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MOVING FORWARD WITH SERVICES ACQUISITION REFORM: A LEGISLATIVE APPROACH TO UTILIZING COMMERCIAL BEST PRACTICES

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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CONTENTS

	Page
Hearing held on November 1, 2001	1
Statement of:	
Soloway, Stan Z., president, Professional Services Council; Mark Wagner, vice president, Federal Government affairs, Johnson Controls, Inc.; Renato DiPentima, president, SRA consulting and systems integration, SRA International, Inc.; Charles Mather, chief executive officer, Acquisition Solutions, Inc.; and Charles Tiefer, professor of law, University of Baltimore Law School	60
Woods, William T., Acting Director, Acquisition and Sourcing Management; Stephen A. Perry, Administrator, U.S. General Services Administration; Angela B. Styles, Administrator for Federal Procurement, Office of Management and Budget; and Deidre A. Lee, Director, Defense Procurement, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Department of Defense	8
Letters, statements, etc., submitted for the record by:	
Davis, Hon. Thomas M., a Representative in Congress from the State of Virginia, prepared statement of	2
DiPentima, Renato, president, SRA consulting and systems integration, SRA International, Inc., prepared statement of	99
Lee, Deidre A., Director, Defense Procurement, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Department of Defense, prepared statement of	45
Mather, Charles, chief executive officer, Acquisition Solutions, Inc., prepared statement of	108
Perry, Stephen A., Administrator, U.S. General Services Administration, prepared statement of	19
Soloway, Stan Z., president, Professional Services Council, prepared statement of	63
Styles, Angela B., Administrator for Federal Procurement, Office of Management and Budget, prepared statement of	26
Tiefer, Charles, professor of law, University of Baltimore Law School, prepared statement of	132
Turner, Hon. Jim, a Representative in Congress from the State of Texas, prepared statement of	6
Wagner, Mark, vice president, Federal Government affairs, Johnson Controls, Inc., prepared statement of	69
Woods, William T., Acting Director, Acquisition and Sourcing Management, prepared statement of	10

MOVING FORWARD WITH SERVICES ACQUISITION REFORM: A LEGISLATIVE APPROACH TO UTILIZING COMMERCIAL BEST PRACTICES

THURSDAY, NOVEMBER 1, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 3:40 p.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the subcommittee) presiding.

Members present: Representatives Davis, Turner, Kanjorksi, and Mink.

Staff present: Melissa Wojciak, staff director; Amy Heerink, chief counsel; George Rogers, counsel; Victoria Proctor, professional staff member; James DeChene, clerk; Tania Shand, minority professional staff member; and Jean Gosa, minority assistant clerk.

Mr. DAVIS. Good afternoon and welcome to today's legislative hearing on the Services Acquisition Reform Act legislation.

Because of the time delays we have had, and I appreciate your bearing with us and the fact that we're going to have votes again in another hour, what I'm going to do is put the entirety of my statement in the record, and yield to Mr. Turner for any statement he may wish to make.

[The prepared statement of Hon. Thomas M. Davis follows:]

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Opening Statement of Chairman Tom Davis
Hearing on "Moving Forward with Services Acquisition Reform: A Legislative Approach to Utilizing Commercial Best Practices"
Subcommittee on Technology and Procurement Policy
November 1, 2001 at 2:00 pm
2154 Rayburn House Office Building

Good afternoon and welcome to today's legislative hearing on Services Acquisition Reform Act (SARA) legislation. This hearing will build on the oversight hearings conducted over the past year on the continuing barriers government agencies have in acquiring the goods and services necessary to meet mission objectives. The goal of this hearing is to review proposed legislative initiatives designed to provide the federal government greater access to the commercial marketplace. The reforms of the early to mid-nineties have resulted in significant streamlining, cost savings, access to technological advancements, and reduced procurement cycles which have dramatically improved the quality of products and services purchased by the federal government.

In conducting oversight in the past year, I looked at IT grant management, seat management for federal agencies, IT and acquisition workforce training, major horizontal acquisitions such as FTS 2001 and the MAA program, the debate on outsourcing of services, intellectual property, management reform initiatives within federal agencies, and the use of commercial best practices for service contracting. What I found was that many agencies had the tools for success but management and workforce issues remained major barriers to the transformation promised by information technology. Additionally, the government is not utilizing commercial best practices or fully realizing the importance of performance metrics in acquisition cycles. The proposed legislation before the Subcommittee is necessary to further streamline procurement and achieve greater utilization of commercial best practices.

The federal government purchases $87 billion in services a year. In order to ensure the government is maximizing efficiency for service contracting, the Subcommittee intends to review the SARA draft legislation which includes provisions to address workforce training, business environment reform, contract management, the utilization of performance-based contracting and share-in-savings contracting. This hearing will highlight what additional steps are necessary to ensure government is moving towards market-based solutions.

Over the past decade, the growth of service contracting has largely matched the increase of service contracting in the private sector. While procurement reform touched on service contracting, it was not the emphasis of those efforts. I believe the Subcommittee needs to determine what can and should be done **legislatively** to promote greater utilization of commercial best practices, increased cross-agency acquisitions along with enhanced cross-agency information sharing, and acquisition workforce training.

While overall procurement dollars have gone down, spending for services has risen steadily since the early nineties. In fiscal year 1990, the government spent $70 billion on service contracts. That number has grown to over $87 billion in fiscal year 2000. This represents an increase of twenty-four percent in the past ten years. Service contracts now represent forty-three percent of total government purchasing. This is larger than any other category of government purchasing.

Additionally, contracting for information technology services has grown from $3.7 billion in FY1990 to $13.4 billion in FY2000, with that number only expected to increase as the federal government moves to transform itself to a more citizen-centric, streamlined service provider. The National Academy of Public Administration (NAPA), in a recent study, stated that over 70% of the government's information technology is produced outside of government. That figure is commensurate with how the private sector handles its' IT management as well. In fact, NAPA believes the government has it right when it comes to IT outsourcing. However, the government lacks the skills in the day-to-day business management of those contracts.

When I reviewed the procurement reform initiatives of the early nineties, there were many agency success stories. I also believe that previous reform efforts have significantly changed federal purchasing or the actual procurement cycle but little has been done to look at overall acquisition management. Many agencies simply do not realize that acquisition is often the most significant portion of their yearly discretionary budget. It is about 40% of the entire federal government's discretionary spending yearly. The government has yet to take the Government Performance and Results Act and integrate it into the entire acquisition cycle so the government is purchasing smarter.

Prior to the events of September 11th, it was clear to me that the federal government was missing an invaluable partnership opportunity to work with the private sector in realizing the full potential of commercial services and information technology. The goal of SARA is to eliminate barriers to commercial acquisition practices. Clearly, the events of September 11th make the goals of SARA even more vital for the federal government to realize.

SARA is comprised of six titles designed to help federal government agencies take a more strategic approach to acquisition. SARA first and foremost contains a comprehensive acquisition training and workforce title that will help us change the management challenges that continue to exist to past procurement reform initiatives and move the government towards a business management culture.

Title II of SARA is centered around business environment reform and focuses on eliminating many of the barriers that exist in acquisition from agency-to agency. While each acquisition team at an agency is integral in accomplishing mission goals, much of the necessary skills remain the same among all agencies. This is yet another attempt to eliminate the stovepipes that plague government transformation.

Title III of SARA is focused on contract incentives and authorizing additional contract types such as share-in-savings contracts in the FAR. This is intended to overcome the ongoing barriers within agencies to utilizing innovative contract vehicles. My hope is to address head-on the resistance some contracting officials have to using alternative contract types.

Title IV of the bill focuses on commercial services practices including expanding the commercial definition allowed under FAR Part 12, creating a preference for performance-based acquisition, and revisiting a commercial entity definition. We also attempt to ensure commercial liability provisions can be included in contracts for services and eliminate prohibitions on organizational conflict-of-interest.

Title V is focused solely on IT acquisitions. It includes an IT exemption for the Trade Agreements Act and the Buy America Act, a review of our intellectual property laws for IT including the Bayh-Dole Act, and cooperative purchasing for state and local governments.

Title VI revisits many of the socio-economic provisions that have not been addressed since the laws were put into place including the Davis-Bacon Act and Service Contract Act thresholds for procurements.

I intend to introduce SARA shortly after today's hearing. I look forward to hearing from our witnesses on these provisions. Over the coming months, I am planning to work with both the proponents and opponents to SARA to develop a consensus piece of legislation that will give the government the necessary tools to transform itself. If the federal government is going to meet the many challenges that lay ahead, it must be willing to adapt to a comprehensive reform environment that includes fostering increased collaboration with the private sector.

Mr. TURNER. I will follow your lead and do the same, Mr. Chairman.

[The prepared statement of Hon. Jim Turner follows:]

Statement of the Honorable Jim Turner
Hearing "Moving Forward with Services Acquisition Reform: A Legislative Approach to Utilizing Commercial Best Practices"

Subcommittee on Technology and Procurement Policy

November 1, 2001

Thank you Mr. Chairman. Today we will hear testimony from a number of administration and private sector witnesses about the Service Acquisition Reform Act, legislation you plan to introduce soon. You have indicated that this is the first of a number of hearings on that legislation. I applaud your deliberation. The issues addressed in your legislation are complex and often difficult and they deserve a thorough and detailed examination. For instance, I know that representatives of organized labor will be very interested in commenting on the record about amending the Service Contract and Davis Bacon Acts.

I also want to thank you for your willingness to accommodate minority witnesses both at this hearing and in the future. The acquisition reforms of the past decade were enacted for the most part with bipartisan support and input. I am hopeful that we can continue that tradition, Mr. Chairman, as this legislation works its way through the legislative process.

The federal government is the largest purchaser of goods and services in the world, spending over $200 billion annually on everything from fighter jets to brownie mix to janitorial services. Getting the acquisition process and procedures right, ensuring that they system is as efficient and credible as possible, is of utmost importance because it can mean literally billions of dollars to the federal government and ultimately the American taxpayers.

