types of accountability challenges, management difficulties, and policy problems." PHILLIP J. COOPER, GOVERNING BY CONTRACT: CHALLENGES AND OPPORTUNITIES FOR PUBLIC MANAGERS 45 (2003); *see* discussion *infra* Part III.A. The acquisition workforce took a hit from both downsizing and outsourcing, losing personnel yet gaining work. *See* discussion *infra* Parts II.C., II.D.

HeinOnline -- 35 Pub. Cont. L.J. 188 2005-2006

agencies missed opportunities to take full advantage of the benefits offered by streamlined acquisition processes 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 [limited] data that agencies can use to make informed decisions."[101]

B. *Decrease in the Federal Government Workforce*

As government officials called for a more streamlined and efficient Government, agency leaders looked to downsizing as a means to achieving these goals. Between 1986 and 2001, the federal government workforce downsized from approximately 2.3 million to 1.8 million employees, resulting primarily from changes in national security requirements after the dissolution of the Soviet Union and end of the Cold War.[102] As a general matter, however, the Government downsized with no strategic planning for reshaping the civilian workforce.[103]

The Defense Department is the second largest employer of civilian federal workers, after the Postal Service, employing 37 percent of all nonpostal federal employees.[104] Between fiscal years 1989 and 2002, DoD reduced its civilian workforce by over 400,000 positions, from 1,075,437 to 670,166—a reduction of approximately 38 percent.[105] The president's fiscal year 2003 budget request projected additional reductions in DoD's civilian workforce to 614,865 by fiscal year 2007—a reduction of nearly 43 percent from fiscal year 1989.[106]

Although DoD lessened the adverse effects of force reductions on the civilian workforce through voluntary separation incentives, early retirement, and hiring freezes, it did not have an integrated strategic view and failed to correlate reductions with specific skill-level requirements.[107] While reviewing early phases of DoD downsizing, the Government Accountability Office

101. Spending and Workforce Trends, *supra* note 1, at 3, 10; *see* GAO-03-98, *supra* note 6, at 64–65. Although acquisition reforms appear attractive because of their focus on efficiency and on giving broader discretion to contracting personnel, they seemingly ignore those principles that are the foundation of our Government's procurement system: transparency, integrity, and competition. In reality, many of the reforms have diluted "internal and external oversight mechanisms and threatened public confidence in the procurement system." Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 631 (2001); *see* Benjamin, *supra* note 9; Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (2002), *available at* http://papers.ssrn.com/abstract=304620; Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 Pub. Cont. L.J. 383 (2002).

102. Commercial Activities Panel Report, *supra* note 7, at 27.

103. *Id.*

104. GAO-03-98, *supra* note 6, at 25.

105. U.S. Gen. Accounting Office, GAO-04-753, DoD Civilian Personnel: Comprehensive Strategic Workforce Plans Needed, Report to the Ranking Minority Member, Subcommittee on Readiness, Committee on Armed Services, House of Representatives, at 7 (2004), http://www.gao.gov/new.items/d04753.pdf [hereinafter Strategic Workforce Plans].

106. GAO-03-98, *supra* note 6, at 25.

107. Statement of David E. Cooper, *supra* note 98, at 7; GAO-03-98, *supra* note 6, at 26–27.

HeinOnline -- 35 Pub. Cont. L.J. 189 2005-2006

(GAO)[108] learned some DoD officials were concerned about a "lack of attention to identifying and maintaining a balanced basic level of skills needed to maintain in-house capabilities as part of the defense industrial base."[109] Because military personnel rotate assignments frequently and political appointees typically have short tenure, the career civilian workforce typically possesses DoD's "institutional memory."[110]

Lack of strategic planning or attention to force shaping, however, has resulted in a civilian workforce unbalanced in age and experience, which "puts at risk the orderly transfer of institutional knowledge."[111] There is an ever-widening gap between older, experienced employees and younger, less-experienced employees. Although the DoD civilian workforce of today is more experienced, it is also older—58 percent will be eligible for early or regular retirement by 2006.[112] In its effort to meet congressionally mandated numerical reductions, DoD placed limits on hiring new employees. It is now difficult to replace those personnel retiring from mission-critical positions with trained, experienced employees.[113]

C. *Human Capital in Federal Procurement—A Crisis in the Making*

These personnel challenges are even more critical in the acquisition area. Overall, the total number of federal civilian acquisition personnel decreased 22 percent from 1991 to 2001.[114] Of the remaining civilian acquisition personnel, approximately 38 percent will be eligible to retire by the end of fiscal year 2007.[115] The Department of Defense bore the full brunt of this downsizing, losing half its acquisition workforce between 1991 and 2001 in response to congressional mandates to downsize,[116] base realignments and closures,

108. The General Accounting Office (GAO) was redesignated the Government Accountability Office (GAO) effective July 7, 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108–271, § 8, 118 Stat. 811, 814 (2004).

109. GAO-03-98, *supra* note 6, at 26–27.

110. *Id.* at 27.

111. *Id.; see* Statement of David E. Cooper, *supra* note 98, at 7.

112. GAO-03-98, *supra* note 6, at 27.

113. *See* Gansler, *supra* note 5, at 16–18.

114. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 29; SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 4 n.4. GAO defined the acquisition workforce as those individuals serving in the following fourteen occupation series: GS-246, industrial relations; GS-346, logistics management; GS-511, auditors; GS-1101, general business; GS-1102, contracting series; GS-1103, industrial property manager; GS-1104, property disposal; GS-1105, purchasing officer; GS-1106, procurement clerical support; GS-1150, industrial specialists; GS-1152, production control; GS-1910, quality assurance; GS-2003, supply management; and GS-2010, inventory management. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 27–28.

115. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 22.

116. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 907, 117 Stat. 1392, 1563 (2003); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106–65, § 922, 113 Stat. 512, 724 (1999); Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105–261, § 931, 112 Stat. 1920, 2106 (1998); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105–85, § 912, 111 Stat. 1629, 1860 (1997); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104–201, § 902, 110 Stat. 2422, 2617 (1996); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, § 906, 110 Stat. 186, 404 (1996).

HeinOnline -- 35 Pub. Cont. L.J. 190 2005-2006

acquisition reforms, and DoD's changing mission.[117] Of DoD's remaining civilian acquisition workforce, 38 percent will be eligible to retire by 2007.[118]

Even as DoD reduced its acquisition workforce, emerging security threats, rapidly evolving technology, and acquisition reforms increased demands for a workforce having new knowledge, skills, and abilities and an ability to transition from a role of technician to that of business manager.[119] With the projected high attrition of the DoD acquisition workforce, DoD must "identify the best strategies for filling its talent needs through recruiting and hiring and follow up with the appropriate investments in training and development."[120]

D. *Number and Type of Procurement Actions*

Unfortunately, the acquisition workload has not decreased proportionately with the reduction of the acquisition workforce. Instead, the number of procurement actions increased from 13.2 million in fiscal year 1990 to 14.8 million in fiscal year 1999, or 12 percent.[121] There also have been changes in the types of contract actions. The greatest amount of work for acquisition personnel is on contracting actions over the $100,000 simplified acquisition threshold. Those actions increased from 97,948 in fiscal year 1990 to 125,692 in fiscal year 1999, or 28 percent.[122] At the same time, the increased usage of the government purchase card, discussed below, has decreased the number of smaller-dollar actions.[123]

This imbalance between human resources and workload has created acquisition management and performance shortfalls. Adverse consequences include the following:

- Impairment of the ability to accomplish the mission;
- Insufficient staff to manage requirements efficiently or conduct market research;
- Inability to focus on future technologies and the integration of those technologies;
- Increased administrative and procurement lead times along with reduced scrutiny in reviewing acquisition actions;

117. Between fiscal years 1990 and 1999, DoD reduced its total acquisition workforce from 460,516 to 230,556, a reduction of 50 percent. Although not counted in the acquisition workforce, Defense Contract Audit Agency staffing decreased between fiscal years 1990 and 1999 from 7,030 to 3,958 work years, a reduction of 44 percent. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF DEF., D-2000-088, DoD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACTS 4, 7 (2000), *available at* http://www.dodig.osd.mil/audit/reports/fy00/00-088.pdf [hereinafter DoD ACQUISITION WORKFORCE REPORT]; *see* SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 21; GAO-03-98, *supra* note 6, at 72; COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 29.

118. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 22.

119. GAO-03-98, *supra* note 6, at 72-73.

120. *Id.* at 73.

121. DoD ACQUISITION WORKFORCE REPORT, *supra* note 117, at 9; *see also supra* note 1 and accompanying text (Federal Procurement Data System collects information on federal contract actions and dollars spent by executive department and agency).

122. DoD ACQUISITION WORKFORCE REPORT, *supra* note 117, at 10.

123. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 21; *see* discussion *infra* Part III.C.

HeinOnline -- 35 Pub. Cont. L.J. 191 2005-2006

- Reduced contract oversight;
- Increased program costs resulting from contracting for support services;
- Lost opportunities to develop cost savings initiatives;
- Skill imbalances; and
- Inability to hire and retain personnel.[124]

E. *Role of the Government in the 21st Century*

Even as the number of procurement actions surged, the contracting focus shifted from acquisition of goods and construction to that of services. Confronted with personnel ceilings and congressionally mandated workforce reductions, federal agencies in the 1990s found themselves with a smaller workforce to meet their public policy obligations and accomplish agency missions. Government officials faced increased pressure from first the Clinton then the Bush administration to reduce the size of the Government and contract out government work to the private sector.[125] They seized upon outsourcing[126] as a means to fill the widening gap between workforce and workload.

124. DoD Acquisition Workforce Report, *supra* note 117, at 16–20, 29–32; *see generally Iraq Contracting: Predictable Lessons Learned, Testimony Before the S. Democratic Policy Comm.*, 108th Cong. (Sept. 10, 2004) (statement of Steven L. Schooner) (discussing lack of appropriate oversight of contract performance at Abu Ghraib prison), *available at* http://docs.law.gwu.edu/facweb/sschooner/Sen-Iraq04.pdf [hereinafter Statement of Steven L. Schooner]; Schooner, *Fear of Oversight*, *supra* note 101, at 629–30 (discussing reduced oversight in government procurement since the early 1990s).

125. Competitive sourcing is one of five governmentwide initiatives of the Bush administration. Even while governor of Texas, Bush stated, "Government should be market-based—we should not be afraid of competition, innovation, and choice. I will open government to the discipline of competition." U.S. Office of Mgmt. & Budget, Executive Office of the President, The President's Management Agenda: Fiscal Year 2002, at 17 (2001), http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf. The other four initiatives are strategic management of human capital, improved financial performance, expanded electronic government, and budget and performance integration. *Id.* at 10–30.