The past decade has seen extensive changes in the federal procurement system. Among other things, these have focused on simplifying the acquisition process by permitting and even encouraging the purchase of commercial goods when possible and by empowering the contracting-officer as a decision maker. The decade has also seen a marked shift in federal spending patterns, particularly with the rapid growth in contracting for services, which now accounts for 43% of total contracting -- $87 billion, a larger percentage than any other category. We have also seen the development of a looming human capital crisis throughout the federal government, which has certainly not left the acquisition workforce untouched. Increased training may well be one area we need to consider to address this problem.

Competition has been a guiding principle in federal procurement since the Revolutionary war, and rightly so. It allows the federal government to use the market place to help ensure that it gets the best price and value for the goods and services it buys. It also provides a level playing field for contractors, and helps prevent fraud, favoritism and abuse. We need to proceed carefully with this and any other procurement changes to ensure that this principle is not compromised.

Thank you Mr. Chairman.

Mr. DAVIS. Thank you very much.

I guess no one else is here to make an opening statement, so I'm going to call our first panel of witnesses to testify. We have a distinguished panel. As you know, it's the policy of this committee that all witnesses be sworn before you testify. So if you'd rise with me and raise your right hands.

[Witnesses sworn.]

Mr. DAVIS. Thank you. Be seated.

To afford sufficient time for questions, if you'd try to limit your remarks to no more than 5 minutes. We have a timer in front of you. When it turns orange, you have 1 minute left. It will be green for 4 minutes, orange for 1 minute and then red, and then try to sum up.

The entire written statement is part of the permanent record. We'll begin with Mr. Woods, followed by Mr. Perry, Ms. Styles and Ms. Lee. Thank you for being with us.

STATEMENTS OF WILLIAM T. WOODS, ACTING DIRECTOR, ACQUISITION AND SOURCING MANAGEMENT; STEPHEN A. PERRY, ADMINISTRATOR, U.S. GENERAL SERVICES ADMINISTRATION; ANGELA B. STYLES, ADMINISTRATOR FOR FEDERAL PROCUREMENT, OFFICE OF MANAGEMENT AND BUDGET; AND DEIDRE A. LEE, DIRECTOR, DEFENSE PROCUREMENT, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS, DEPARTMENT OF DEFENSE

Mr. WOODS. Good afternoon, Mr. Chairman, Mr. Turner.

I am pleased to be here today to assist the subcommittee in its consideration of proposals to improve the Government's acquisition of services. We fully support the efforts of the subcommittee in addressing this very important issue.

As we testified before this subcommittee in May, agencies face a number of challenges in ensuring that their procurement of services are conducted as efficiently as possible. The package of proposals the subcommittee is considering, which together would comprise the Services Acquisition Reform Act, would address many of these challenges. We look forward to working with the subcommittee as these proposals continue to evolve.

My statement today focuses on three areas. First, strengthening management oversight of services acquisitions. Second, improving the acquisition work force and third, moving toward a more performance based contracting environment.

Strengthening management oversight begins with leadership. And in this regard, the proposed legislation would create a chief acquisition officer within each agency. Such an approach is consistent with that of the leading companies in the private sector.

Our discussions with a number of those companies about how they buy services indicate that a chief acquisition officer can play a critical role in changing an organization's culture and practices. Equally important, however, was the corporate decision to adopt a more strategic perspective in acquiring services. For many companies, this meant taking an enterprise-wide approach to acquiring services in order to leverage their buying power.

But in all cases, committed leadership was critical to realizing efficiencies and improving service levels. These are clearly outcomes Federal agencies desire, and we believe an agency chief acquisition officer could do much to help agencies achieve those outcomes.

Second, we are pleased to see that a number of the proposals are designed to strengthen the acquisition work force. Addressing human capital issues in acquisition is not just a matter of the size of the work force. It is also a capacity issue. While acquisition reforms in recent years have helped streamline the process, Federal contracting still remains a complex and technical area. The products and services the Government buys are becoming increasingly more sophisticated, particularly in the area of information technology. Yet agencies are at risk of not having enough of the right people with the right skills to manage these procurement.

Last, the legislative proposals are intended to promote greater use of performance based contracting. Today I would like to highlight one particular form of performance based contracting known as share-in-savings contracting.

Share-in-savings contracting can take many forms. But perhaps one of the best known examples in Government is the Federal Energy Management Program. Under this program, contractors are expected to contribute all of the up-front costs to identify a facility's energy needs. And then at their cost, to install, operate and maintain energy efficient equipment. In return, the companies get a share of the energy savings generated by these improvements.

Since 1998, the Department of Energy has issued 57 orders under the program. Preliminary indications are that these 57 orders will allow the agency to obtain almost $150 million in capital improvements. In addition, the agency expects to realize significant reductions in energy usage, resulting in millions of dollars in continuing savings.

The subcommittee has asked us to undertake a review to identify examples of how commercial companies use share-in-savings contracting. And we look forward to reporting back to the subcommittee with the results of that review.

In conclusion, the increasing significance of service contracting has prompted a renewed emphasis by the Congress and by the administration on resolving longstanding problems with service contracts. We support the committee's efforts, and we look forward to continuing to assist the subcommittee in its development of the Services Acquisition Reform Act. This concludes my statement.

[The prepared statement of Mr. Woods follows:]

United States General Accounting Office

GAO

Testimony

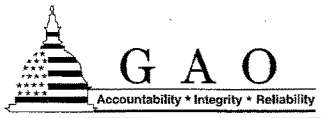
Before the Subcommittee on Technology and Procurement Policy
Committee on Government Reform
U.S. House of Representatives

For Release on Delivery
Expected at 1:30 p.m., EST
Thursday, November 1, 2001

CONTRACT MANAGEMENT

Improving Services Acquisitions

Statement of William T. Woods
Acting Director
Acquisition and Sourcing Management



GAO-02-179T

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to assist the Subcommittee in its consideration of proposals to improve the government's acquisition of services. Work performed by the General Accounting Office (GAO) continues to show that improvements are needed in a number of areas related to how the government buys services. We fully support the efforts of the Subcommittee in addressing this issue.

Federal agencies spend billions of tax dollars each year to buy services, ranging from clerical support and consulting services, to information technology services, to the management and operation of government facilities, such as national laboratories. And the amount spent on services is growing substantially. Last year alone, the federal government acquired more than $87 billion in services—a 24-percent increase in real terms from fiscal year 1990.

As we testified before you in May, Mr. Chairman, agency procurements of services often are not being conducted as efficiently as they could be.[1] We have found that too frequently agencies are not clearly defining their requirements, fully considering alternative solutions, performing vigorous price analyses, or adequately overseeing contractor performance. Such problems clearly point to a need for more focused management attention.

At the same time, agencies are at risk of not having enough of the right people with the right skills to manage service contracts. Years of downsizing and curtailed investments in human capital have produced serious imbalances in the skills and experience of the acquisition workforce, and, in effect, created a retirement-driven talent drain. It is clear that more needs to be done to strengthen the acquisition workforce.

The package of proposals the Subcommittee is considering, which together would comprise the Services Acquisition Reform Act (SARA), would address many of these issues, and we look forward to working with the Subcommittee as these proposals continue to evolve. Today, I would like to offer our perspective on some of the proposals under consideration, highlighting areas where our completed or ongoing work may be helpful to the Subcommittee.

[1] *Contract Management: Trends and Challenges in Acquiring Services* (GAO-01-753T, May 22,2001)

My statement focuses on three areas:

- Strengthening management oversight of services acquisitions,
- Improving the acquisition workforce, and
- Moving toward a performance-based contracting environment.

Chief Acquisition Officer

Strengthening management oversight begins with leadership, and in this regard, the proposed legislation would create a chief acquisition officer within each agency. Such an approach is consistent with that of some of the leading companies in the private sector.

Our discussions with a number of private sector companies about how they buy services indicate that a procurement executive or a chief acquisition officer plays a critical role in changing an organization's culture and practices. Company officials said that the position needs to be sufficiently high in the organization to have the authority to effect any needed structural, process, or role changes. They indicated that senior management support was essential to provide direction and vision, facilitate the development of common processes and approaches, and when necessary, provide the necessary clout to obtain initial buy-in and acceptance of reengineering efforts. These officials also said that this commitment and support needs to be sustained over time.

Equally important, we learned, is the corporate decision to pursue a more strategic approach to acquiring services. Taking a strategic approach involves a range of activities—from developing a better picture of what an organization is spending on services, to taking an enterprisewide approach to procuring services, to developing entirely new ways of doing business. Adopting such an approach has contributed greatly to realizing the types of efficiencies and improved service levels federal agencies desire. An agency Chief Acquisition Officer can do much to help an agency achieve those outcomes.

Training the Acquisition Workforce

We are pleased to see that a number of the proposals are designed to strengthen the acquisition workforce. Following a decade of workforce downsizing and curtailed investment in their people, federal agencies currently face skills, knowledge, and experience imbalances. Without corrective action, these imbalances could worsen given the number of federal civilian workers who will become eligible to retire in the next few years.

This issue is particularly acute in the acquisition area. At the Department of Defense, for example, contracting workload has increased by about 12 percent in recent years, but the workforce available to perform that workload has been reduced by about half over the same period. The result is fewer people whose job it is to ensure maximum value for the taxpayer.

Addressing human capital issues in acquisition is not just a matter of the size of the workforce. It is also a capacity issue. While acquisition reforms have helped streamline smaller acquisitions, larger acquisitions, particularly for information technology, remain complex and technical. Yet agencies are at risk of not having enough of the right people with the right skills to manage these procurements. Consequently, a critical issue the federal government faces is whether it has today, or will have tomorrow, the ability to manage the procurement of increasingly sophisticated services.

A key element in addressing this situation is workforce training. Our work indicates that the leading companies in the private sector take a targeted, customized approach to training. They commit training resources to a few, well-defined areas. By contrast, we have found that standard training at the Department of Defense, for example, often did not reach the right people at the right time, or was not of sufficient depth to help program officials implement acquisition reform initiatives.[2] Our work at the General Services Administration (GSA) and the Department of Veterans Affairs showed that neither agency had established core training requirements for some segments of their acquisition workforces,[3] nor had they identified all funds they planned to use for workforce training as required by the Clinger-Cohen Act.[4] At your request, Mr. Chairman, we have work underway to determine the current status of acquisition workforce training at these and other agencies.