126. The labels "outsourcing," "contracting out," "competitive sourcing," and "privatization" are often used interchangeably when discussing the replacement of government personnel with contractor personnel. Choosing between these terms is more than "mere semantics," however, and involves significant policy decisions. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan. L. & Pol'y Rev. 549, 556 n.22. This article focuses on "outsourcing" and will interchange the term with the phrase "contracting out." Outsourcing refers to the contracting out of work that is, or once was, performed by government personnel. Simply put, the Government "hires" contractor personnel to replace, augment, or work alongside government personnel. Please note the term "hires," an employment term, is used facetiously. A contract should not create an employer-employee relationship between the Government and contractor personnel, and contractor personnel, in theory, remain employees subject to the direction and control of the contractor. As government personnel interact more and more at the worksite with contractor personnel, who often perform the same function as the government personnel, the distinction between the two types of personnel and their respective roles become blurred. For a history of contracting out in the 20th century, see Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. Rev. 859 (2000). Competitive sourcing permits government personnel to compete with the private sector to determine which entity will perform a commercial activity more economically. Office of Management and Budget Circular A-76 guides federal agencies through the process of determining whether a commercial activity should be performed under contract by a commercial source or in-house by government personnel. *See* U.S. Office of Mgmt. & Budget, Circular No. A-76 (Revised), Performance of

HeinOnline -- 35 Pub. Cont. L.J. 192 2005-2006

1. The Federal Workforce—An "Illusion of Smallness"[127]

The effort to reduce the size of the Federal Government was seemingly a success and President Clinton declared the "era of big government is over" in 1996.[128] At the time, there were approximately 4.2 million federal employees and military personnel, down from a post-World War II high of 5.9 million in 1968.[129] If, however, one considers the 12.7 million full-time-equivalent jobs generated under federal contracts, grants, and mandates to state and local governments in 1996, "this illusion of smallness disappears."[130]

The number of private sector contractors performing work for the Government exploded in the 1990s and continues to grow "dramatically and at alarming rates."[131] From 1998 to 2001, DoD spent slightly less than half its budget for contractor support.[132] After the tragic events of September 11, 2001, defense spending surged by 51 percent with the wars in Iraq and Af-

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COMMERCIAL ACTIVITIES (2003), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_ correction.pdf [hereinafter OMB CIRCULAR A-76]; *see also* Notice of Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). For additional discussion of competitive sourcing, see U.S. GEN. ACCOUNTING OFFICE, GAO-04-367, COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE (2004), *available at* http://www.gao.gov/new.items/d04367.pdf; Daniel Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321 (2004); Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48 (1998); Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311 (2004); Ralph C. Nash & John Cibinic, *Contracting Out: The Debate Continues*, 16 NASH & CIBINIC REP. ¶ 33, July 2002; Schooner, *supra* note 98; David M. Walker, *The Future of Competitive Sourcing*, 33 PUB. CONT. L.J. 299 (2004); Warren M. Anderson et al., *And the Survey Says . . . The Effectiveness of DoD Outsourcing and Privatization Efforts*, ACQUISITION REV. Q., Spring 2002, at 91; Kurt Chelf & Tim Reed, *Strategic Sourcing—The Future Outsourcing in the DoD*, CONT. MGMT., Apr. 2002, at 10. Privatization occurs when the Government completely divests itself of a function and transfers not only performance but also control and ownership to the private sector. Privatization by DoD occurs most often with military housing under the authority of 10 U.S.C. §§ 2871–2885 or utility systems under the authority of 10 U.S.C. § 2688. There is potential conflict with the American idea of democracy, which dictates that the exercise of governmental authority remains accountable to the American people and subject to the rule of law. For additional discussion of privatization, see Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000); Darrell A. Fruth, Note, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 HARV. J.L. & TECH. 521 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Jeffrey A. Renshaw, *Utility Privatization in the Military Services: Issues, Problems, and Potential Solutions*, 53 A.F. L. REV. 55 (2002); E.S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731 (2001); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003).

127. PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 1–12 (1999).

128. President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), *reprinted in* 1 PUB. PAPERS 79, 79 (1996).

129. LIGHT, *supra* note 127, at 1–2.

130. *Id.* at 1 (the 12.7 million jobs included "5.6 million generated under federal contracts, 2.4 million created under federal grants, and 4.6 million encumbered under mandates to state and local government").

131. *Id.* at 45.

132. Larry Makinson, Center for Public Integrity, *Outsourcing the Pentagon: Who Benefits from the Politics and Economics of National Security?* Sept. 29, 2004, http://www.publicintegrity.org/pns/report.aspx?aid=385.

HeinOnline -- 35 Pub. Cont. L.J. 193 2005-2006

ghanistan.[133] Overall, contract spending has increased slightly faster than direct spending with slightly over half of the defense budget going to private contractors.[134] If one considers the "true size of government" to include all people who produce goods and services for the Federal Government, the number is much larger than federal personnel head counts suggest.[135]

2. The Private Contractor Workforce

a. The "Shadow of Government"[136]

Although contractor employees may not show up in federal personnel head counts, the Government could not do its job without them. Federal agencies no longer "have the capacity to deliver directly the services and perform the tasks with which they are charged by law."[137] They rely heavily upon federal contracts, grants, and other arrangements to accomplish their missions. The employees working under and receiving paychecks under these arrangements have become a "shadow of government."[138]

One could "easily argue that the shadow of government includes a significant number of workers who would have been federal civil servants in the absence of head count constraints."[139] The size of their shadow is unknown, however, because federal agencies do not keep exact data on the number of contractor employees producing goods and services through contracts, grants, and other arrangements.[140] They do not keep data because no one wants the data to exist.[141] Thus continues the illusion of a smaller, leaner government workforce.

Instead of focusing on keeping the government workforce artificially small, government resources would be more wisely spent determining the least-costly mix of personnel (military, civilian, and contract) needed to accomplish

133. *Id.* The Center for Public Integrity has two Internet resources with additional information on contract spending for the wars in Iraq and Afghanistan: *Outsourcing the Pentagon: Who's Winning the Big Contracts*, http://www.publicintegrity.org/pns/ (last visited Aug. 1, 2005); and *Windfalls of War: U.S. Contractors in Afghanistan and Iraq*, http://www.publicintegrity.org/wow/ (last visited Aug. 1, 2005); *see also* Robert S. Nichols, *Iraq Reconstruction: Needs, Opportunities, and the Contracting Environment*, 80 Fed. Cont. Rep., (BNA) 410 (Oct. 28, 2003).

134. Makinson, *supra* note 132.

135. LIGHT, *supra* note 127, at 44.

136. *Id.* at 1; *see* DANIEL GUTTMAN & BARRY WILLNER, THE SHADOW GOVERNMENT: THE GOVERNMENT'S MULTI-BILLION-DOLLAR GIVEAWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, "EXPERTS," AND THINK TANKS (1976); Daniel Guttman, Center for Public Integrity, *The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work—Mostly Out of Public View*, Sept. 29, 2004, http://www.publicintegrity.org/pns/report.aspx?aid=386 (last visited Aug. 1, 2005).

137. COOPER, *supra* note 100, at 11.

138. LIGHT, *supra* note 127, at 1; *see* GUTTMAN & WILLNER, *supra* note 136.

139. LIGHT, *supra* note 127, at 47.

140. *See, e.g.*, John D. Donahue, *The Problem of Public Jobs*, *in* MARKET-BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE 264, 272 (John D. Donahue & Joseph S. Nye Jr. eds., 2002); LIGHT, *supra* note 127, at 6–7; Guttman, *The Shadow Pentagon*, *supra* note 136; Makinson, *supra* note 132.

141. LIGHT, *supra* note 127, at 17.

HeinOnline -- 35 Pub. Cont. L.J. 194 2005-2006

the mission, consistent with requirements, force structure, and policy.[142] "There are many good reasons to cast a shadow, whether to improve government performance, to protect taxpayer interest," or to promote socioeconomic programs; maintaining an illusion of smallness is not one of them.[143]

b. The Economics of Outsourcing—Are the Savings Real?

Challenging the growing size of the contractor workforce "requires challenging a common myth—that outsourcing saves money."[144] The Government's true cost consists of more than payments to the contractor. Federal agencies also must consider the transaction costs of contract management in determining the net savings of contracting as compared with providing the service directly. Then, if contract payments and contract management costs are higher than the actual costs of direct service delivery, an agency must ask itself what is gained by contracting out the work.

c. Capacity to Manage

More importantly, federal agencies do not abdicate their responsibilities to the public for performance merely by passing off work to contractors. Outsourcing is not a "throw-it-over-the fence handoff."[145] To ensure successful performance, agencies must have the capacity to administer and manage their contracts and oversee contractor operations.[146] As the Government's reliance on contracting has grown, however, its administration, management, and oversight of contracts have diminished.[147]

Agencies that fail to budget for and/or maintain an adequate contract management infrastructure will invariably face problems, oftentimes serious, with contract performance. The Government will likely incur delays and additional costs as it tries to correct inefficient and ineffective programs. Some problems may reach headline proportions with accusations of fraud, waste, and abuse further undermining public trust and confidence in government procurement.[148]

Having a capacity to manage contracts also means having a sufficient number of qualified acquisition personnel to manage the contracts. Contrary to

142. *See, e.g.*, U.S. DEP'T OF DEF., DIRECTIVE NO. 1100.4, GUIDANCE FOR MANPOWER MANAGEMENT (2005), *available at* http://www.dtic.mil/whs/directives/corres/html/11004.htm. This directive requires manpower authorities to consider all available sources "to include Active and Reserve military manpower, U.S. and foreign national civilian manpower; intra-governmental, contract, and host-nation support." *Id.* at ¶ 3.2.3.

143. LIGHT, *supra* note 127, at 4.

144. Schooner, *supra* note 126, at 553; *see* DoD ACQUISITION WORKFORCE REPORT, *supra* note 117, at 18 ("[I]n general, obtaining contract support was more expensive than obtaining in-house matrix support."); *see also* Guttman, *Public Purpose and Private Service*, *supra* note 126, at 878.

145. David Karabinos, *May the Source Be with You*, CONT. MGMT., Sept. 2003, at 11.

146. COOPER, *supra* note 100, at 102. Contract administration, especially for service contracts, "can be a labor-, information-, and technology-intensive activity." *Id.*

147. DONALD F. KETTL, SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS 195 (1993).

148. *Id.* at 194.

HeinOnline -- 35 Pub. Cont. L.J. 195 2005-2006

what many in the Government would believe or hope to be true, "these contracts do not manage themselves."[149] The Government did not have enough acquisition personnel before the events of September 11, 2001, and the situation has only worsened.[150] Procurement spending has spiked in response to new security challenges. Not surprisingly, the number of procurement actions has risen, and there is pressure on contracting personnel to award contracts quickly and fill empty seats with warm bodies.

Out of necessity, if not desperation, the overworked and understaffed acquisition workforce is using a "triage-type focus on buying,"[151] applying what limited resources they have first to the awarding of contracts and leaving less for the administration of contracts once awarded.[152] Most reform efforts were directed at the business strategy part of contracting (what to buy and how to buy it) and source selection. The administration of contracts after award has been the neglected stepchild of strategic contracting management.[153] The Government will never be the "world's smartest buyer"[154] unless it invests time and resources into contract administration and oversight.

It must begin by recruiting, training, motivating, and retaining skilled acquisition professionals in numbers sufficient to manage the Government's increased acquisition workload. As discussed above, the private sector now invests more into research and development than the Government.[155] The government acquisition workforce of the 21st century will need skills that are management oriented and technologically capable as the Government procures more and more of its modern technology from the commercial marketplace.[156] These same skills are needed in the private sector, however, and the Government must be able to compete against the private sector in recruiting and retaining the required talent.[157]

3. The Evolving Nature of Public Service[158]

The role of the Government is shifting from that of provider of goods and services to manager of the provider of goods and services.[159] This shift is transforming federal procurement from what some thought of as a support function to a "primary management and administrative function that is playing an increasingly critical role in enabling federal departments and agencies to discharge their primary missions."[160]

149. *Id.* at 180.
150. *See supra* note 1 and accompanying text.
151. Schooner, *supra* note 126, at 560.
152. *Id.* at 560.
153. Kelman, *supra* note 2, at 89–90.
154. *See supra* notes 41–45 and accompanying text.
155. *See* discussion *supra* Part II.A.3.d.
156. Gansler, *supra* note 5, at 16–17.
157. *Id.*
158. LIGHT, *supra* note 127, at vii.
159. *See* COOPER, *supra* note 100, at 45; Gansler, *supra* note 5, at 13, 17; KETTL, *supra* note 28, at 61–62.
160. Martin, *supra* note 96, at 88.

HeinOnline -- 35 Pub. Cont. L.J. 196 2005-2006

Contracting out is a reality. Given the constant push in society to do more with less, it is unlikely the American people will tolerate a federal workforce large enough to accomplish the Government's missions. The Government is dependent on its shadow workforce to do that. It is this dependence that makes the lack of contract administration and oversight so troubling. As the federal workforce shrinks in size, agencies delegate more responsibilities to contractors, yet, without contract management, know little of what is happening in the shadows.

To be a smart buyer, the Government must know what to buy, who to buy it from, and what it has bought.[161] Before it can know this, it must sort through the shadows and determine what kind of federal workforce the Government needs to "hold the core competency to assure merit, capacity, accountability, and performance."[162] Otherwise, there is danger of abdicating the Government's responsibilities "to a private work force, unseen, unmonitored, and unchecked."[163] What should be the exercise of government power through the authority of government institutions would shift toward government by contract.[164]

As a matter of policy, government personnel are responsible for the basic work of Government and contractors may not perform inherently governmental functions.[165] This policy was designed in part to ensure these functions continued to fall within the law and that federal agencies remained accountable to Congress, the president, and the American people.

> Concern about which federal agency activities are inherently governmental functions . . . goes back as far as the early days of the nation, as evidenced . . . by the discussions in the Federalist Papers among the framers of the Constitution over what functions are appropriate for the federal government to exercise.[166]

161. *See* Gansler, *supra* note 5; KETTL, *supra* note 147, at 179–97.

162. LIGHT, *supra* note 127, at vii; *see* Guttman, *Public Purpose and Private Service*, *supra* note 126, at 890.

163. LIGHT, *supra* note 127, at 45.

164. The American idea of democracy dictates that the exercise of governmental authority must remain accountable to the American people and subject to the rule of law. As contractors take over functions once performed by government personnel, their role in the exercise of governmental administrative authority remains unclear. For discussion of this and other federal public policy issues implicated by outsourcing, contracting out, competitive sourcing, and privatization, see COOPER, *supra* note 100; Donahue, *supra* note 140; GUTTMAN & WILLNER, *supra* note 136; KETTL, *supra* note 147; LIGHT, *supra* note 127; Freeman, *supra* note 126; Fruth, *supra* note 126; Guttman, *Governance by Contract*, *supra* note 126; Guttman, *Public Purpose and Private Service*, *supra* note 126; Light, *supra* note 126; Metzger, *supra* note 126; Symposium, *The Changing Shape of Government*, 28 FORDHAM URB. L.J. 1319 (2001); Renshaw, *supra* note 126; Savas, *supra* note 126; Schooner, *supra* note 98; Schooner, *supra* note 126; Shapiro, *supra* note 126; Stevenson, *supra* note 126; Walker, *supra* note 126.

165. *See, e.g.*, Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105–270, 112 Stat. 2382 (1998); OMB CIRCULAR A-76, *supra* note 126; OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FAIR ACT INVENTORY USER'S GUIDE (2003), http://www.whitehouse.gov/omb/procurement/fair/2003users_guide.html; Memorandum from David H. Safavian, Administrator, Office of Management and Budget, Executive Office of the President, to Heads of Executive Departments and Agencies (May 23, 2005), http://www.whitehouse.gov/omb/memoranda/fy2005/m05–12.pdf.

166. GAO/GGD-92–11, *supra* note 8, at 2.

HeinOnline -- 35 Pub. Cont. L.J. 197 2005-2006

The definition of an "inherently governmental activity"[167] is vague, however, and has become an ever-moving target, making it difficult to determine what core functions should be done by government personnel and what skills and what size federal workforce are needed to perform these core functions.[168] The more the Government relies upon outsourcing and contractors to get its work done, the more difficult it becomes to determine where the "federal mission ends and contract, grant, or mandate work begins."[169] This difficulty is particularly true "when contractors and civil servants do the same jobs often in the same office at the same time."[170]

The lack of authorized federal positions and lack of federal personnel with sufficient expertise to perform the work has led to agencies contracting out work without regard for whether it was inherently governmental.[171] The recent allegations of abuse at Abu Ghraib prison in Iraq serve to illustrate how contracting out governmental functions can lead to problems with government oversight and accountability. The allegations involved not only military but also contractor personnel. The investigations and publicity that followed brought to light disturbing uses of contractor personnel in roles that are normally performed by government personnel.[172]

167. [A]gencies shall . . . [p]erform inherently governmental activities with government personnel . . . An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

OMB CIRCULAR A-76, *supra* note 126, at ¶ 4b and app. A, ¶ B.1.a; *see* FAR 2.101, 37.102(c); FAR subpt. 7.5; GAO/GGD-92-11, *supra* note 8, at 4 ("GAO's review of historical documents, relevant books and articles, prior GAO work, applicable laws, government policy, and federal court cases showed that the concept of 'governmental functions' is difficult to define.").

168. *See* LIGHT, *supra* note 127, at 145-51.

169. *Id.* at vii.

170. *Id.* at 5.

171. *See* GAO/GGD-92-11, *supra* note 8, at 6 ("[C]ontracting for governmental functions is largely due to staff shortages, lack of staff with sufficient expertise, and the fact that contract money is easier to obtain than staff."); Guttman, *The Shadow Pentagon*, *supra* note 136.

172. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-201, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS 2, 5-6 (2005), http://www.gao.gov/new.items/d05201.pdf [hereinafter GAO-05-201] ("To learn more about some of the challenges of interagency contracting, [GAO] reviewed the process that [DoD] used to acquire interrogation and certain other services through the Department of Interior to support military operations in Iraq."). A 143-page report, commonly called the Fay Report, provides the results of an Army investigation into the allegations. MG GEORGE R. FAY, INVESTIGATING OFFICER, DEPARTMENT OF THE ARMY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 9 (Aug. 23, 2004), *available at* http://www.npr.org/documents/2004/abuse/fay-jones_report.pdf [hereinafter FAY REPORT]. The Inspector General of the Department of the Interior (DOI) reviewed twelve procurements placed by DOI National Business Center "on behalf of U.S. Army clients contracting for interrogation, intelligence, logistics, and security services under [GSA] Federal Supply Schedules." The review found that eleven of the twelve procurements were outside the scope of work for the schedules. Memorandum from Earl E. Devaney, Inspector General, Department of Interior, to the Assistant Secretary for Policy, Management and Budget (July 16, 2004), http://www.oig.doi.gov [hereinafter Interior IG Report].

HeinOnline -- 35 Pub. Cont. L.J. 198 2005-2006

The Government Accountability Office found that "military intelligence units at Abu Ghraib were severely underresourced" and that DoD faced a "critical and largely unforeseen need for interrogators and screeners" in support of operations in Iraq.[173] An earlier Army investigation determined that "contract interrogators from CACI and contract linguists from Titan were hired in an attempt to address [these] shortfalls."[174] Many observers now question the use of private contractors for interrogation services at Abu Ghraib.[175] The Army itself questioned the use of private contractors for intelligence functions as early as 2000, and as a matter of Army policy barred such work from private sector performance. The policy memorandum cautioned against the risks to national security and to maintaining adequate civilian oversight of intelligence operations from relying on contractors to perform these functions.[176] The Army ignored its own policy and paid the price for doing so.

Army and Interior officials also "abdicated their contracting responsibilities to a large degree. In this void, the contractor played a significant role in

173. GAO-05-201, *supra* note 172, at 2, 6.

174. FAY REPORT, *supra* note 172, at 9.

175. Schooner, *supra* note 126; Center for Public Integrity, *Windfalls of War: Private Contractors: As Early as December 2000 the Army Was Aware of the Risks of Calling on the Private Sector for Intelligence Work*, June 13, 2004, http://www.publicintegrity.org/wow/report.aspx?aid=328.

176. Memorandum from Patrick T. Henry, Assistant Secretary of the Army, for Manpower and Reserve Affairs, through the Administrative Assistant to the Secretary of the Army and the Director of the Army Staff, to the Assistant Deputy Chief of Staff for Intelligence (Dec. 26, 2000) (copy on file with author). The memorandum was issued in compliance with the FAIR Act requiring that agencies identify inherently government work versus work that is commercial and may be contracted out. It exempted the intelligence function from contractor performance under Exemption Number 2000–0004. The memorandum determined the following:

> At the tactical level, the intelligence function under the operational control of the Army performed by military in the operating forces is an inherently Governmental function barred from private sector performance . . . The gathering and analysis of intelligence as described above requires the exercise of substantial discretion in applying Government authority because intelligence at the tactical level is integral to the application of combat power by the sovereign authority . . . At the operational and strategic level, the intelligence function . . . should be exempted from private sector performance on the basis of risk to national security from relying on contractors to perform this function . . . Private contractors may be acquired by foreign interest, acquire and maintain interest in foreign countries, and provide support to foreign customers. The contract administration oversight exerted over contractors is very different from the command and control exerted over military and civilian employees. Therefore, reliance on private contractors poses risks to maintaining adequate civilian oversight over intelligence operations. Civilian oversight over intelligence operations and technologies is essential to assure intelligence operations are conducted with adequate security safeguards, and within the scope of law and direction of the authorized chain of command and officials.

Id. at 1–2. The Army memorandum concluded that "Field Manual 100–21, CONTRACTORS ON THE BATTLEFIELD (March 2000) should be modified and clarified to reflect these determinations." *Id.* at 3. The updated version of the field manual, however, was itself written by a contractor, Military Professional Resources, Inc., and contains no discussion of or restrictions on intelligence gathering by contractors. U.S. DEP'T OF ARMY, FIELD MANUAL 3–100.21 (100–21), CONTRACTORS ON THE BATTLEFIELD (2003) [hereinafter FM 3–100.21]; *see* Jonathan Werve, Center for Public Integrity, *Windfalls of War: Contractors Write the Rules: Army Policy Governing Use of Contractors Omits Intelligence Restrictions*, June 30, 2004, http://www.publicintegrity.org/wow/report.aspx?aid=334.

HeinOnline -- 35 Pub. Cont. L.J. 199 2005-2006

developing, issuing, and administering" the contract task orders.[177] The contractor, in essence, replaced the Government in its decision-making process, all the while unmonitored, unchecked, and without accountability to the American people. This arrangement created conflicts of interest and undermined the integrity of the competitive contracting process.[178]

A related concern involves the increased use of prohibited personal services contracts. Many service support contracts are "body shop or employee augmentation"[179] arrangements with statements of work that "read like loud cries of 'Help!'"[180] After describing the mission of the supported organization, they require the contractor to assist or support the organization in fulfilling the mission as needed, rarely giving the contractor real responsibility for a function or an actual requirement as is done in a non-personal services contract. These are personal services contracts where the Government retains the function and buys contractor personnel as part of its official workforce.

A personal services contract is one that, by its express terms or as administered, makes the contractor employee appear in effect to be a government employee.[181] Oftentimes, the contractor employee is subject to the supervision and control usually found in relationships between the Government and its employees.[182] These contracts are prohibited unless specifically authorized by statute.[183]

The misuse of the CACI and Titan service support contracts was not unique among contracts supporting operations in Iraq. In 2003, the DoD Inspector General performed an in-depth review of twenty-four contracts the Defense Contracting Command-Washington awarded for the Office of Reconstruction and Humanitarian Assistance (ORHA)/Coalition Provisional Authority after the Defense Contract Audit Agency found irregularities in both the award and administration of the contracts.[184] It found that ten of the twenty-four contracts were prohibited personal services contracts for subject matter experts who would work under the direction of the ORHA Director and for whom the Government would assume management and control re-

177. GAO-05-201, *supra* note 172, at 13. For example, the contractor developed requirements, identified its blanket purchase agreement with Interior as the contract vehicle to use, drafted statements of work, suggested using a rough order of magnitude as the Government's cost estimate, acted as liaison between Army officials in Iraq and the Interior contracting office, provided a draft justification and approval to award additional work to the company on a sole source basis, sent invoices directly to Interior for payment as opposed to the normal practice of having government personnel do this, and requested work that was outside the scope of the contract and later awarded separately on a sole source basis. *Id.*

178. *Id.* at 14.

179. Schooner, *supra* note 126, at 561.

180. Guttman, *Public Purpose and Private Service*, *supra* note 126, at 873.

181. FAR 2.101; *see* FAR 37.104.

182. *See* FAR 37.104.