[2] *Best Practices: DOD Training Can Do More to Help Weapon System Programs Implement Best Practices* (GAO/NSIAD-99-206, Aug. 16, 1999).

[3] *Acquisition Reform: GSA and VA Efforts to Improve Training of Their Acquisition Workforces* (GAO/GGD-00-66, Feb. 18, 2001).

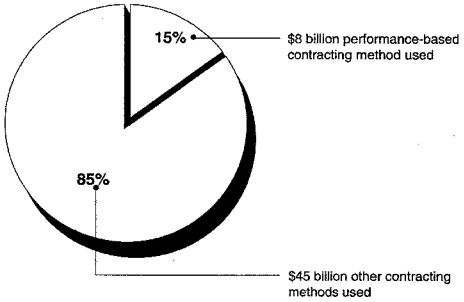
[4] P.L. 104-106

Performance-Based Contracting

The legislative proposals are intended to promote greater use of performance-based contracting. Performance-based service contracting is a process where the customer agency specifies the outcome or result it desires and leaves it to the vendor to decide how best to achieve the desired outcome. Historically, the government has not widely used this strategy, but it is beginning to move in that direction in an effort to attract leading commercial companies, gain greater access to technological innovations, and better ensure contract performance.

Figure 1 shows that, for the first 6 months of fiscal year 2001, about 15 percent of service contracts were reported to be performance-based. The Office of Management and Budget established a goal that 20 percent of contracts for services be performance-based in fiscal year 2002.

Figure 1: Governmentwide Obligations for Services, Oct. 1, 2000 – Mar. 31, 2001



Note: Architect and engineering services and construction excluded.

Source: All actions reported to the Federal Procurement Data System.

Mr. Chairman, you have asked us to identify governmentwide mechanisms that can be implemented to encourage the use of performance-based contracting. In responding to this request, we also plan to review how federal agencies are using performance-based contracting when acquiring services as well as how they are measuring outcomes. We look forward to sharing the results of our review with the Subcommittee.

Today, however, I would like to highlight one particular form of performance-based contracting, share-in-savings contracting, an innovative tool that allows agencies to leverage limited resources. Basically, in share-in-savings contracting, the contractor funds a project up front in return for a percentage of the savings that are actually realized by the agency.

Perhaps one of the best known examples of share-in-savings contracting in government is in the Department of Energy. Energy's Federal Energy Management Program has crafted an energy savings contract under which energy service contractors are expected to contribute all the up-front costs identifying a federal facility's energy needs and buying, installing, operating, and maintaining energy-efficient equipment to cut energy bills. In return, the companies get a share of energy savings generated by the improvements. For example, since 1998, the government has issued 57 energy savings orders to private-sector energy services companies. Although we have not verified the numbers, the contractors' preliminary indications are that these 57 orders will allow the agency to obtain almost $150 million in capital improvements. In addition, the agency expects to realize significant reductions in energy usage.

Almost 6 years after the Clinger-Cohen Act called for the creation of pilot programs to test the share-in-savings concept in federal information technology contracts, the government has not identified many suitable candidates for use of this technique. In large part, this is because use of this tool requires solid baseline data about the existing cost of an activity and a reliable method for measuring whether success has been achieved. Gathering reliable baseline data can be difficult. According to the GSA Assistant Commissioner of the Federal Technology Service, many of the projects GSA reviewed for a pilot share-in-savings contracting program were rejected because the agencies proposing the projects could not determine baseline costs.

The Subcommittee has asked us to identify and analyze examples of best practices using the share-in-savings contracting method found in the commercial sector. We plan to hold discussions with prominent commercial companies to better understand (1) why they chose share-in-savings contracting as a means to help achieve their business goals or improve their administrative processes, and (2) what their experiences with this contracting method have been.

Conclusion

In conclusion, Mr. Chairman, the increasing significance of service contracting has prompted a renewed emphasis by the Congress and the administration on resolving longstanding problems with service contracts. We support the Subcommittee's efforts to improve the government's acquisition of services. The proposals being discussed address many of the critical issues, and would introduce innovative techniques designed to enhance contract performance. We look forward to providing you with the findings that result from our ongoing reviews and to continuing to assist the Subcommittee in its development of the Services Acquisition Reform Act.

Mr. Chairman and Members of the Subcommittee, this concludes my statement. I would be happy to answer any questions you may have.

Contact and Acknowledgement

For further information, please contact William T. Woods at (202) 512-4841. Individuals making key contributions to this testimony include Don Bumgardner, Cristina Chaplain, Odi Cuerro, Ralph Dawn, Tim DiNapoli, Dan Hauser, and John Yakaitis.

Mr. DAVIS. Thank you very much.

Mr. Perry, thanks for being with us.

Mr. PERRY. Chairman Davis, Mr. Turner, thank you for the opportunity to appear before this subcommittee and discuss the acquisition process within the U.S. General Services Administration, and to also talk about its impact upon our customers throughout the Federal Government. I will also outline GSA's views on the proposal in the bill, the Service Acquisition Reform Act.

First, we'll talk a bit about the current state of our procurement system as we see it. We are all aware, I think, of the significant effort by what was called the Section 800 panel in the early 1990's in this area. Following the issuance of the Section 800 panel report, the changes to the acquisition system have been really dramatic.

The positive impact of those changes was shown once again recently as we responded using our existing procurement processes to respond to the attack on September 11th. Literally hours after that attack began, we were using these processes to acquire and ship protective clothing, including 65,000 suits and 5,000 face masks, 3,000 respirators, 1,000 entrenching tools, 400 cars, trucks and trailers, 500 phone sets, 250 cells, just to name a few items. My point being that we were able to respond because of some of the improvements that have been made to the process over the years. We also were able to provide millions of square feet of office space to help re-establish the offices and 3,200 workstations.

Even given all this, while the legislative changes that have resulted from the Section 800 panel report, namely the Federal Acquisition Streamlining Act and the Clinger-Cohen Act, which allow us to provide goods and services to agencies in a more efficient and cost-effective manner, in spite of all this, GSA does believe that the current system could still be improved.

Since the passage of Clinger-Cohen in 1996, GSA has been focused in terms of its efforts on ensuring that the acquisition work force has the skills and competencies necessary to provide the quality services that GSA customers require. To ensure that members of our acquisition work force have these skills and competencies, GSA has established mandatory core training requirements for contract specialists, for purchasing agents, for contracting officer representatives and for warranted contracting officers. The training is provided by private sector vendors, and the syllabus for the training was jointly developed by the Federal Acquisition Institute and the Defense Acquisition University.

We also have had an active education program within GSA to help our acquisition work force earn undergraduate degrees and acquire college level training in business. GSA faces many challenges, such as a work force where many of our associates are approaching retirement eligibility and an increased need for strategic human capital management to ensure that our associates have the appropriate skills and competencies.

Further, the nature of the agency's business requires that associates develop specialties for the markets in which they do business. Given this, we believe that it requires not only training but on the job experience.

We also need to review the training delivery options and evaluate whether our associates have acquired the skills and com-

petencies that are necessary to obtain best value as we provide goods and services, construction and real estate for our customer agencies. We will measure our success both in terms of the information retained at the end of these education and training programs and also in terms of the improved performance that we achieve over time.

With respect to our views on the proposed legislation, we believe that both as a supplier of acquisition services to other Federal agencies and as a user of the acquisition system, that more could be done to improve the Federal acquisition system. However, I must qualify my remarks only to the extent that I need to state that GSA has not yet reviewed the draft of the bill's language. I'm basing my comments on draft summaries of the proposed bill.

Nevertheless, GSA believes that agencies should make training a priority and they should be held accountable for determining the current and future needs of their acquisition work force. The Government has the ability today to extend contract terms based upon reviews of contractor performance, rewarding contractors with good performance with longer performance terms under the contract.

In fact, current law and regulations provide agencies with the flexibility to incentivize contractors to achieve or exceed agreed-upon performance criteria. These tools can be used in conjunction with performance based contracting to incentivize good performance and thus produce a better return on the taxpayers' dollar.

Finally, we believe that the simplified acquisition threshold should be adjusted periodically to reflect inflation and to ensure that the original purpose of the legislation is in fact achieved.

In conclusion, Mr. Chairman, I believe that significant progress has been made over the past decade improving our Federal acquisition system. However, we also believe that any legislative proposal must not compromise fundamental notions of integrity, competition and transparency. We believe that changes we have discussed today could make the Government a more efficient buyer of goods and services.

I'm pleased to offer these comments and that concludes my statement.

[The prepared statement of Mr. Perry follows:]

STATEMENT OF

STEPHEN A. PERRY

ADMINISTRATOR
OF
GENERAL SERVICES

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY
AND PROCUREMENT POLICY

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2001

Chairman Davis, Ranking Member Turner, and members of the subcommittee, thank you for the opportunity to appear before you today to discuss the subject of the acquisition process within the United States General Services Administration (GSA) and its impact on our customers throughout the Federal government. I will also outline GSA's views on your proposed bill, the Services Acquisition Reform Act (SARA).

Current State of the Procurement System

We are all aware of the significant effort by the Section 800 Panel. Following the issuance of the Section 800 Panel Report the changes to the acquisition system were dramatic. The positive impact of those changes was proved most recently when we were able to respond to the needs of the federal agencies after the terrorist attack on America. Literally, in hours GSA acquired and shipped 65,000 protective suits, 5,000 facemasks, 3,000 respirators, 1,000 entrenching tools, 400 cars, trucks and trailers, 500 phone sets, 250 cell phones, just to name a few items. We also provided millions of square feet of office space, and 3,200 workstations.

While the legislative changes that resulted from the Section 800 Panel report, the Federal Acquisition Streamlining Act and the Clinger-Cohen Act, allow us to provide goods and services to agencies in a more efficient and effective manner – GSA believes that the current system could still be improved.

What GSA has been Doing to Review How it Provides Services to Customers Since the Passage of the Clinger-Cohen Act

Since the passage of the Clinger-Cohen Act in 1996, GSA has focused its efforts on ensuring that its acquisition workforce has the skills necessary to provide quality service to GSA customers.