183. FAR 37.104(b); *see, e.g.*, 5 U.S.C. § 3109 (2000); 10 U.S.C. § 129b (2000).

184. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF DEF., D-2004-057, ACQUISITION: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON (2004), *available at* http://www.dodig.mil/audit/reports/fy04/04-057.pdf.

HeinOnline -- 35 Pub. Cont. L.J. 200 2005-2006

sponsibilities.[185] The Government could have hired these individuals as government employees and "reduced the overall cost to the Government for the subject matter experts."[186] Instead, the Government paid the general and administrative costs of the prime contractor and gained little if any benefit.

The separate bodies of laws and rules governing the government workforce and contractor workforce have not kept pace with real-world developments and no longer fit reality. There is a long tradition of laws and rules enacted to ensure governmental bodies do not abuse the power of Government.[187] With so much work today contracted out, it is often difficult to draw the line between the government and contractor workforces, and government officials find themselves "negotiating fuzzy boundaries."[188] All too often, there is a lack of training on, and understanding of, the appropriate relationship between the government employee or military member and the contractor employee.[189] This has contributed to inappropriate or insufficient "contract management or command and control of contractors in a wartime environment."[190]

III. EMERGING PROCUREMENT TRENDS AND CHALLENGES

A. *Increase in Service Contracting*

Between 1986 and 2001, defense and civilian agency contracting for services, including research and development, increased from $121 billion to

185. *Id.* at 15.

186. *Id.*

187. The rules governing federal employees are generally found in Title 5 of the U.S. Code and implementing regulations. Those governing military members are generally found in Title 10 and implementing regulations. Title 18 contains criminal prohibitions against conflicts of interest and other ethics violations. The rules governing the contractor workforce are generally found in Title 41 of the U.S. Code, the FAR, and agency supplements to the FAR. For further discussion of the separate regulatory systems for government employees and contractors, see Guttman, *Public Purpose and Private Service*, *supra* note 126.

188. KETTL, *supra* note 28, at 39.

189. *See* FAY REPORT, *supra* note 172, at 19, 51–52; Schooner, *supra* note 126, at 562. For additional discussion on organizational conflicts of interest and other ethics issues raised by having contractors perform what was once government work, see Claude P. Goddard Jr., *Business Ethics in Government Contracting—Part II*, BRIEFING PAPERS, June 2003, at 1; Claude P. Goddard Jr., *Business Ethics in Government Contracting—Part I*, BRIEFING PAPERS, May 2003, at 1; Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005); Guttman, *Public Purpose and Private Service*, *supra* note 126, at 894–901; James McAleese, *Creation of Safe Harbors of Ethical Conduct in Major DoD Procurements to Speed the Fielding of Transformational Technologies for U.S. Warfighters*, THE CLAUSE, Summer 2004, at 6, *available at* http://www.bcabar.org/the_clause/clause_jun_2004.pdf; Shirl K. Nelson, *Planning for Organizational Conflicts of Interest*, CONT. MGMT., July 2002, at 36; Diane Whitmoyer, *Managing Organizational Conflicts of Interest*, CONT. MGMT., June 2004, at 16; Christopher R. Yukins, *Ethics in Procurement: New Challenges After a Decade of Reform*, 38 PROCUREMENT LAW. 3 (Spring 2003). In a recent report, GAO found that DoD (1) lacks information to evaluate its training and counseling efforts on conflict-of-interest and procurement integrity rules and (2) "needs more knowledge of government contractors' standards of conduct efforts." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-341, DEFENSE ETHICS PROGRAM: OPPORTUNITIES EXIST TO STRENGTHEN SAFEGUARDS FOR PROCUREMENT INTEGRITY 6–13 (2005), http://www.gao.gov/new.items/d05341.pdf.

190. FAY REPORT, *supra* note 172, at 19.

HeinOnline -- 35 Pub. Cont. L.J. 201 2005-2006

$136 billion.[191] In 1986, contracting for supplies and equipment accounted for $145 billion, or 55 percent of total spending.[192] By fiscal year 2001, service contracting had become the largest acquisition category at $109 billion, or 51 percent of total spending.[193]

"Spending on services could increase even further" to support new defense and homeland security requirements in the wake of the September 11, 2001, terrorist attacks.[194] Also, the Bush administration's emphasis on competitive sourcing and outsourcing could significantly increase the number of service contracts and government reliance on contractor employees to provide needed services.[195] The current two-year goal of the Office of Management and Budget is to compete 15 percent of the Federal Government's commercial-type positions.[196]

Purchases of information technology services and professional, administrative, and management services are largely driving this shift from supplies to services. Between fiscal years 1991 and 2001, information technology services increased from $4.5 billion to $15.8 billion, a 251 percent increase.[197] Over the same period, professional, administrative, and management support services rose from $12.9 billion to $20.3 billion, a 58 percent increase.[198] These increases coincided with a 22 percent decrease in the civilian workforce.[199] In reality, the Government did not get smaller with downsizing—contractor employees merely replaced civilian employees.[200]

The largest user of service contracts has been DoD with one-half of the $109 billion spent on federal service contracts in 2001.[201] Service contracts at DoD increased from $51.5 billion in fiscal year 1991 to $55.3 billion in fiscal

191. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 25–26.

192. *Id.* at 25.

193. *Id.*

194. *Contract Management: Comments on Proposed Services Acquisition Reform Act, Testimony Before the H. Comm. on Government Reform*, GAO-03-716T, at 2 (2003) (statement of William T. Woods), *available at* http://www.gao.gov/new.items/d03716t.pdf [hereinafter Statement of William T. Woods, GAO-03-716T].

195. Competitive sourcing involves determining, prospectively, whether government resources or the private sector offers the Government—as a consumer—the best value in performing certain tasks. Outsourcing, on the other hand, entails replacing existing government personnel with contractors and relying upon the private sector when new tasks arise.

Schooner, *supra* note 98, at 267.

196. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 9–10.

197. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 26. From fiscal years 1997 through 2001, 46 percent of DoD's service spending was on information technology. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 32.

198. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 26. From fiscal years 1997 through 2001, 21 percent of DoD's service spending was for professional, administrative, and management support. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 32.

199. *See* discussion *supra* Part II.B.

200. *See* LIGHT, *supra* note 127; Paul C. Light, *Fact Sheet on the True Size of Government* (2003), http://www.brook.edu/gs/cps/light20030905.pdf; Schooner, *supra* note 98, at 276–78.

201. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 25.

HeinOnline -- 35 Pub. Cont. L.J. 202 2005-2006

year 2001, a 7 percent increase, then to $93 billion in fiscal year 2002, an 81 percent increase from 1991 and 68 percent increase from 2001.[202]

Despite this huge investment in buying services, audits and reviews by GAO and the DoD Office of the Inspector General have found that poor contract management undermines DoD's ability to effectively manage service spending and ensure it receives the services needed to meet the warfighter's requirements as efficiently as possible.[203] In fact, GAO has identified DoD contract management as a high-risk area.[204]

Too often, "requirements are not clearly defined, alternatives are not fully considered, vigorous price analyses are not performed, and contractors are not adequately overseen," reported GAO.[205] There is limited visibility or control of the service contract workforce at the DoD or military department level, few information systems provide reliable data and are capable of being used as a management tool, and performance metrics to judge the efficiency and effectiveness of contract services are lacking.[206] Inadequate data on contracts and contractor operations inevitably lead to inadequate management, for one cannot manage what one does not know.

Without this information, DoD cannot plan for the future. To make matters worse, DoD "lacks a strategic plan that integrates or coordinates ongoing initiatives or that provides a road map for identifying or prioritizing future service contracting-related efforts."[207] In sum, the widespread growth of ser-

202. *Id.* at 26; U.S. GEN. ACCOUNTING OFFICE, GAO-03-935, CONTRACT MANAGEMENT: HIGH-LEVEL ATTENTION NEEDED TO TRANSFORM DOD SERVICES ACQUISITION 1, 3 (2003), *available at* http://www.gao.gov/new.items/d03935.pdf [hereinafter GAO-03-935].

203. GAO-03-98, *supra* note 6, at 62; *Contract Management: Taking a Strategic Approach to Improving Service Acquisitions, Testimony Before the Subcomm. on Technology and Procurement Policy of the H. Comm. on Government Reform*, GAO-02-499T (Mar. 7, 2002) (statement of William T. Woods), *available at* http://www.gao.gov/new.items/d02499t.pdf; Statement of David E. Cooper, *supra* note 98, at 5; *see* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF DEF., D-2004-015, ACQUISITION: CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE, AND MANAGEMENT SUPPORT SERVICES (2003), *available at* http://www.dodig.osd.mil/audit/reports/fy04/04-015.pdf [hereinafter DoD IG D-2004-015].

204. GAO-03-98, *supra* note 6.

> As the security environment shifted from a Cold War structure to one of many and varied threats, DOD did not keep pace with the changing capabilities and productivity of the modern business environment. Indeed, transformation applies not just to what DOD does but also to how DOD does it and who implements it. . . [I]f these and related support problems are not addressed, inefficiencies will continue to make the cost of carrying out assigned missions unnecessarily high and, more importantly, increase the risk associated with those missions.

Id. at 3.

205. GAO-03-98, *supra* note 6, at 62; *see* U.S. GEN. ACCOUNTING OFFICE, GAO-03-661, BEST PRACTICES: IMPROVED KNOWLEDGE OF DOD SERVICE CONTRACTS COULD REVEAL SIGNIFICANT SAVINGS 6 (2003), *available at* http://www.gao/gov/new.items/d03661.pdf; DoD IG D-2004-015, *supra* note 203.

206. GAO-03-98, *supra* note 6, at 62; *see* DoD IG D-2004-015, *supra* note 203; Guttman, *The Shadow Pentagon*, *supra* note 136 ("[C]ontractors are doing the basic work of government, and government lacks the expertise and experience to control the contractor workforce.").

207. GAO-03-98, *supra* note 6, at 62.

HeinOnline -- 35 Pub. Cont. L.J. 203 2005-2006

vice contracting has expanded beyond the Government's capacity to administer and manage its contracts and oversee contractor operations.[208]

Not surprisingly, the contracting personnel the DoD Office of the Inspector General interviewed never received training in service contracts.[209] Lack of adequate and experienced staff combined with constant personnel turnover have left contracting personnel overburdened with work and less familiar with acquisitions assigned to them.[210]

Of greater concern are those issues regarding DoD service contracting that are rarely addressed yet have broader and more strategic impact. In the words of a dissenting member of the GAO Commercial Activities Panel, these include the following:

- The impact of excessive service contracting on military readiness,
- The role played by service contracting and in-house personnel ceilings in causing and perpetuating the government's "human capital crisis," which is particularly acute in the Department of Defense (DoD),
- The inability . . . to track the costs and savings associated with service contracting,
- The failure to track the cost and size of the service contractor workforce, [and]
- The inability of DoD to determine the extent to which inherently governmental work has been contracted out.[211]

B. *Increase in Intragovernmental Acquisitions*

The Economy Act provides authority for federal agencies to order goods and services from other federal agencies and pay the actual costs of those goods and services, which is also known as contract off-loading.[212] It applies in the absence of a more specific interagency acquisition authority.[213] Economy Act orders arguably provide benefits to both ordering and servicing agencies. The ordering agency is saved the time and expense of awarding and administering its own contract and the servicing agency may use the requiring agency's orders to fulfill obligations under its contracts, which are often indefinite-delivery/indefinite-quantity contracts.

Government agencies are increasingly taking advantage of contracts and acquisition services offered by other agencies, such as the GSA Federal Supply

208. *See* discussion *supra* Part II.E.2.c.

209. DoD IG D-2004–015, *supra* note 203; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., D-2000–100, CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE, AND MANAGEMENT SUPPORT SERVICES, 15 (2000), *available at* http://www.dodig.osd.mil/audit/reports/fy00/00–100.pdf [hereinafter DoD IG D-2000–100].