To ensure that members of its acquisition workforce have these skills and competencies, GSA established mandatory core training requirements for contract specialists, purchasing agents and contracting officer representatives, as well as all warranted contracting officers. The training is provided by private sector vendors and the syllabus for this training was jointly developed by the Federal Acquisition Institute and the Defense Acquisition University. We also have an active education program within GSA to help our acquisition workforce

earn undergraduate degrees and to acquire college level training in business. In almost every GSA region college courses are brought into our offices and associates are encouraged to take courses to advance their education and professional qualifications at no cost to themselves. We also have an aggressive educational reimbursement program that encourages our associates to take college courses on their own time.

Today our acquisition workforce faces a new variety of challenges in acquiring the goods, services, construction, and real estate that our customer agencies need to perform their missions. The expectations of, and demands on our workforce are greater than ever before. In addition to managing the procurement process from cradle to grave, contracting specialists are now expected to have much greater knowledge of market conditions, industry trends and the technical details of the commodities and services they procure.

Strategic Human Capital Management

Our efforts over the past several years were a good beginning. However, GSA faces challenges such as a workforce where many associates are approaching retirement eligibility and an increased need for strategic human capital management to ensure we're providing our associates with the appropriate skills. Further, the nature of the agency's business requires that associates develop specialties for the markets in which they do business. This requires both training and on the job experience.

We also need to review training delivery options and evaluate whether our associates have acquired the skills and competencies to obtain the best value goods, services, construction, and real estate. Our review will include the use of distance learning techniques and an analysis of the best technique or combination of techniques to deliver the education and training needed. We will measure our success both in terms of the information retained at the end of the education and training and then in terms of improved performance over time.

Realizing this, we recently established an Acquisition Workforce Office. Its mission is to develop, for the first time, a strategic human capital management plan for GSA's acquisition workforce. This Office is focused on addressing GSA's acquisition workforce requirements and is working with the Acquisition Workforce Committee of the Procurement Executives Council and with the private sector in executing the office's mission. The Acquisition Workforce Committee represents

all of the Senior Procurement Executives and is developing a government wide approach to managing the acquisition workforce. To date the committee's work includes establishing a standardized set of workforce skills and competencies. It is exploring the practicality of implementing a new governmentwide standards for workforce education and training requirements. GSA's plan will:

- Revisit who should be included in GSA's acquisition workforce (for example, currently our real estate specialists are not included);
- Confirm the skills and competencies needed by the members of GSA's acquisition workforce;
- Develop a plan for recruiting and retaining acquisition workforce members;
- Develop the curriculum necessary to acquire the appropriate skills and competencies;
- Acquire courses in a variety of formats (classroom, distance learning, etc.);
- Evaluate the success of the courses in terms of the skills and competencies acquired and improved performance;
- Certify that members of the acquisition workforce meet a minimum government wide standard; and,
- Develop a milestone plan for implementing the succession plan.

Views on Proposed Legislation

We believe, both as a supplier of acquisition services to other federal agencies and as a user of the acquisition system, that more could be done to improve the federal acquisition system. However, I must qualify my remarks by stating that GSA has not reviewed any draft language. Instead, I am basing my comments on draft summaries of the proposed bill.

GSA believes that agencies should make training a priority and therefore they should be held accountable for determining the current and future needs of their acquisition workforce.

On the matter of establishing a Chief Acquisition Officer for each agency, GSA believes that any senior Chief Acquisition Officer within an agency should be responsible for providing advice and other assistance to the head of the agency as he or she requests, and to other senior personnel to ensure that acquisitions are managed in a manner that implements the policies and procedures of the Federal Acquisition Regulation and the priorities established by the head of an agency.

The government has the ability to extend contract terms based upon reviews of contractors' performance, rewarding contractors with good performance with a longer performance term under the contract. Indeed, current law and regulations provide agencies with the flexibility to incentivize contractors to achieve or exceed agreed upon performance criteria. These tools can be used in conjunction with performance based contracting to incentivize good performance and thus produce a better return on the taxpayer's dollar.

Finally, we believe that the simplified acquisition threshold should be adjusted periodically to reflect inflation and to ensure that the original purpose of the legislation is achieved.

Conclusion

Significant progress has been made over the past decade in improving the Federal acquisition system. However, we believe that any legislative proposal must not compromise fundamental notions of integrity, competition and transparency. We believe the changes we have discussed today could make the Government a more efficient buyer of goods and services.

Mr. DAVIS. Thank you very much.

Ms. Styles.

Ms. STYLES. Chairman Davis, Congressman Turner, I commend your leadership in the area of procurement and I appreciate your invitation to participate in today's discussion.

Service contracting represents an increasing proportion of the roughly $200 billion in procurement we spend each year. We must ensure that those dollars are invested wisely so that our procurement process delivers the cost effective quality service that forms the underpinning of successful mission performance.

As you know, the President has called upon agencies to become market based and results oriented rather than process driven. If we take away just one message from the President's management agenda, it is that results are what matter in the end, not just making promises, but making good on promises. The message has important ramifications for our procurement system which provides a critical link for turning promises made to our citizenry into positive results.

As described in your letter of invitation, the vision behind SARA is to ensure that the Government is maximizing efficiency for service contracting. While efficiency is important, recent reviews of our acquisition processes conducted by the GAO, IGs and others, serve as an important reminder to our procurement community at large that there is no substitute for vigilant application of the acquisition basics, namely, sound acquisition planning, consistent use of competition, well structured contracts designed to produce cost effective, quality performance from contractors small and large, and solid contract management.

Even the most streamlined and efficient acquisition tools, such as the multiple award task and delivery order contract, and multiple award schedules, cannot produce quality results if requirements are inadequately defined, competition is not used consistently or price evaluations are weak. My point is not that the tools of efficiency are doomed to failure. In fact, I share the subcommittee's belief that we can ill afford a reduction in efficiency.

At the same time, Mr. Chairman, I am of the strong opinion that we also cannot afford to weaken our resolve in adhering to the other basic building blocks of our processes, including, importantly, competition, that are critical to securing better prices and higher quality. Getting back to basics must be a priority.

I think that SARA challenges us to reassess various facets of our procurement process, from our reliance on the commercial marketplace and our use of contracting mechanisms that will motivate better contractor performance to the effectiveness of our current management structures and our investment in the acquisition work force. This assessment will prove to be a worthy endeavor if it is pursued in an environment where all acquisition basics are emphasized and the public's trust is fostered through results oriented processes that promote fairness, integrity and transparency in addition to efficiency.

I am of the firm belief that competition is a key to integrity. With competition we ensure integrity in the expenditure of taxpayer dollars, fulfilling our fundamental job as public servants. I want to look at a few examples. In the pursuit to buy commercial,

we must continue to break down the barriers that limit our access to marketplace efficiencies, so that agencies have effective Government access to the state of art commercial technologies that drive costs down and quality up.

At the same time, we must ensure that our commercial item purchases are well planned through meaningful market research and negotiated effectively, and we are not simply relying on published catalog prices as evidence of fair and reasonable pricing. We must further ensure that our policies are not stretched to the point where we are no longer able to negotiate deals that are in the best interest of the Government.

We should, for example, be using contract types that provide appropriate incentives for our contractors to perform efficiently and effectively. And we must not shy away from concepts such as performance based service contracting, that would enable us to achieve better acquisition solutions from our service contractors by fostering their creativity and initiative.

On the other hand, we must be willing to return to the basics when our continued efforts to make progress fall short. For PBSC, that means reviewing definitional building blocks and reaching a common understanding on how to define PBSC.

I would also like to the pilots of GSA and DOD with PBSC. They are good examples for going forward with this type of contracting in the future.

As appropriate opportunities arise, we must seek to be innovative but be careful to ensure that our pilot efforts yield demonstrable results before they are made permanent. We must not endorse tools that have not yet proven their ability to help agencies perform their mission successfully.

Finally, as we identify opportunities for improvement, we must distinguish those that require legislative action from those that may be better left to executive implementation. Business management reforms, for example, may oftentimes be more appropriately addressed administratively. This can help to minimize the potential for imposing one size fits all solutions on agencies with varying structures and roles.

In the coming months and years, the expectations of our citizens will rest heavily on the shoulders of our procurement process and its ability to maximize return on taxpayer investment at a time in our Nation's history when results count more than ever. Meeting this challenge will take work. I applaud the subcommittee for its willingness to engage the administration in this important dialog.

The changes in the past decade have enabled agencies to satisfy many of its needs more expeditiously. Unfortunately, these changes have not as yet been as effective in helping us meet more important goals, namely, prices and quality. To make progress on all fronts, we must as a start focus on getting back to our tried and true proven acquisition basics. Only in this way will we ensure the resources entrusted to the Federal Government are well managed and wisely used.

I look forward to working with the subcommittee as we embark together to improve the performance of Government. This concludes my prepared remarks.

[The prepared statement of Ms. Styles follows:]

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STATEMENT OF ANGELA B. STYLES

ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2001

Chairman Davis, Congressman Turner, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss your ideas for the "Services Acquisition Reform Act" (SARA). I am pleased by the Subcommittee's interest in service contracting and its efforts to stimulate meaningful discussion on this important topic.

As this Subcommittee knows, the President has called upon his Administration to improve the Federal Government's performance. Among other things, we have been charged with making our agencies market-based and results-oriented, rather than process driven. Inasmuch as service contracting represents an increasing proportion of the roughly $200 billion in procurement dollars spent each year, we must ensure those dollars are spent wisely.

The President's approach for improving performance, as set forth in his Management Agenda, is clear: focus on priorities and do them well. Rather than

announcing a wide array of initiatives, the Management Agenda keys on the government's most glaring problems.

Underlying this focused approach is a recognition that we often react to system weaknesses by pursuing an array of new initiatives, without stopping to examine why current initiatives may be falling short. If we do not address the root cause of our shortcomings, new initiatives, like the ones they replace or supplement, will fail to produce the results we have been entrusted to deliver to the American public. This message is especially important in the context of our procurement system which has undergone significant and continual reform over the past decade and will be relied upon to maximize the return on taxpayer investment at a time in our Nation's history when results count more than ever. For this reason, I would like to look first at the key problems that are most deserving of our attention, and then consider some of the main issues that SARA would address.

Setting Priorities

The concept of SARA, as summarized in the Subcommittee's letter of invitation, is to further streamline the procurement process and "ensure the government is maximizing efficiency for service contracting." This objective is clearly important. federal managers must have effective tools to accomplish their jobs without being encumbered by unnecessary operational rigidity or "one-size-fits-all" solutions. Only in this way will our citizens receive timely delivery of services as they rightfully deserve.

Thanks in significant part to Congress, our current procurement process is able to deliver many goods and services in far less time than it took a decade ago.

While attainment of even greater efficiency is a laudable goal, we must ensure that our efforts are equally shaped by the basic building blocks of our procurement system: sound acquisition planning, consistent use of competition, well structured contracts designed to produce cost-effective quality performance from contractors small and large, and solid contract management. All of these activities must occur in an environment that fosters the public's trust through fairness, integrity, and transparency.

Recent reviews of our acquisition activities illustrate that even the most streamlined and efficient tools will not produce quality results if the "acquisition basics" are not followed. Consider, for example, some of the findings that the General Accounting Office (GAO) has made regarding agency use of multiple award task and delivery order contracts and multiple award schedules contracts. While these vehicles offer highly efficient access to the marketplace, the results reported by the GAO (some of which were cited in testimony before this Subcommittee last spring) were generally disappointing. The GAO found, in two separate reports, that agencies acquire hundreds of millions of dollars in services without taking basic steps to ensure best value. The types of problems cited are not new -- e.g., inadequately defined requirements, inconsistent use of competition, and insufficient price evaluation. In another report, the GAO raised some concerns regarding price reasonableness determinations made under the commercial items simplified source selection test authority provided by the Clinger-Cohen Act.

My point in raising these examples is not to suggest that tools of efficiency are doomed to failure. We can ill afford such a reduction in efficiency. At the same time, we must understand that the application of "acquisition basics" needs improvement. These glaring problems must become our priority to fix.

As one step in this direction, the Office of Federal Procurement Policy (OFPP) has been working with the drafters of the Federal Acquisition Regulation (FAR) to ensure expediency does not come at the expense of competition and good contracting practices. Our recently published proposed rule would, among other things:

- draw greater attention to the capital planning requirements of the Clinger-Cohen Act and encourage more deliberation by agency acquisition planners before orders are placed;
- improve the structuring of orders by, among other things, reminding agencies that individual orders must clearly describe all services to be performed or supplies to be delivered so that the full cost or price for performance of the work can be established when the order is placed; and
- strengthen the quality of the fair opportunity process by facilitating better information exchange between agency customers and contract holders and reinforcing agency responsibility to document the basis for exceptions (including the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision).

Strengthened FAR guidance also has been developed for the multiple award schedules, and we expect that another proposed rule will be published in the near future.

In addition, we are working with the General Services Administration (GSA) and other agencies to improve access to information on multiple award contracts through an electronic index on the Internet where agencies awarding contracts for inter-agency use provide basic information for review by potential customers. The index could serve as a

resource to help an agency during acquisition planning and market research to more easily identify whether there may be a suitable existing federal contract that can satisfy the agency's needs. (For example, where a multiple award contract has a heavy small business presence, ordering through one of these vehicles may facilitate access to the expertise of these concerns.) This index may also help to reduce duplication of effort and better ensure these vehicles are established and operated in the best strategic interest of the taxpayer.

Admittedly, these are just first steps addressing one component of our procurement process. But these steps are indicative of an important message I wish to convey to our acquisition community: we need to achieve greater balance in our priorities and better results from our acquisition tools. This message really is no different from that which you have heard me state regarding our competitive sourcing initiative, where agencies are making plans to increasingly subject commercial tasks performed by the government to competition. Our high level of commitment to competition is sought not for the sake of process, but rather because experience has demonstrated repeatedly that when agencies invest the effort to make their service providers compete to perform commercial activities, the taxpayer wins -- irrespective of which sector ends up performing the work.

In short, Mr. Chairman, as we chart the course for better performance, we must keep a watchful eye towards a better balance between efficiency and competition and on the need for our priorities to remain focused around improved application of our acquisition basics, lest we repeat our past mistakes. With these basic guiding principles

in mind, I would now like to turn to some of the more specific concepts in SARA as outlined in your letter of invitation.

Issues Under Consideration for SARA

1. Tending to our Acquisition Workforce

The success of any of our initiatives depends, ultimately, on the knowledge and skills of the contracting officials charged with conducting the acquisitions that support agency missions. They are the ones we must rely upon to understand and strategically apply our "acquisition basics" as a matter of routine. For this reason, we share your interest in improving the management of human capital.

Funding. According to the draft narrative, SARA would establish an acquisition workforce training fund. Funding would be generated through fees paid by federal agencies making purchases from government-wide acquisition contracts (GWACs) and the multiple award schedules program operated by GSA.

As a general matter, I believe acquisition training programs should be funded through the normal budget and appropriations process. In accordance with the Clinger-Cohen Act, OMB Circular A-11 includes specific instructions to agencies to budget for acquisition training. We intend to emphasize these instructions to the agencies. Admittedly, some civilian agencies are unable to report their spending on acquisition training because internal agency budget and financial control systems do not track transactions at that level. Nevertheless, we know that various agencies, such as the

Department of the Treasury through the Treasury Acquisition Institute, are spending significant sums on acquisition training. Before we consider any centralized funding approach, we would be better served by ascertaining how much is spent on acquisition training at the civilian agencies.

If more resources are committed to acquisition training, we urge that the commitment be made through the regular appropriations process. Using fees generated from purchases made from multiple award contracts and schedules to fund training could unnecessarily discourage the use of these vehicles, which – if appropriately utilized – can provide both effective and efficient access to the marketplace. This proposal could create a hardship on small agencies who may rely more heavily on these vehicles to meet their needs.

Performance measures. The best measure of the success of acquisition training is achieved through demonstrated performance - - especially when supervisors evaluate employees. While all acquisition training programs should have rigorous and valid measurement criteria for successful completion (e.g., exams or other valid testing measures), it is the supervisors of our acquisition personnel, and the executives who are responsible for these programs, who are in the best position to assess whether training programs meet agency mission requirements and provide employees with professional level competence and skill.

2. Improving our Business Environment

The draft narrative to SARA describes several possible actions to reform our business environment. Let me briefly address the two referenced in the letter of invitation: (1) establishing a chief acquisition officer (CAO), and (2) undertaking a comprehensive review of acquisition-related statutes and regulations to identify remaining barriers. As a general matter, I would note that business management reforms, which can be addressed administratively, may be better left to executive implementation. This approach minimizes the potential for imposing "one-size-fits-all" solutions on agencies with varying structures and roles.

The role of the procurement executive. According to the draft narrative, SARA would establish a CAO within civilian agencies. The CAO would: (1) report directly to the head of the agency, and (2) be a career employee who also would be a member of the Procurement Executives Council. Presumably, this construct would replace that in the Office of Federal Procurement Policy Act (OFPP Act), which requires the head of each executive agency to designate a senior procurement executive responsible for management direction of the agency's procurement system.

I appreciate that the heightened need for strategic management and bottom-line results may create greater challenges for our procurement executives. However, it is not clear to me that these challenges would be met more effectively just because the statute defines where the function is placed within the agency. The most effective placement of

such an official is best left to the discretion of an agency head who is familiar with, and ultimately accountable for, mission performance. The agency head will be best able to shape the function based on the agency's organizational structure and size as well as the prominence and general complexity of acquisition activities required to carry out the agency's mission. An across-the-board prescription addressing organizational placement could lead to additional layers of force-fit bureaucracy. This approach might be especially constraining in small agencies with minimal procurement budgets and personnel. For these reasons, I am inclined to conclude that the current statutory framework set forth in the OFPP Act achieves an appropriate balance between the importance of the role within an executive agency and needed agency head management flexibility.

Review of our legal framework. It appears from the letter of invitation that the Subcommittee may wish to mandate, in statute, a comprehensive review of procurement legislation and regulations. Such a legislative mandate is unnecessary. I agree that, in today's fast changing world, it is important that we continually review our statutory and regulatory framework to ensure it is enabling our workforce to effectively invest the government's procurement resources. We are already doing just that.

Last week, the Administration transmitted to Congress the "Freedom to Manage Act of 2001." The proposal is intended to facilitate Congress' rapid consideration and removal of statutory barriers to good management that have been identified by agencies. If enacted, this proposal would provide a useful avenue for my office and the procuring

agencies to identify obstacles. In any event, we will not hesitate to develop and provide the Congress with legislative proposals as necessary to ensure our acquisition workforce has the tools it needs for meeting agency requirements.

With respect to regulatory review, we are working with the Office of Information and Regulatory Affairs, the FAR Council members, the Defense Acquisition Regulations Council, and the Civilian Agency Acquisition Council to actively examine current regulatory policies and implement changes as needed to improve results. The councils are considering a wide variety of timely issues, ranging from the improved acquisition of services under the multiple award schedules and the use of non-cost based incentives in commercial item contracts, to the use of electronic signatures in federal contracting.

I plan to keep a watchful eye on the process as well. Earlier, I noted the need for transparency. Among other things, we can do a better job of explaining our procurement rules so that the public has a clearer understanding of them and the rationale behind them. Admittedly, some rules take longer to develop than others, but, as I noted above, real progress will be made only if our rules are shaped to foster balance in our activities – furthering efficient delivery of quality goods and services while, at the same time, taking effective advantage of competition in an environment that instills the public's confidence.

3. Using Performance-Based Service Contracting (PBSC)

Let me now turn briefly to the topic of performance-based service contracting – i.e., where the focus is on desired mission-related outcomes as opposed to how work is

performed. With performance-based contracts, we can achieve better acquisition – solutions for service contracts by fostering the creativity and initiative of the private sector.

Your letter of invitation points out that PBSC is underutilized. In part, I believe the problem centers on a lack of clarity regarding the definition of what constitutes a performance-based service contract. Based on my experience, there is considerable disagreement among agencies regarding the requirements to qualify a contract as performance-based. Previous attempts by OFPP to clarify the definition, including a "checklist" of minimum required elements for an acquisition to be considered performance-based, have been unsuccessful.