210. DoD IG D-2004–015, *supra* note 203; DoD IG D-2000–100, *supra* note 209, at 15–16.

211. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 63 (dissenting view of Bobby L. Harnage Sr., National President, American Federation of Government Employees, AFL-CIO).

212. 31 U.S.C. § 1535 (2000); FAR pt. 17.5; U.S. DEP'T OF DEF., DoD 7000.14-R DoD FINANCIAL MANAGEMENT REGULATION, VOL. 11A, CH. 3 (2000) [hereinafter FMR]; U.S. DEP'T OF DEF., INSTRUCTION 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (1995), *available at* http://www.dtic.mil/whs/directives/corres/html/400019.htm; Ralph C. Nash & John Cibinic, *Contract Off-Loading: A Proper Downsizing and Streamlining Tool?* 10 NASH & CIBINIC REP. ¶ 24, May 1996.

213. FAR 17.500(b).

HeinOnline -- 35 Pub. Cont. L.J. 204 2005-2006

Schedule (FSS) contracts.[214] Usage of FSS contracts tripled between fiscal years 1997 and 2001 to about $14.4 billion.[215] The Department of Defense is the largest user of the GSA schedule program, accounting for 45 percent of schedule sales in fiscal year 2001.[216] The Defense Department increased its sales from approximately $1.9 billion in fiscal year 1997 to $6.5 billion in 2001, an increase of 250 percent.[217]

In 1996, GSA began offering information technology services under its FSS program, and as federal spending and employment patterns changed, agencies began to purchase more professional services using contracts awarded and managed by other agencies.[218] The GSA schedule program now offers a wide range of services, and "use of the schedule program to acquire services has increased significantly over the past several years."[219]

Use of other governmentwide contracts also has increased in recent years. The Federal Acquisition Streamlining Act of 1994 authorizes agencies to enter into multiple award task and delivery order contracts for services and goods.[220] Multiple award contracts occur when the Government awards two or more contracts from one solicitation.[221] They establish a group of contractors technically capable of performing the work who compete for task or delivery orders throughout the contract period, usually on a best-value basis. The Clinger-Cohen Act of 1996 authorizes the use of governmentwide acquisition contracts (GWACs) for information technology-related products and services.[222] These are typically multiple-award contracts that allow an indefinite quantity of goods or services within specified limits to be furnished

214. Interagency contracts increased from $4 billion in fiscal year 1992 to over $32 billion in fiscal year 2004. U.S. GEN. ACCOUNTING OFFICE, GAO-05-207, HIGH-RISK SERIES: AN UPDATE 24, 25 (2005), *available at* http://www.gao.gov/new.items/d05207.pdf [hereinafter HIGH-RISK SERIES UPDATE]; *see* SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 11.

215. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 3, 12.

216. *Id.* at 13.

217. *Id.*

218. Statement of David E. Cooper, *supra* note 98, at 4.

219. *Id.*

220. FASA § 2304a(a), (d)(1)(B). The FAR defines a delivery order contract 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" and a task order contract 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." FAR 16.501-1. Both are forms of indefinite-delivery contracts, of which there are three types: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts (ID/IQ). FAR 16.501-2(a). "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." FAR 16.504(a). The contracting officer "must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources." FAR 16.504(c)(1)(i).

221. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., D-2001-1891, MULTIPLE AWARD CONTRACTS FOR SERVICES, at 1 (2001), *available at* http://www.dodig.osd.mil/audit/reports/fy01/01-189.pdf [hereinafter DoD IG D-2001-189].

222. *See* Clinger-Cohen Act, *supra* notes 50–51; Statement of David E. Cooper, *supra* note 98, at 4.

HeinOnline -- 35 Pub. Cont. L.J. 205 2005-2006

over the course of the contract period through delivery or task orders with the contractor. The servicing agencies award the contracts against which requiring agencies place orders. Using these contract vehicles allows federal agencies to procure goods and services quickly using streamlined procedures while obtaining the advantage of competition and economy of scale.

Although federal agencies can meet their needs quickly using intragovernmental acquisitions, GAO and the DoD and GSA Offices of Inspector General continue to identify problems with orders, especially service orders, placed against FSS schedules, and governmentwide contracts. These problems include poor planning, inadequately defined requirements, splitting of requirements to avoid procurement or fiscal threshold limitations, awarding of orders outside the scope of the base contract, failure to follow procedures and guidelines on competition, insufficient price evaluation and failure to ensure fair and reasonable prices, and lax oversight of contractor performance.[223]

The Government Accountability Office found that DoD personnel rarely sought competing quotes from multiple contractors for information technology services orders placed against GSA FSS contracts. Personnel merely compared the labor rates of their preferred contractor with those of other schedule contractors and did not obtain competing quotes. This failure undermined their ability to ensure DoD received the best services for the best price.[224]

In an audit of multiple-award contract orders placed between 1995 and 1998, the DoD Office of the Inspector General found few problems with delivery orders for goods but significant problems with service task orders.[225] It found contracting officers awarded task orders without regard to price and that price was "not a substantial factor in the selection of vendors for

223. Statement of David E. Cooper, *supra* note 98, at 5; HIGH-RISK SERIES UPDATE, *supra* note 214; SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 14; DoD IG D-2001-189, *supra* note 221; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., Rep. No. 1999-116, DoD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS (1999), *available at* http://www.dodig.osd.mil/audit/reports/fy99/99-116.pdf [hereinafter DoD IG 1999-116]; OFFICE OF INSPECTOR GEN., GEN. SERVS. ADMIN., COMPENDIUM OF AUDITS OF THE FEDERAL TECHNOLOGY SERVICE REGIONAL CLIENT SUPPORT CENTERS (2004), *available at* http://www.pubklaw.com/hi/gsaig12-14-04.pdf [hereinafter GSA IG REPORT]; *see* Benjamin, *supra* note 9. In January 2005, the Government Accountability Office identified management of interagency contracting as high-risk. HIGH-RISK SERIES UPDATE, *supra* note 214. The comptroller general has taken the unusual step of sending letters to the secretaries of the Air Force and Army to bring to their attention the problems it encountered in a protest regarding overly broad statements of work. *In re* Valenzuela Eng'g, Inc., Comp. Gen. B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51. In the letter to the Acting Secretary of the Air Force, the comptroller general wrote that an intragovernmental acquisition violates the Competition in Contracting Act when the work statement "is so broad that it does not reasonably describe the scope of services needed, and therefore does not provide potential offerors notice of the work that will be within the scope of the resulting contract." *Id.* at 4. As recently as 2004, the comptroller general voiced its concern about whether the use of broad long-term ID/IQ contracts undermines the efficiencies that full and open competition would produce. Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78, at 3 n.5.

224. Statement of David E. Cooper, *supra* note 98, at 6.

225. DoD IG 1999-116, *supra* note 223.

HeinOnline -- 35 Pub. Cont. L.J. 206 2005-2006

the initial multiple award contract."[226] Contracting officers also did not provide contractors a fair opportunity to be considered, awarding 53 percent of the task orders on a sole-source basis.[227] Of those, only 12 percent had a valid sole-source justification and 17 percent had no justification at all.[228]

The audit attributed these problems, in part, to vague requirements for the number and scope of subsequent task orders. This, in turn, made it difficult for contractors to forecast reasonable costs. The DoD Deputy Inspector General stated he believed the root causes for failing to compete task orders were "lack of clear guidance, pressure to make task order awards rapidly, and excessive workload in some contracting offices, which deterred contracting personnel from questioning sole-source preference input from program managers."[229]

Although the FAR does not allow preferred source designations,[230] program management offices continue to exert influence and internal pressure on contracting organizations to favor incumbents on previous contracts or otherwise favor one contractor over another.[231] The problems of program office source designations are compounded when these offices are not only the customer but also responsible for technical evaluations, cost analysis, and/or source selection recommendations, for they may write evaluations and recommendations to favor preferred sources. Unless the contracting officers question these evaluations and recommendations, award will likely be made to preferred sources in violation of competition requirements. If in-house

226. *Id.* at 3, 7.

227. *Id.* at 14–15. The DoD IG follow-on audit in 2001 found that contracting organizations "continued to direct awards to selected sources without providing all multiple award contractors a fair opportunity to be considered." DoD IG D-2001–189, *supra* note 221, at i. Of 423 multiple-award task orders for services it reviewed, 72 percent were awarded on a sole-source or directed-source basis, of which 87 percent were improperly supported. *Id.* FAR 16.5 implements the multiple-award portion of FASA. 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" unless certain exceptions apply. FAR 16.505(b)(1)(i).

228. DoD IG 1999–116, *supra* note 223, at 15–18.

229. *Defense Acquisition, Testimony Before the Subcomm. on Readiness and Management Support of the S. Comm. on the Armed Servs.*, D-2000–118, at 6 (Apr. 26, 2000) (statement of Donald Mancuso), http://www.dodig.osd.mil/audit/reports/fy00/00–118.pdf.

230. FAR 16.505(b)(1)(ii)(B).

231. DoD IG D-2001–189, *supra* note 221; DoD IG 1999–116, *supra* note 223; *see* Stephen M. Daniels, *Why We Should Be Concerned About the Movement Toward Procurement Reform*, Remarks at the Government Contract Law Symposium of The Judge Advocate General's School, Army (Dec. 12, 1996), *in* ARMY LAW., Mar. 1997, at 3. Judge Daniels, Chairman of the General Services Board of Contract Appeals, stated:

> An inevitable consequence of the personnel cuts, and the new demands on the time of the contracting officials who remain, will be the temptation to cede more authority for procurements to the program offices for which the contracting personnel are doing the buying. This is a real problem. Program offices generally want whatever they need immediately, and . . . don't particularly care how much it costs or how it was bought.

Id. at 7.

HeinOnline -- 35 Pub. Cont. L.J. 207 2005-2006

contracting officers refuse to award to specific contractors or otherwise bypass procurement or fiscal laws or regulations,[232] program offices merely take their business to other agencies, such as GSA, through intragovernmental acquisitions. This result only adds to the problems discussed above.

The GSA Office of Inspector General found that several factors contributed to improper GSA contracting practices. These included an ineffective system of internal management controls, GSA personnel sacrificing adherence to proper procurement procedures to accommodate customer preferences for certain sources, and an excessive focus on customer satisfaction and revenue growth.[233]

When contracting out for goods or services, servicing agencies may not charge ordering agencies a fee exceeding the actual cost of entering into and administering the contract.[234] In a review of contract service programs between fiscal years 1999 and 2001, however, GAO found that most reported an excess of revenues over costs in at least one year.[235] Some did not identify

232. FAR 16.505, however, states that orders placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*, a governmentwide acquisition contract, or multi-agency contract) may not be used to circumvent conditions and limitations imposed on the use of funds (*see, e.g.*, 31 U.S.C. § 1501(a)(1)(A) (2000) ("an amount shall be recorded as an obligation of the United States government only when supported by documentary evidence of a binding agreement between an agency and another person (including an agency) that is in writing, in a way and form, and for a purpose authorized by law"); 31 U.S.C. § 1502(a) (2000) (appropriations are available only for the bona fide needs of an appropriation's period of availability)). FAR 16.505(a)(7)(ii).

233. GSA IG Report, *supra* note 223, at 9. In his comments to the GSA IG Report, the GSA Administrator discussed GSA's "Get It Right" plan, which was implemented in 2004:

> The "Get It Right" plan is a fully integrated approach to assessing regulatory compliance and providing feedback to customer agencies, industry partners, the acquisition workforce, and stakeholders. It has five major objectives:
>
> 1. Secure the best value for the federal agencies and American taxpayers through an efficient and effective acquisition process, while ensuring full and open competition, and instilling integrity and transparency in the use of GSA contracting vehicles.
> 2. Make acquisition policies, regulations and procedures clear and explicit.
> 3. Improve education/training of the federal acquisition workforce on the proper use of GSA contracting vehicles and services.
> 4. Ensure compliance with federal acquisition policies, regulations and procedures. Non-compliance is unacceptable!
> 5. Communicate with the acquisition community, including agencies, industry partners, the Office of Management and Budget (OMB), Congress, and other stakeholders, regarding the use of GSA contracting vehicles and services.