Therefore, as a first step towards improving use of PBSC, I will be working with the agencies on a common definition. This does not mean that agencies should refrain from gaining experience with PBSC in the meantime. In this regard, I am pleased that numerous agencies are actively pursuing pilot programs. Among other things, strong performance-based statements of work will be important to the success of the Administration's competitive sourcing initiative -- forming the basis for good public-private and private-private competitions. PBSC will allow parties to offer innovative solutions to meet the government's needs rather than having the government preempt this innovation by telling the parties how to do the work.

OFPP recognizes that agencies likely will need additional guidance. We will be assessing ways to achieve a successful government-wide transition to PBSC.

4. Buying Commercial Items and Using Commercial Practices

Reliance on the commercial marketplace can help us to get more for our contract dollar than is possible when the government buys custom-designed products and services. Effective government access to commercial technologies remains a successful formula for driving costs down and quality up.

Our vision of becoming a citizen-centered electronic government reaffirms the importance of keeping abreast and taking advantage of developments in the marketplace. As my colleague Mark Forman will tell you, the government seeks to leverage the productivity improvements achieved through the marketplace's development of revolutionary Internet technologies. These improvements pave the way for enhanced quality, responsiveness, efficiency and effectiveness in how the government does business.

Commercial technologies are helping us to provide better access to our business opportunities through a single government-wide point of entry on the Internet, known as "FedBizOpps." As of the beginning of October, the FAR requires agencies to provide access through FedBizOpps to their synopses and associated solicitations (with certain exceptions) for actions over $25,000. By watching successful commercial strategies, we are reminded of the need to eliminate redundancies in our processes. In our transition to an e-government, we are working, among other things, to eliminate the repeated requests we make to our contractors for information that already is available to the government. In short, we must build on results achieved by the marketplace if we are to take

maximum advantage of the tremendous opportunities that the Information Age has created for our government, our business partners, and our citizens.

Let me now share a few specific thoughts regarding our access to the marketplace and the use of commercial practices.

Access to the commercial marketplace. Barriers still limit our access to the marketplace. In this regard, we need to review certain international requirements that place restrictions on government purchases. The imposition of country source restrictions on manufacturing and content represents a significant deterrent to the acquisition of both commercial and state-of-the-art information technology (IT) products. In today's globally integrated market, these restrictions represent an expensive challenge for manufacturers that increases the cost of procurement and impedes our ability to obtain the latest advances in commercial IT.

In addition, it is time to take another look at the government-unique requirements imposed by the Service Contract Act (SCA). The requirements of the SCA and the resultant administrative burden, in the past, have been justified as being necessary to protect prevailing labor standards. However, modification of these requirements and their applicability to commercial item acquisitions should encourage broader participation by the commercial marketplace in fulfilling government needs.

Although not relevant to the acquisition of services per se, you might note that I am actively working with the regulatory councils and agencies towards the publication of a proposed rule that finally would implement authority provided in the Clinger-Cohen

Act (almost six years ago) to better facilitate our buyers' access to commercial off-the-shelf items (commonly called "COTS"). Waiver of government-unique requirements whose continued application is not in the best interest of the government will free our workforce from constraints that unnecessarily may be limiting their access to readily available products that effectively and efficiently can meet the government's requirements.

Use of commercial practices. As you know, our commercial marketplace polices are set forth in FAR Part 12. In terms of services, Part 12 applies to services that are of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.

Like you, I have been approached by members of the procurement community who believe that the government could benefit by expanding the definition of commercial item so that more procurement dollars for services are subject to FAR Part 12. As you can guess by now, my initial reaction is to ensure that our current commercial item transactions are planned, competed, and administered effectively. There is no substitute in Part 12 (or any other FAR part) for adherence to the acquisition basics. Indeed, many of the task orders reviewed by the GAO reports I mentioned earlier involved commercial services. Thus, our first priority must be to improve how we contract for commercial services.

Requirements personnel and contracting officers need to work together to develop sound statements of work that focus on desired performance or functions and incentivize good performance. They must conduct effective research to identify suitable options in the marketplace. And, as with any acquisition, our buyers must develop effective bargaining positions to ensure that commercial items are acquired at fair and reasonable prices.

I intend to work with the agencies to make sure they have the guidance necessary to execute sound business strategies for acquiring commercial items. These efforts alone should help to better ensure that Part 12 policies are used more consistently and robustly. Stating requirements in performance-based terms, for example, will allow for a greater field of commercial offerors and solutions to meet our needs -- enhancing competition and opportunities for better prices. Working to develop an effective bargaining position (remembering, for example, that published prices are not necessarily good prices) will better ensure purchases are made at fair and reasonable prices.

In terms of expanding the definition of commercial item, it is important to keep in mind that access to Part 12 (which is already broad) is bounded for a reason: we must be able to enter into deals that are in the best interest of the government. Of course, opportunities always exist for improvement, and I look forward to working with the agencies and Congress to consider improvements to Part 12 policies that are consistent with the government's ability to effectively invest the public's funds.

5. Using Share-in-Savings Contracts

We appreciate the Subcommittee's desire to vest agencies with innovative contracting mechanisms that may motivate better contractor performance and, in turn, help agencies to improve how they fulfill their missions. In this regard, we understand that the Subcommittee is considering permanent expansion of the "share-in-savings" pilot authority set forth in the Clinger-Cohen Act. Under share-in-savings contracts, the government agrees to share savings which the contractor achieves through contract performance.

We recognize that agency interest in this pilot authority has been weak, likely because agencies may find insufficient or unclear incentive to use it. Accordingly, we agree that consideration should be given to adding incentives, provided they are consistent with sound fiscal policy (i.e., where agencies fund the contract either in full or, at a minimum, for the first year plus termination costs). To stimulate agency interest, we understand that the Subcommittee may be considering language that would allow agencies to retain a portion of savings out of their appropriation accounts. On balance, this may be a reasonable incentive for agencies, but retained savings should be limited to the acquisition of additional IT.

Of particular importance, we want to ensure that the methodology proves beneficial before it is expanded government-wide or otherwise made permanent. To date, we have not seen demonstrable results. For this reason, we would want share-in-savings authority to remain limited to a pilot. A report discussing results achieved under the

pilot, including a discussion of cost reductions, could help Congress decide whether or not provision of general authority would be beneficial for the government.

Conclusion

As the President has stated, this Administration is dedicated to ensuring that the resources entrusted to the Federal Government are well managed and wisely used. This message has important ramifications for our procurement system, which provides a critical link for turning promises made to our citizenry into positive results.

Over the past decade, our system has undergone a great deal of change. These changes have had some positive effects – such as the ability to make many of our purchases faster. Unfortunately, these changes have not, as of yet, been as effective in helping us meet other important goals – namely, better prices and quality. To make progress on these fronts, we must, as a start, focus on getting back to our tried and proven acquisition basics: sound acquisition planning, consistent use of competition, and effective contract management. Only in this way will our procurement system be able to deliver the cost-effective quality service that forms the underpinning of successful mission performance.

I look forward to a productive dialogue with this Subcommittee as we embark together to improve the performance of government. This concludes my prepared remarks. I am happy to answer any questions you might have.

Mr. DAVIS. Thank you very much.

Ms. Lee.

Ms. LEE. Good afternoon, Chairman Davis, Mr. Turner.

I appreciate the opportunity to appear before you today to discuss acquisition. Our economy, including the business of the Department of Defense, has become more service oriented. Over the past decade, the amount spent on services in the Department of Defense has steadily increased such that we now expend almost $60 billion yearly, or approximately 45 percent of our expenditures on service contracts.

Certainly with this shift, we have and will continue to increase our focus on how we acquire and manage services. As your SARA bill notes, to achieve excellence in all acquisition, we must have a well prepared work force. The Defense Acquisition Work Force Improvement Act of 1990 serves as a baseline for professional development and certification of the DOD acquisition professional. During the last 2 years, DOD has initiated an aggressive strategy to invigorate education and training, and particularly to provide currency or updated skills to our work force.

To be successful, we recognize that we must reach all members of the acquisition community, users, program managers, logistics and quality people, as well as the contracting professionals. To reach this broad audience, we are using non-traditional training methods to deliver educational opportunities. Since June 1997, the Department's Acquisition Initiatives, previously the Acquisition Reform Office, has produced 22 satellite broadcasts on a variety of acquisition topics. We're using the Web sites and the Internet to effectively communicate. We have a defense procurement Web site that posts weekly information of use to the contracting officers. The DAR Council is now on line and trying to provide rulemaking in a more timely fashion. And we will soon move to a more interactive forum in that area.

Specific to services, we have established a Web site that links to over 100 templates for guidance in structuring performance based acquisitions. We're also moving to be more Web based training, including specific topic modules and service contracting, both the methods and the successes and the challenges, will certainly be one of the early topics to be deployed.

We recognize that program and contract management, as mentioned by the GAO, attention to results after contract award are vital factors in success, and we must provide more work force education and support in these areas. In addition to training and more current information, we have developed and employed various information technology systems throughout the Department to streamline the procurement process. You're familiar with many of these, and in the interest of time, I'll just mention central contractor registration, electronic data access, the Federal Business Opportunities, FedBizOps, where everyone can now access all Government-wide opportunities. And we are working on the Past Performance Information System, which is an automated retrieval, where both industry and Government can look at their performance record and consider that for future activities.

But this is certainly not enough, and we have specific initiatives regarding services. We've stepped up education on how to properly

use the schedules, the GWACs and the MACs, in regard to competition and specifically services. DOD is leading the effort to require all agencies to report in the Federal Procurement Data System purchases made by one agency on behalf of another. And this information is particularly important to us, so that DOD can manage our service dollars and actions.

We are exploring how the Department oversees very large acquisition of services as we go to more base operating and more service oriented support systems, and whether this oversight process is effective and properly managed. We're trying to improve it by developing an oversight policy for non-hardware acquisitions that will provide senior DOD officials the opportunity to ensure that these acquisitions are of the highest quality, support DOD goals and follow the Secretary of Defense direction.

I greatly appreciate the committee's continuing interest in acquisition and the near term focus on services. I agree that we have made much progress but there is always more to be done. And on behalf of the Department I would like to affirm my commitment to improve the business process, to have appropriate oversight and to provide the acquisition work force with the necessary support to achieve excellence in all acquisitions, including services.

Mr. Chairman and Mr. Turner, I look forward to working with you and your exceptional staff on these challenges, and thank you for the opportunity to appear here today. I look forward to answering your questions.

[The prepared statement of Ms. Lee follows:]

STATEMENT OF

DEIDRE A. LEE

DIRECTOR, DEFENSE PROCUREMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION,

TECHNOLOGY & LOGISTICS

BEFORE THE SUBCOMMITTEE ON

TECHNOLOGY AND PROCUREMENT POLICY

COMMITTEE ON GOVERNMENT REFORM

NOVEMBER 01, 2001

STATEMENT OF THE DIRECTOR, DEFENSE PROCUREMENT

OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION,

TECHNOLOGY AND LOGISTICS

BEFORE THE U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

COMMITTEE ON GOVERNMENT REFORM

NOVEMBER 01, 2001

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to come before you and discuss the acquisition of services within DoD and the proposed Services Acquisition Reform Act.

Our business environment within the Department of Defense has become very complex, particularly in the acquisition of services. The amount of money the Department spends on services has increased significantly over the past decade, to the point where we now spend approximately an equal amount of money for the acquisition of services as we do for equipment. Because of this shift, we have increased our focus on how we acquire services.

We have paid close attention to helping our acquisition workforce achieve excellence in the acquisition of services and have made progress in several ways. We realize the importance of a trained workforce to address the challenges of working in our new environment. The Department has been improving its training processes for the last

decade with the Defense Acquisition Workforce Improvement Act of 1990 that established a professional development framework and imposed certification requirements on the acquisition workforce. For the last two years, DoD has also initiated an aggressive outreach strategy to jump-start education and training.

We also use other non-traditional methods to provide training support to our workforce. Since June 1997, the Department's Acquisition Initiatives (previously Acquisition Reform) office has produced 22 satellite broadcasts on a variety of acquisition topics. These tapes are distributed widely for use in local training and to support the annual Acquisition and Logistics Excellence Week training. The Department has also developed a guidebook for Performance Based Services Acquisition for use by the entire defense acquisition workforce. We believe that for the most effective use of services, training must go well beyond the contracting workforce and extend to all acquisition personnel to include program managers, logisticians, and engineers. Contractor services are used extensively throughout our workplace today so we must train the people who define what the Government expects and who oversee the contractor's performance. Additionally, in partnership with Acquisition Initiatives, we have established a web site for Performance Based guidance that links to 100 templates for use by the acquisition workforce. We also are providing hands on assistance to program teams through the Change Management Center and other service acquisition teams.

We recently held a conference on Performance Based Services Acquisitions with the services and defense agencies. The purpose of this conference was threefold. First, it

assessed where each service and major defense agency were with respect to implementing Performance Based Services Acquisitions within their respective organizations. Second, it promoted the sharing of information concerning what has proven effective in accomplishing Performance Based Services Acquisition. Finally, it identified areas that require additional attention. The conference identified several issues that need resolution and we are currently working to resolve them. Resolution of these issues should help focus DoD on performance based service contracting and should help remove perceived barriers to doing performance based service contracting.

In addition to training, we have developed and employed various information technology systems throughout the Department to streamline the procurement process and help our acquisition community to work more effectively and efficiently. These web-based systems include: The Central Contractor Registration (CCR) which expedites contract award and payment by providing a centralized, electronic registration process for vendors that want to do business with DoD; Electronic Document Access (EDA) provides an electronic version of contracts and modifications thereby facilitating the payment process; Federal Business Opportunities "FedBizOps" provides industry and vendors easy, electronic access to our business opportunities, eliminating the labor required to address, package, and mail solicitations; and the Past Performance Automated Information System (PPAIS) is a shared data warehouse that contains over 13,000 records on contractor past performance for contracts valued in excess of $420B which streamlines the source selection process. In addition, we are working in coordination with OFPP, NASA, and NIH to develop a shared past performance information (PPI) data-

warehouse/retrieval approach that leverages the investments already made in the collection systems in use today.

The Department has issued policies to clarify techniques for services acquisition. The first area of policy clarification is designed to ensure the Department takes full advantage of the potential for competition inherent in multiple award task order contracting. We have emphasized the importance of competition when using this type of vehicle, and of having contracting personnel adequately document instances in which competition is not used. We realize the need to increase competition and are looking at ways that will help us achieve this objective.

A second area of focus is to ensure proper tracking of DoD funds spent by others. DoD is leading the effort to require all agencies to report in the Federal Procurement Data System any purchases made for another agency. This will provide us detailed information on money spent for services and supplies by other agencies to satisfy DoD requirements.

We have continued to look for ways to improve the acquisition of services. One area we are exploring is how the Department oversees very large acquisitions of services, whether the oversight process is effective, and how it might be improved. We are working closely with the Military Components and other agencies to develop an oversight policy for non-hardware acquisitions that will provide senior DoD officials the

opportunity to ensure that such acquisitions are of the highest quality, support DoD goals, and follow Secretary of Defense direction.

In closing, I would like to affirm my commitment to improve the business process, have appropriate oversight, and provide the acquisition workforce with the necessary training to achieve excellence in the acquisition of services. At the same time, I am committed to developing policy that will assist the Department in overcoming the challenges we face in order to achieve our objectives. I look forward to working with you to improve our acquisition of services.

Thank you for the opportunity to appear here today. I will be happy to address any questions you may have.

Mr. DAVIS. Thank you very much.

Mr. Perry, I understand you need to leave quickly. Could you stay for just a couple questions?

Mr. PERRY. I certainly will.

Mr. DAVIS. I'll start quickly and then yield to Mr. Turner. We'll focus on you and then get to the rest of the panel.

Do you think it's appropriate to revisit acquisition reform legislatively?

Mr. PERRY. Well, there's always the opportunity for improvement, so yes. Yes, to revisit for purposes of identifying opportunities for improvement, for sure. I would have no hesitancy in subscribing to that.

Mr. DAVIS. Do you think that we can effectively clean up regulatory and statutory barriers to improved acquisition performance without legislation?

Mr. PERRY. That I'm not as sure about. I think that is part of what we would need to review.

Mr. DAVIS. I think that obviously this committee wants to do is to work with all of you to try to see where you need legislative help to do it, and we're going to give you some suggestions. But to try to work together to craft something with Mr. Turner and Mr. Waxman and others that can move through and have some meaningful effect on procurement.

So in our opinion, part of that's a legislative fix, part of it can be done administratively.

Mr. PERRY. That would be very prudent, to pursue that and to study that and determine the results of that study. At this point, we haven't reviewed any document along those lines, but we would be inclined to do so.

Mr. DAVIS. Well, we'll put something out as a talking point and go from there, I think in very short order.

A couple other questions. Do you believe that the chief acquisition officer within each Federal agency could assist GSA in performing daily operations?

Mr. PERRY. Certainly there needs to be a person designated in each agency or some part of the agency to do this important work. Speaking for GSA, we happen to have a position, it's not titled chief acquisition officer, but a person who does report directly to me for acquisition related matters. And so we would advise that other agencies should do something similar.

Mr. DAVIS. One of our challenges is to ensure that the training and the education which the acquisition work force would receive under the work force training fund would reach the right people at the right time to provide sufficient depth to help program offices implement acquisition reform initiatives. We would need to work with you to ensure that's being done. That is a tough nugget, basically, how you continue to train and retrain people and bring them up to snuff and where do you spend that money.

Mr. PERRY. Absolutely. That's the whole issue of what some call succession planning and what some call human capital, strategic management of human capital. It needs to be done, and it needs to be done, as you point out, in a targeted way, that is to first identify what the skill gaps are and where they are, and then to ad-

dress those skill gaps, as opposed to having a one size fits all approach.

But that's the issue, having to be at the right place at the right time. And I think each agency has to be involved in identifying what is the right place and the right time. Again, in GSA's case, we have attempted initially, by establishing mandatory training for all of our acquisition work force, but now are involved in doing competency assessments, so that we can have even more targeted training to make sure that we are delivering training to the right people at the right time.

Mr. DAVIS. In your work with share-in-savings, GAO noted that it was often difficult for GSA to approve projects with this type of contract vehicle, because agencies have difficulty in measuring the baseline. Do you have any tools that you think agencies need to have in place to better establish a baseline for share-in-savings vehicles?

Mr. PERRY. Well, some of that does come as part of the training on performance based contracting, identifying performance expectations, understanding what the cost savings are and how they will be shared. It's not something that is not currently done with some success. So I think we could use the models that are in place and provide training to people. There may also be some cultural issues, if you will, that are also involved in that.

And some of those cultural issues have to do with the risk sharing that comes along with savings sharing, because the flip side of sharing the savings is, well, what if there aren't the savings, and how do I deal with that in my budgetary process. But it could even be structured such that the risk is transferred to the private sector partner as opposed to the Federal agency.

Mr. DAVIS. In the work your agency's done to date with horizontal acquisitions, like FTS 2001, you have encountered some significant barriers to meeting goals of the contract. What do you see as ongoing barriers to greater cross-agency acquisition information sharing?

Mr. PERRY. As I understand, some of those barriers are potentially legislative, or I should say statutory or either regulatory, where there are in fact some parts of statutes that make it more difficult for agencies to work with one another in that way. Here again, I think that another part of the barrier is cultural. We hopefully are daily moving more and more away from the cultural barrier that prevents agencies from working closely with one another, and even within agencies, to have parts of agencies work in a collaborative fashion to the extent we should.

And then last, but I think very importantly, there is also the concern about when the objective of this working across agencies falls often is efficiency. And that efficiency can have an impact on employment. I think that's a real concern but one that has to be addressed forthrightly and directly.

Mr. DAVIS. Finally, do you think that agencies can sufficiently share best practices to improve acquisition Government-wide?

Mr. PERRY. Yes. Again, there are models of that being done, getting over the barriers of not invented here. But even more importantly than that, that cultural issue, is to have an effective process for disseminating the information with respect to best practices.