GSA IG Report, *supra* note 223, at 14–20. For more information on GSA's "Get It Right" plan, see the GSA website at http://www.gsa.gov.

234. FAR 17.505(d); FMR, *supra* note 212, at vol. 11A, ¶ 030601. Actual costs include all direct costs attributable to providing the goods or services and indirect costs funded out of the servicing agency's currently available appropriations that bear a significant relationship to providing the goods or services and benefit the ordering agency. GSA Recovery of SLUC Costs for Storage of IRS Records, Comp. Gen. B-211953, 1984 WL 47048, at *1, *8–*9 (C.G. Dec. 7, 1984); Wash. Nat'l Airport, Comp. Gen. B-136318, 1978 WL 13460, at *674, *682–83 (C.G. Aug. 14, 1978); FAR 17.505(d); FMR, *supra* note 212, at vol. 11A, ¶ 030601.

235. U.S. Gen. Accounting Office, GAO-02-734, Contract Management: Interagency Contract Program Fees Need More Oversight, Report to the Chairman and Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate (2002), *available at*

HeinOnline -- 35 Pub. Cont. L.J. 208 2005-2006

or accurately report the cost of providing interagency contract services, leaving doubt as to whether their fees accurately reflect their costs.[236] The schedules programs in particular generated hefty earnings. Rather than adjust fees to reflect actual costs, GSA used the earnings to support other programs, which means ordering agencies are consistently overcharged for services.[237]

The fee-for-service system may have "helped keep contracting and procurement offices alive during deep downsizing in acquisition."[238] When agencies use fees to fund the operations of their offices, however, there is intense pressure to please the customers and garner more business, even if it means taking shortcuts to procurement procedures.[239] Program offices, as discussed above, are all too willing to pay a fee to an outside servicing agency to avoid contracting constraints, such as competition requirements, that slow down its in-house contracting office. Once the servicing agency streamlines the purchase, it has no interest and often has insufficient resources to properly manage the contract. In the end, the program office has succeeded in obtaining a contract for a small fee with its favored contractor and no contract administration or oversight to prevent it from taking the contractor's performance outside the scope of the contract.[240]

Use of intragovernmental acquisitions is a powerful tool that both servicing and ordering agencies can abuse without careful management. Most recently, the Abu Ghraib prison scandal in Iraq brought attention to problems that can be traced to procurements made under GSA schedules that were outside the scope of work for those schedules and to insufficient and inadequate contractor oversight.[241] Unfortunately, allegations of prisoner abuse were made

http://www.gao.gov/new.items/d02734.pdf [hereinafter PROGRAM FEES OVERSIGHT REPORT]. Many of these interagency contract service programs operate under revolving funds that allow retention of earnings (*see, e.g.*, 10 U.S.C. §§ 2208–2209 (2000)). There is concern whether these programs operate "consistent with applicable fiscal laws, including the miscellaneous receipts statute," 31 U.S.C. § 3302(b) (2000), which requires deposit of money into the miscellaneous receipts account of the U.S. Treasury's General Fund without deduction. PROGRAM FEES OVERSIGHT REPORT, *supra*, at 3.

236. PROGRAM FEES OVERSIGHT REPORT, *supra* note 235, at 3.

237. *Id.*

238. Anne Laurent, *Award-Winning Acquisition*, GOV'T EXEC., Aug. 25, 2000, http://www.govexec.com/top200/2000top/00tops1.htm.

239. *See supra* note 233 and accompanying text; *see also* Statement of Steven L. Schooner, *supra* note 124, at 10–12; Benjamin, *supra* note 9, at 468–70; Thornton, *supra* note 101, at 416–19. The fee-for-service system in government has been described by some as entrepreneurial. *See, e.g.*, Matthew Weinstock, *Building Entrepreneurs*, GOV'T EXEC., June 1, 2002, http://www.govexec.com/features/0602/0602s5.htm.

240. Program offices increasingly rely upon this approach to "hire" contractor personnel to replace or augment their civilian employees and military members. "This reliance is driven by the juxtaposition of two trends: (1) increased government downsizing and (2) the targeted acquisition workforce reductions." Statement of Steven L. Schooner, *supra* note 124, at 7, n. 18. The contractor employees work alongside and with the civilian and military personnel, who often receive no training on how to operate in this new environment. Without proper contract administration, these contracts are in danger of becoming prohibited personal services contracts. *See* discussion *supra* Part II.E.3.

241. *See* FAY REPORT, *supra* note 172, at 47–52; Interior IG Report, *supra* note 172; *see also* Statement of Steven L. Schooner, *supra* note 124, at 3. Delivery orders for interrogation, intel-

HeinOnline -- 35 Pub. Cont. L.J. 209 2005-2006

against not only military members but also contractor employees. The military investigation found the following:

> The general policy of not contracting for intelligence functions and services was designed in part to avoid many of the problems that eventually developed at Abu Ghraib, i.e., lack of oversight to insure that intelligence operations continued to fall within the law and the authorized chain of command, as well as the government's ability to oversee contract operations. . . Proper oversight did not occur at Abu Ghraib due to a lack of training and inadequate contract management and monitoring. Failure to assign an adequate number of [contracting officer representatives] to the area of contract performance puts the Army at risk of being unable to control poor performance or become aware of possible misconduct by contractor personnel. This lack of monitoring was a contributing factor to the problems that were experienced with the performance of the contractors at Abu Ghraib.[242]

The United States military has contracted with civilian contractors since the American Revolution. Contractors typically provided supplies and transportation. Over the course of the last two decades, the military has come to depend upon civilian contractors on the battlefield for various types of logistical and operational service support, as well as the maintenance and operation of complex weapons, communications, and intelligence systems they have developed for the military.[243]

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ligence, logistics, and security services were awarded under a blanket purchase agreement (BPA) with the National Business Center, a fee-for-service activity of the Department of Interior. The orders were outside the scope of the GSA schedules used, Information Technology (No. 70) and Professional Engineering Services (No. 871). Fay Report, *supra* note 172; INTERIOR IG REP., *supra* note 172. As stated in the Fay Report, "it is not clear who, if anyone, in Army contracting or legal channels approved the use of the BPA, or why it was used." *Id.* at 49.

242. FAY REPORT, *supra* note 172, at 49, 52. The Fay Report also found: "No training is conducted at any level . . . on the employment of contract interrogators in military operations" and "[n]o doctrine exists to guide interrogators and their intelligence leaders . . . in contract management or command and control of contractors in a wartime environment. *Id.* at 19. Another indicator of the "inadequacy of on-site contract management and lack of contract training is the apparent lack of understanding of the appropriate relationship between contractor personnel, government civilian employees, and military personnel." *Id.* at 51.

243. In the past two decades, there has been a dramatic increase in contractor service support overseas, from the Balkans to the current support of military operations in Afghanistan and Iraq. There are two primary types of support: (1) systems support requiring expertise in weapons systems maintenance and information technology and (2) combat and contingency operations support involving general logistical support. *See* FM 3-100.21, *supra* note 176. Contractor support for military operations overseas raises numerous legal, contractual, and operational issues, many not yet resolved. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS, REPORT TO THE SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, COMMITTEE ON ARMED SERVICES, U.S. SENATE (2003), *available at* http://www.gao.gov/new.items/d03695.pdf; Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?* 147 MIL. L. REV. 1 (1995); Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000); Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?* 51 A.F. L. REV. 111 (2001); Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369 (2004); Andrew D. Irwin, *Special Compliance Considerations When Supporting the U.S. Government Abroad*, BRIEFING PAPERS, June 2004, at 1; James J. Mc-

HeinOnline -- 35 Pub. Cont. L.J. 210 2005-2006

From the issues and problems discussed above, it is becoming increasingly evident that governmental agencies such as DoD are "at risk of not having enough of the right people with the right skills to manage service procurements."[244] As Professor Schooner recently stated before Congress:

> If the government plans to rely heavily upon contractors, the government must maintain, invest in, and apply appropriate acquisition professional resources... When faced with applying limited resources, agencies focus first upon awarding contracts and less upon administering those contracts once awarded. To be clear—the government lacks the procurement professionals needed to manage the contractors that continue to replace outsourced government personnel.[245]

Beginning in the early 1990s, federal spending patterns changed, the federal and acquisition workforces downsized, and acquisition reform brought about new contracting vehicles and techniques.[246] The Government must now ask itself whether it has, and will have tomorrow, the ability to acquire and manage the procurement of increasingly sophisticated services in this new environment.[247]

C. *Increase in Use of the Government Purchase Card*

Agencies use government purchase cards for many of their low-dollar-value procurements to obtain goods and services directly from vendors. Under the provisions of the FAR, the government purchase card is the preferred method for purchases under the micropurchase threshold of $2,500.[248] The purchase card also may be used to place a task or delivery order against, or make payments under, an existing basic contract, basic ordering agreement, or blanket purchase agreement.[249]

Cullough & Courtney J. Edmonds, *Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath*, BRIEFING PAPERS, May 2004, at 1; Thomas Catan, *Private Armies March into a Legal Vacuum*, FINANCIALTIMES.COM, Feb. 10, 2005, at 8.

244. Statement of David E. Cooper, *supra* note 98, at 1; *see* Ralph C. Nash & John Cibinic, *Contracting Out Procurement Functions: The "Inherently Governmental Function*, 14 NASH & CIBINIC REP. ¶ 45, Sept. 2000 (wondering "whether some agencies have enough personnel left in-house" to properly determine whether a service function should be contracted out and, if so, can the Government provide sufficient oversight).

245. Statement of Steven L. Schooner, *supra* note 124, at 4–5.

246. Statement of David E. Cooper, *supra* note 98, at 10.

247. *Id.* at 1.

248. FAR 13.201(b); *see* FAR 2.101.

> "Micro-purchase" means an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold.
>
> "Micro-purchase threshold" means $2,500, except it means—
>
> (1) For construction subject to the Davis-Bacon Act, $2,000; and
> (2) For acquisitions of supplies or services [in support of contingency operations]—
> (i) $15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and
> (ii) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

FAR 2.101.

249. FAR 13.301.

Federal agencies in the 1990s promoted use of purchase cards for small purchases and the number of purchase card accounts and spending soared dramatically. In September 2000, there were 500,000 cardholders governmentwide,[250] and use of the purchase card increased between fiscal years 1994 and 2003 from $1.0 billion to $16.4 billion.[251] In fiscal year 2003 alone, more than 325,000 card holders used purchase cards to make approximately 26.5 million transactions for $16.4 billion in goods and services.[252] As with FSS orders, DoD is typically the largest user of purchase cards among federal agencies.[253]

Using the purchase card offers significant benefits over traditional contracting and payment methods, including lower transactions costs; greater flexibility in making small, routine purchases; and less administrative effort for both the Government and vendor.[254] In audits of purchase card programs at DoD and civilian agencies, however, GAO and inspectors general found that agencies generally had not taken advantage of opportunities to obtain savings.[255] Even more disturbing, "purchase card management oversight and internal control were ineffective,"[256] which "left agencies vulnerable to fraudulent, improper, and abusive charges" by cardholders, vendors, or other third parties.[257]

250. *Purchase Cards: Increased Management Oversight and Control Could Save Hundreds of Millions of Dollars, Testimony Before the S. Comm. on Governmental Affairs*, GAO-04–717T, at 2, 7 (Apr. 28, 2004) (statement of Gregory D. Kutz et al.) *available at* http://www.gao.gov/new.items/d04717t.pdf [hereinafter GAO-04–717T]. This meant that nearly 16 percent of all government employees were cardholders. In comparison, defense contractors with purchase card programs usually had no more than 4 percent of employees as cardholders. *Id.*

251. *Id.* at 4–6.

252. *Id.* at 1.

253. For example, in fiscal year 2002, the Department of Air Force spent about $1.6 billion on purchase card expenditures, the Department of Army spent $2.7 billion, and the Department of Navy spent $1.8 billion, for a total of $6.1 billion within the Department of Defense. U.S. GEN. ACCOUNTING OFFICE, GAO-04–430, CONTRACT MANAGEMENT: AGENCIES CAN ACHIEVE SIGNIFICANT SAVINGS ON PURCHASE CARD BUYS 6 (2004), *available at* http://www.gao.gov/new.items/d04430.pdf [hereinafter GAO-04–430]. This represented "nearly 45 percent of the federal government's fiscal year 2002 purchase card activity." U.S. GEN. ACCOUNTING OFFICE, GAO-04–156, PURCHASE CARDS: STEPS TAKEN TO IMPROVE DOD PROGRAM MANAGEMENT, BUT ACTIONS NEEDED TO ADDRESS MISUSE 4 (2003), *available at* http://www.gao.gov/new.items/d04156.pdf.

254. GAO-04–717T, *supra* note 250, at 1–2.

255. GAO-04–430, *supra* note 253, at 8–27.

256. GAO-04–717T, *supra* note 250, at 2. The testimony given in GAO-04–717T was based upon findings from GAO-04–430, *supra* note 253. For additional GAO reports on federal agency purchase card internal controls and strategic purchasing using purchase cards, see GAO-04–717T, *supra* note 250, at 21–22; GAO-04–430, *supra* note 253, at 56–57.

257. GAO-04–717T, *supra* note 250, at 6. For additional discussion of the background, benefits, and drawbacks of government purchase card programs, see Steven L. Schooner & Neil S. Whiteman, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, 4 PUB. PROCUREMENT L. REV. 148 (2000); Jessica Tillipman, *The Breakdown of the United States Government Purchase Card Program and Proposals for Reform*, 6 PUB. PROCUREMENT L. REV. 229 (2003); Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?* 30 PUB. CONT. L.J. 403 (2001); Jeff P. MacHarg, Note, *Doing More With Less—Continued Expansion of the Government Purchase Card Program by Increasing the Micropurchase Threshold: A Response to Recent Articles Criticizing the Government Purchase Card Program*, 31 PUB. CONT. L.J. 293 (2002).

HeinOnline -- 35 Pub. Cont. L.J. 212 2005-2006

Between September 2000 and January 2004, GAO examined the purchase card program management practices of the six federal agencies accounting for over 85 percent of the Government's purchase card spending.[258] In establishing their purchase card programs, the agencies had focused on maximizing the use of purchase cards, paying bills quickly, and developing performance metrics for these two activities.[259] They failed to establish a strong control environment and key internal controls were ineffective.[260]

Specifically, GAO found across the agencies a proliferation of cardholders, excessive and unreasonable spans of control for approving officials, cardholder credit limits exceeding organization procurement needs, no training records for cardholders, and insufficient human capital resources to monitor purchases and develop a strong oversight program.[261] Within DoD, inadequate guidance on the management of purchase card programs, flawed policies and procedures, lack of adherence to valid policies and procedures, and weak internal control mechanisms have plagued its purchase card programs for years.[262]

In April 2002, OMB issued a memorandum to executive branch departments and agencies stating that fraudulent and unauthorized purchase card expenditures were unacceptable and required "prompt and effective remedial action."[263] It requested that each agency review the adequacy of its internal controls for purchase card expenditures and prepare remedial action plans detailing the agency problems and internal controls the agency will use to manage program risks. In October 2002, OMB issued another memorandum requiring federal agencies to submit quarterly reports on purchase card activities beginning with the first quarter of fiscal year 2003.[264] Most recently, OMB issued Revised Circular No. A-123 with guidance to federal managers on improving the management of government charge card programs.[265]

258. GAO-04-717T, *supra* note 250, at 1-3; GAO-04-430, *supra* note 253, at 2. These agencies included the Departments of Agriculture, Defense, Interior, Justice, Transportation, and Veterans Affairs.

259. GAO-04-717T, *supra* note 250, at 6.

260. *Id.* at 6-11.

261. *Id.* at 6-9; *see* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., D-2002-075, ACQUISITION: CONTROLS OVER THE DoD PURCHASE CARD PROGRAM (2002), *available at* http://www.dodig.osd.mil/audit/reports/fy02/02-075.pdf [hereinafter DoD IG D-2002-075].

262. SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 17; GAO-03-98, *supra* note 6, at 65-66; *see* DoD IG D-2002-075, *supra* note 261.

263. Memorandum from Mitchell E. Daniels Jr., Director, Office of Management and Budget, to Heads of Departments and Agencies, Use of Government Purchase and Travel Cards (Apr. 18, 2002), http://www.whitehouse.gov/omb/memoranda/m02-05.html.

264. Memorandum from Mitchell E. Daniels Jr., Director, Office of Management and Budget, to Heads of Departments and Agencies, Increased Oversight for Government Purchase and Travel Cards (Oct. 15, 2002), http://www.whitehouse.gov/omb/memoranda/m03-02.html.

265. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-123 (REVISED), MANAGEMENT'S RESPONSIBILITY FOR INTERNAL CONTROL (2005), http://www.whitehouse.gov/omb/circulars/a123/a123_appendix_b.pdf; *see also* Michael Hardy, *Purchase Cards Facing Tougher Controls: Agencies Turn to Technology to Ferret Out Waste, Fraud and Abuse*, FCW.COM, Aug. 1, 2005, http://www.fcw.com/article89743-08-01-05-Print. On a related point, OFPP recently issued guidance on management controls for implementing the increased micropurchase threshold and use of the purchase

HeinOnline -- 35 Pub. Cont. L.J. 213 2005-2006

Congress also responded to these concerns and took actions to improve the management of federal agency purchase card programs. It set forth specific requirements for DoD's purchase card program in DoD's fiscal year 2003 authorization and appropriations acts.[266] Most recently, the Consolidated Appropriations Act of 2005 requires federal agencies to evaluate the creditworthiness of individuals before issuing them a government purchase card.[267]

Responding to criticisms and recommendations, agencies have made improvements regarding purchase card management by reducing the number of cardholders, implementing new training and approval processes, and putting in place automated controls to monitor credit limits and improve review of monthly statements.[268]

D. *Expanded Use of Performance-Based Acquisitions*

Because of the significant growth in service contracting, Congress and the administration are encouraging "greater use of performance-based service contracting to achieve greater cost savings and better outcomes."[269] With performance-based contracting, an agency states only the desired outcome and the contractor determines how it will achieve that outcome.[270] In fiscal year 2001, federal agencies "reported that 24 percent of their eligible service contracts, by dollar value, were considered performance based."[271] The goal of OMB for that year was 10 percent.[272] The fiscal year 2005 goal is 40 percent.[273]

Review by GAO has found, however, that federal agencies do not always successfully incorporate the following performance-based attributes into these contracts: "describing desired outcomes rather than how the services should be performed, setting measurable performance standards, describing how the contractor's performance will be evaluated, and establishing positive and negative incentives, as appropriate."[274] The Government Accountability Office further found, and the federal agencies readily admitted, that agency person-

card to meet immediate needs arising in the aftermath of Hurricane Katrina. Memorandum from David H. Safavian, Administrator, Office of Federal Procurement Policy, to Chief Acquisition Officers and Chief Financial Officers, Implementing Management Controls to Support Increased Micro-purchase Threshold for Hurricane Katrina Rescue and Relief Operations (Sept. 13, 2005), http://www.whitehouse.gov/omb/procurement/publications/katrina_guidance2005.pdf.

266. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107–314, § 1007, 116 Stat. 2458, 2633 (2002); Department of Defense Appropriations Act for Fiscal Year 2003, Pub. L. No. 107–248, §§ 8087, 8103, 116 Stat. 1519, 1556, 1561 (2002).

267. Consolidated Appropriations Act, Pub. L. No. 108–447, § 639, 118 Stat. 2809, 3281 (2004).

268. Spending and Workforce Trends, *supra* note 1, at 17; *see* GAO-04–717T, *supra* note 250, at 14–16.

269. Spending and Workforce Trends, *supra* note 1, at 18; *see* Seven Steps to PBSA, *supra* note 95.

270. *See* FAR 2.101; FAR subpt. 37.6.

271. Spending and Workforce Trends, *supra* note 1, at 18–19.

272. *Id.* at 19.

273. Memorandum from Robert A. Burton, *supra* note 94.

274. Spending and Workforce Trends, *supra* note 1, at 20.

HeinOnline -- 35 Pub. Cont. L.J. 214 2005-2006

nel do not fully understand performance-based contracting or how to take advantage of this acquisition approach.[275]

Performance-based contracting initiatives are both a challenge for federal procurement and a potential response to the challenges presented by the contracting out of former government work, increase in service contracting, and human capital crisis in federal procurement.[276] In order to function more efficiently and effectively in the new service environment, agencies and their contracting organizations must provide the necessary training, guidance, and tools to the acquisition workforce and establish metrics to monitor performance of contracts awarded using performance-based contracting approaches.[277]

IV. A STRATEGIC APPROACH TO MEET ACQUISITION CHALLENGES

With taxpayer dollars at risk in a time of budget constraints and agency missions on the line in a time of global war, these trends and challenges underscore the importance of ensuring that acquisitions, especially service contracts, are awarded and managed properly. In order to be successful, government agency contracting functions, and efforts to improve them, must be linked to agency strategic plans.[278] The Government Accountability Office recently reviewed the processes of several commercial companies and discovered their strategic approach to acquisition resulted in significant cost savings and service improvements that could be used by DoD and other agencies.[279]

The following four broad principles were critical to carrying out each company's strategic approach to acquisition: (1) clear, strong executive leadership committed to the strategic approach, with goals and targets; (2) increased and improved knowledge on spending with analysis to identify opportunities to reduce costs, improve service levels, and provide better contract management and oversight; (3) creation of supporting structures, processes, and roles that maximize return; and (4) enablement of success through continued leadership,

275. *Id.* at 20.

276. Martin, *supra* note 96, at 91.

277. Statement of David E. Cooper, *supra* note 98, at 9; *see also* Martin, *supra* note 96, at 91.

278. *See* HIGH-RISK SERIES UPDATE, *supra* note 214, at 28.

279. U.S. GEN. ACCOUNTING OFFICE, GAO-02-230, BEST PRACTICES: TAKING A STRATEGIC APPROACH COULD IMPROVE DOD'S ACQUISITION OF SERVICES, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT (2002), *available at* http://www.gao.gov/new.items/d02230.pdf [hereinafter TAKING A STRATEGIC APPROACH]; *see also* SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 7; GAO-03-98, *supra* note 6, at 62-64. Based in part on GAO's Report No. GAO-02-230 and its recommendations, the National Defense Authorization Act for Fiscal Year 2002 required DoD to implement a management structure for and collect data on the procurement of services. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 801, 115 Stat. 1174-1178 (2001); *see* Memorandum from Robert J. Henke, Principal Deputy Under Secretary of Defense (Comptroller), and Michael W. Wynne, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics, to various departments, offices, commands, and agencies throughout DoD, Proper Use of Non-DoD Contracts (Oct. 29, 2004), http://www.acq.osd.mil/dpap/policy/policyvault/2005-0924-DPAP.pdf.

HeinOnline -- 35 Pub. Cont. L.J. 215 2005-2006

clear lines of communication, and metrics to demonstrate value and credibility of new processes.[280]

An organization's people are the key to its success or failure. Federal agencies today must put a "greater focus on human capital strategies to adequately meet the current and emerging needs of government and its citizens in the most effective, efficient, and economical manner possible."[281] To do this, they need sustained leadership; effective strategic workforce capital planning; innovative approaches to recruit, train, and retain talent; and performance management systems that link pay and awards with performance and organizational results.[282]

This transformation of the acquisition workforce will not be quick or easy. It is necessary, however, because of the looming "human capital crisis."[283] The first step to aggressively attacking the problem is recognizing that there is a problem with the size and capacity of the workforce.[284] The Government must

280. GAO-03-935, *supra* note 202, at 5-7; GAO-03-98, *supra* note 6, at 62-64; TAKING A STRATEGIC APPROACH, *supra* note 279.

281. COMMERCIAL ACTIVITIES PANEL REPORT, *supra* note 7, at 29.

> Strategic workforce planning, an integral part of human capital management, helps ensure that an organization has the staff with the necessary skills and competencies to accomplish its strategic goals. Critical skills are core mission and support occupations that are vital to the accomplishment of an agency's goals and objectives. Competencies are a set of behaviors that encompass knowledge, skills, abilities, and personal attributes that are critical to successful work accomplishment... Strategic workforce planning is an iterative, systematic process that addresses two critical needs: (1) aligning an organization's human capital program with its current and emerging mission and programmatic goals and (2) developing long-term strategies for acquiring, developing, and retaining an organization's workforce to achieve programmatic goals.

STRATEGIC WORKFORCE PLANS, *supra* note 105, at 2. The strategic workforce planning process includes five elements: (1) involvement of management and employees; (2) workforce gap analysis; (3) workforce strategies to fill the gaps; (4) the building of capability to support workforce strategies; and (5) evaluation of and revisions to strategies. *Id.* at 2, 10-11; *see* FOR THE PEOPLE: CAN WE FIX PUBLIC SERVICE? (John D. Donahue & Joseph S. Nye Jr. eds., 2003); DONALD F. KETTL ET AL., CIVIL SERVICE REFORM: BUILDING A GOVERNMENT THAT WORKS (1996).

282. HIGH-RISK SERIES UPDATE, *supra* note 214, at 39 (highlighting high-risk area of strategic human capital management); U.S. GEN. ACCOUNTING OFFICE, GAO-03-120, HIGH-RISK SERIES: STRATEGIC HUMAN CAPITAL MANAGEMENT (2003), *available at* http://www.gao.gov/pas/2003/d03120.pdf; *see* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-28, HUMAN CAPITAL: KEY PRINCIPLES FROM NINE PRIVATE SECTOR ORGANIZATIONS (2000) (identifies ten principles of human capital management that are common to organizations recognized as being innovative or effective in strategically managing their human capital). In January 2001, GAO first designated strategic human capital management as a governmentwide high-risk area. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-263, HIGH-RISK SERIES: AN UPDATE (2001), *available at* http://www.gao.gov/new.items/d01263.pdf.

283. Gansler, *supra* note 5, at 19.

284. In addition to those reports already discussed, numerous other GAO reports address this issue and are available at GAO's website, http://www.gao.gov. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO-04-797, HUMAN CAPITAL: ADDITIONAL COLLABORATION BETWEEN OPM AND AGENCIES IS KEY TO IMPROVED FEDERAL HIRING (2004); U.S. GEN. ACCOUNTING OFFICE, GAO-04-546G, HUMAN CAPITAL: A GUIDE FOR ASSESSING STRATEGIC TRAINING AND DEVELOPMENT EFFORTS IN THE FEDERAL GOVERNMENT (2004); U.S. GEN. ACCOUNTING OFFICE, GAO-04-39, HUMAN CAPITAL: KEY PRINCIPLES FOR EFFECTIVE STRATEGIC WORKFORCE PLANNING (2003); U.S. GEN. ACCOUNTING OFFICE, GAO-03-914, HUMAN CAPITAL: INSIGHTS FOR U.S. AGENCIES FROM OTHER COUNTRIES' SUCCESSION PLANNING AND MANAGEMENT INITIATIVES (2003); U.S. GEN. AC-

HeinOnline -- 35 Pub. Cont. L.J. 216 2005-2006

face the fact that it does not have today, and will not have tomorrow without strategic planning, the ability to manage procurements of increasingly sophisticated goods and services.[285]

Many agencies find it difficult to predict specific skills and competencies the acquisition workforce may need due to shifting priorities, missions, and budgets. Many simply lack good data on size and location, knowledge and skills, and attrition and retirement rates. While DoD has made some progress in this area, it still lacks strategic workforce plans to guide human capital efforts and data from which to begin.[286]

In November 2003, Congress provided DoD with significant authorities to rewrite the rules, regulations, and procedures that govern how its civilian employees are hired, compensated, promoted, and disciplined.[287] In February

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COUNTING OFFICE, GAO-03-475, DOD PERSONNEL: DOD ACTIONS NEEDED TO STRENGTHEN CIVILIAN HUMAN CAPITAL STRATEGIC PLANNING AND INTEGRATION WITH MILITARY PERSONNEL AND SOURCING DECISIONS (2003); U.S. GEN. ACCOUNTING OFFICE, GAO-03-450, HUMAN CAPITAL: OPPORTUNITIES TO IMPROVE EXECUTIVE AGENCIES' HIRING PROCESSES (2003); U.S. GEN. ACCOUNTING OFFICE, GAO-03-446, HUMAN CAPITAL: SELECTED AGENCY ACTIONS TO INTEGRATE HUMAN CAPITAL APPROACHES TO ATTAIN MISSION RESULTS (2003); U.S. GEN. ACCOUNTING OFFICE, GAO-03-55, ACQUISITION WORKFORCE: STATUS OF AGENCY EFFORTS TO ADDRESS FUTURE NEEDS (2002). For a DoD perspective, *see* THE ACQUISITION 2005 TASK FORCE, U.S. DEP'T OF DEF., SHAPING THE CIVILIAN ACQUISITION WORKFORCE OF THE FUTURE: FINAL REPORT (2000), http://www.acq.osd.mil/dpap/Docs/report1000.pdf; THE DEFENSE SCIENCE BOARD TASK FORCE, U.S. DEP'T OF DEF., HUMAN RESOURCES STRATEGY (2000), http://www.acq.osd.mil/dsb/reports/humanresources.pdf.

285. *See Contract Management: Improving Services Acquisitions, Testimony Before the Subcomm. on Technology and Procurement Policy of the H. Comm. on Government Reform*, GAO-02-179T (2001) (statement of William T. Woods), http://www.gao.gov/new.items/d02179t.pdf. On April 15, 2005, the Office of Federal Procurement Policy (OFPP) issued policy letter 05-01, Developing and Managing the Acquisition Workforce, found at http://www.whitehouse.gov/omb/procurement/policy_letter_05-01.html. Although the letter attempts to establish a framework for creating an acquisition workforce with skills necessary to deliver best-value supplies and services, it does not go far enough. First and foremost, it does not address the shortfall in trained procurement professionals. Instead, it broadens the definition of acquisition workforce, providing for cosmetic growth without adding personnel. Although its purpose paragraph is directed toward a "government-wide" framework, it is addressed only to civilian executive departments and agencies and excludes those subject to the Defense Acquisition Workforce Improvement Act (DAWIA), 10 U.S.C. §§ 1701-1764 (2000), which was title XII of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1638 (1990). The intent of DAWIA was to professionalize the DoD acquisition workforce by establishing specific education, training, and experience requirements. Ironically, OFPP through this letter has delegated responsibility for the education and training of civilian agency acquisition personnel to the Defense Acquisition University (DAU). In essence, DAU has become the "sole gateway to training for all federal acquisition personnel." Christopher R. Yukins, *Feature Comment: A Pedagogical Perspective on Training the Acquisition Workforce*, 47 GOV'T CONTRACTOR, May 4, 2005, at 8-9. This shift in DAU's mission means it must face new challenges as it fosters and promotes the development of a professional acquisition workforce capable of competing and effectively negotiating with "a highly sophisticated private sector." *Id.* For more information on DAU, see its homepage *at* http://www.dau.mil. For further comment on OFPP's policy letter, see Steven L. Schooner, *Feature Comment: Empty Promise for the Acquisition Workforce*, 47 GOV'T CONTRACTOR, May 4, 2005, at 1, 3.

286. *See* Statement of William T. Woods, GAO-03-716T, *supra* note 194, at 3; STRATEGIC WORKFORCE PLANS, *supra* note 105; SPENDING AND WORKFORCE TRENDS, *supra* note 1, at 23.

287. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1101, 117 Stat. 1392, 1621 (2003) (amending 5 U.S.C. pt. III, subpt. I).

HeinOnline -- 35 Pub. Cont. L.J. 217 2005-2006

2005, DoD and the Office of Personnel Management released for public comment the proposed regulations establishing the National Security Personnel System (NSPS), a human resources management for DoD.[288] The proposed regulations have some positive features, such as pay banding and pay for performance; however, they do not define the details for implementing the system or identify a process to involve employees in NSPS development, refinement, and implementation.[289] Still, this system represents a huge step forward for DoD, and NSPS could serve as a model for other agencies to transform their human capital management if it is properly designed and implemented.

V. CONCLUSION

It is not the award of a contract that fulfills an agency's requirements and further enables it to carry out its mission, but rather the timely delivery of goods and services as called for under the terms and conditions of the contract. Without sufficient contract administration and oversight by trained acquisition personnel, the agency is at risk for receiving delivery. Without delivery of the goods and services required, the agency's requirements are not met, thereby placing its very mission at risk. The United States relies upon DoD's acquisition programs to provide for and "maintain the technological superiority that plays an essential role in the national security strategy."[290] "The best foreign policy can be held hostage to an acquisition process that is not able to get weapons to warfighters when they are needed."[291]

For this reason, government organizations must consider strategic contract management a core competency of their organizations and aggressively use contracting to promote central agency goals.[292] Over the last decade, the federal workforce was reduced with significant losses in the acquisition workforce, acquisition reforms introduced new contracting vehicles and techniques, and federal requirements and spending patterns changed.[293] The

288. National Security Personnel System, 70 Fed. Reg. 7551 (Feb. 14, 2005) (to be codified at 5 C.F.R. ch. XCIX and pt. 9901).

289. *See Human Capital: Agencies Need Leadership and the Supporting Infrastructure to Take Advantage of New Flexibilities, Testimony Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, GAO-05-616T (Apr. 21, 2005) (statement of Eileen Larence), http://www.gao.gov/new.items/d05616t.pdf; *Human Capital: Preliminary Observations on Proposed DoD National Security Personnel System Regulations, Testimony Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, GAO-05-432T (Mar. 15, 2005) (statement of David M. Walker), http://www.gao.gov/new.items/d05432t.pdf; U.S. Gov'T ACCOUNTABILITY OFFICE, GAO-05-69SP, FORUM, HUMAN CAPITAL: PRINCIPLES, CRITERIA, AND PROCESSES FOR GOVERNMENTWIDE FEDERAL HUMAN CAPITAL REFORM (2004), http://www.gao.gov/new.items/d0569sp.pdf.

290. GAO-03-98, *supra* note 6, at 27.

291. James H. Gill, *Crisis in the Acquisition Workforce: Some Simple Solutions*, ACQUISITION REV. Q., Summer 2001, at 83, 84.

292. Kelman, *supra* note 2, at 89.

293. Statement of David E. Cooper, *supra* note 98, at 10.

HeinOnline -- 35 Pub. Cont. L.J. 218 2005-2006

Government must improve its acquisitions "while simultaneously addressing human capital issues. One cannot be done without the other."[294]

Bringing in new people with the right skills, abilities, and experiences and training those already in the acquisition workforce will be critical to the successful transition to a world-class government acquisition organization.[295] Agencies such as DoD must commit time, attention, and resources to "restoring, expanding, training, and incentivizing the acquisition workforce."[296] Only by making these investments will agencies have the potential to attain the following government acquisition vision: "A highly skilled and innovative government acquisition workforce, buying high-quality, low-cost goods and services in an efficient and effective fashion from high-quality, low-cost innovative suppliers, with a process that has total public confidence and trust."[297]

294. *Id.*
295. Gansler, *supra* note 5, at 20.
296. Statement of Steven L. Schooner, *supra* note 124, at 6.
297. Gansler, *supra* note 5, at 16.

HeinOnline -- 35 Pub. Cont. L.J. 219 2005-2006

HeinOnline -- 35 Pub. Cont. L.J. 220 2005-2006