Even within agencies, I think it happens today that a best practice is invented in one part of the agency and it's slow to be disseminated to other parts of the agency. That only gets magnified when you think about the whole Government.

But I agree with you that it can and should be done.

Mr. DAVIS. Those are my questions. Do you have any questions, Mr. Turner?

Mr. TURNER. Mr. Chairman, I'll pass in the interest of Mr. Perry's time. I can ask my questions in writing.

Mr. DAVIS. Thank you very much for being here.

Mr. Turner, I'll yield to you, any questions you want to ask of the panel.

Mr. TURNER. Let me perhaps start with a question of Mr. Woods. As I understand performance based contracting, it's a broader term that would include the share-in-savings contracts. And I understand that we've had, I think one example that you cited of a successful share-in-savings contract involved the Department of Energy, you mentioned that.

I'm also advised that there was a share-in-savings contract proposed at the Department of Education that would use share-in-savings contracting for the student financial assistance program modernization effort. And that the inspector general at the Department of Education found some problems or difficulties with utilizing that in that effort.

Could you describe what type of problems were noted there and are there other potential red flags that we ought to be aware of when we start talking about moving into this area of share-in-savings?

Mr. WOODS. Mr. Turner, I'm not familiar with the inspector general's findings. But I do know that we have some concerns as we've been looking at share-in-savings. Those concerns are that it is very, very difficult for agencies to establish the requisite baseline. And that's really the first step in trying to approach share-in-savings, is you have to know what the activity is costing the agency now in order to use that as a starting point.

And then the other very critical point that we also have concern about is being able to establish metrics and outcomes for how you're going to determine success. Those are two challenges that our preliminary work in this area have revealed.

Mr. TURNER. So I take it in the example you cited of the Department of Energy that baseline was pretty easy to determine?

Mr. WOODS. That was easy, yes, sir.

Mr. TURNER. Where's another example of where it would be easy to determine a baseline, so that this type of contracting might be valuable or useful?

Mr. WOODS. Well, there's another example that we're familiar with in the debt collection area. There are a number of programs where the Federal Government is owed debts by various companies and individual citizens in some cases. In that instance, it might be relatively easy to look back over time and see what the collections have been over a given period of time. That might establish the requisite baseline. And then if there's improvement as a result of the contributions of the contractor, it may be relatively easy to use that as the baseline to measure the savings.

Mr. TURNER. Share with us some examples of where it's difficult to establish a baseline, the kinds of problems that we might see in other areas.

Mr. WOODS. I think any time you move beyond the hard numbers, for example, let's say we wanted training, for example. It's very difficult to establish metrics on training. How would an agency be able to repay a contractor based on improvements in training of, let's say, the acquisition work force? We don't know if that would be very difficult to track savings and attribute that to the contributions of the contractor.

Mr. TURNER. And legislation that would encourage greater utilization of share-in-savings contracts or performance based contracts, would it be wise to have some limitation that would define the areas where perhaps Federal agencies should not try to utilize this type, or should there be some control statutorily over the discretion of the agencies to use this type of contracting?

Mr. WOODS. I think one approach to that might be the pilot program that was authorized a couple of years ago in Clinger-Cohen. That might get to the issues that you're looking at. To be able to test it out on a couple of programs, perhaps, and then learn from those programs about what those additional legislative requirements and restrictions might be, I think we first have to start with some pilots. So far we have not seen the pilot program that's authorized by Clinger-Cohen in the information technology area carried out.

Mr. TURNER. What other type of performance based contracting, other than the share-in-savings approach, do you think has the potential for offering some advancements and some improvements in our acquisition policies?

Mr. WOODS. I think what the requisite imagination that almost any area in the, that the Government procures services, could be likely good candidates for a share-in-savings approach. Building maintenance, for example, you may be able to say, here's what we're getting in terms of, here's our standards today, here's what we're paying for that, we'd like you to accomplish that same set of standards with whatever approach industry wants to bring to it and whatever savings results from that, we'll share those savings.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you. Thank you very much.

Again, it comes down at the end of the day to the contracting officer picking the right vehicle for what you're trying to accomplish.

Mr. WOODS. Absolutely.

Mr. DAVIS. And not all these vehicles work all the time in what you want to do. That's where training of acquisition officers is so important.

One difficulty in share-in-savings contracts is that corporations that bid them correctly can make a lot of money. And there's a huge upside that if you did another vehicle, they may not. On the other hand, Government may be willing to try a share-in-savings, because there's no downside for Government, in ways that they wouldn't otherwise.

So these are tough calls. I don't think they ought to be made from Congress. I think they ought to be made right down there on the street where they ought to be made by the agencies. And we

want to give you the ability to do that. That's kind of what it's all about at the end of the day.

Mr. WOODS. Well, they are tough calls, and agencies need that flexibility. Frankly, we have not, we as a Government have not had that much experience with share-in-savings. Preliminary indications are that it is a more widely used, we don't know how much, but a more widely used practice in the private sector. One of the things that we're doing for the subcommittee is to go and take a look at those practices. Then we can report back and identify the candidates that are most suitable for use in the Government.

Mr. DAVIS. Have you noticed what State and local governments have done for IT modernization and stuff in the share-in-savings?

Mr. WOODS. No, we have not.

Mr. DAVIS. I would just say, my experience in local government, you get groups like Service Master, that would come in areas where we were afraid to go out and try it and say, well, we'll guarantee these savings, and it doesn't cost you a penny if you don't produce, allowed us to do some things otherwise we would have been afraid to undertake. It did tremendous streamlining. But again, it depends on the right vehicle at the right time for the right purpose.

In your testimony, you note that many private sector companies have created a chief acquisition officer or similar position. If legislative language gives agencies enough flexibility in determining how such a position is placed in an organization, do you think it will allow for greater strategic acquisition planning?

Mr. WOODS. Absolutely, Mr. Chairman. We found that to be a key attribute of some of the leading private sector organizations. And as you point out, flexibility is needed in order for the agencies to be able to determine exactly where in the organization that person should be.

But what we found uniformly is that the person needs to be at a sufficiently high position in the organization to be able to take that strategic look across the organization. We compare this somewhat to the chief financial officer or the chief information officer at many agencies. We would think something analogous to that position might be appropriate.

Mr. DAVIS. Have you reviewed the Davis Bacon Act and the Service Contract Act thresholds for procurement?

Mr. WOODS. No, sir, we have not.

Mr. DAVIS. Would you consider reviewing these provisions and provide the committee with an analysis on the impact on Federal agency procurement?

Mr. WOODS. Certainly.

Mr. DAVIS. I'd like to see some objective analysis in terms of where the current thresholds are and the impact that they're having. Thanks.

Although the benefits of performance based contracting I think are widely recognized, this type of contracting is still in my judgment not sufficiently utilized. To what extent are agencies utilizing performance based contracting for services?

Mr. WOODS. Well, in my written statement, Mr. Chairman, we pointed out that the reported use of performance based contracting is right now at about 15 percent. We'd like to see that higher. The

administration has set a target for 20 percent for this year. Part of the problem is that the definition of performance based is not universally shared among all agencies. So that's a starting point.

We will have to review as part of the ongoing review that we're doing for the subcommittee about how reliable those numbers are, about 15 percent.

Mr. DAVIS. OK. Ms. Styles, let me ask you a few questions. As I understand my good friend and colleague Steve Horn, who chaired this subcommittee previously, tried unsuccessfully on several occasions to have OMB and agencies comply with training requirements that were set forth in the Clinger-Cohen Act. Additionally, he worked tirelessly to get agencies to adequately fund acquisition training.

It's still not an OMB or agency priority, as I look at it. What additional efforts do you think can be made to ensure that agency budgets are sufficient for acquisition work force training, and if we don't establish a centralized fund and develop a program based on commercial best practices, do you share my concern that we will still have many of the same problems that exist today?

Ms. STYLES. Yes, we're very concerned about training. As a first step, what we are trying to do, and I think GAO is also trying to do, is assess how much we are actually spending on training right now. I'm very concerned that before we make additional expenditures on training that we know exactly how much we're spending.

The problem that we've seen in the past at OMB is that when agencies, and agencies specifically, specifically the problems they've seen is that when they call out their training budget, that is usually the first one to go when it comes back up to the Hill, is that it's easy to cut the training budget so they're very hesitant to call it out.

We need to know what we're spending and we want to move forward from there to make sure that they are appropriately spending the money and managing the money that's being spent on training. We need to know that they're getting the right training, that the money is being managed well and that we're getting something for what we're spending.

Mr. DAVIS. One of our concerns is that we see so much contracting going out the door because we haven't done enough just training people in-house to do it. We have good, strong, capable Federal employees and they're just not getting trained.

Ms. STYLES. I think the training is a major concern for all that we've seen go out the door, particularly in light of the administration's competitive sourcing initiative. We have to focus, and it is one of the Government-side initiatives in the President's management agenda, is human capital.

I think the critical piece of that is the acquisition work force. We can't go forward with any of the other Government-wide initiatives until we have a very good, well trained acquisition work force that we recruit well and we retain these people well. So we really have to focus on those people, because we're not going to manage these contracts well unless these people are trained well.

Mr. DAVIS. As I read your statement, you talk about the concept of a chief acquisition officer, which we've thrown out. Do you think that greater flexibility is given to the executive branch for the

placement of such a position this would help agencies accomplish better strategic planning?

Ms. STYLES. There are two sides to this. One is that with our freedom to manage initiative, we really don't want to see a one size fits all solution in any area. On the other side of this, I see some very difficult cultural problems when you look at the requirements part of the work force, the management, program management and the procurement piece. We've got to make these people in the civilian agencies start working better together.

You can see the DOD, these pieces work together well. And we need to find a way that does it to give the agencies enough flexibility that it isn't one size fits all. Because I think you can end up harming some of the smaller agencies that aren't as flexible and nimble to put people in appropriate places and force them to have a chief acquisition officer in a place that might not be appropriate in using their agency's resources effectively.

Mr. DAVIS. OK. I think that's reasonable.

In your statement, you express a concern with the, well, can you comment on the shared past performance data base that was mentioned in Ms. Lee's testimony?

Ms. STYLES. We actually have been working very hard with the Department of Defense, NIH and NASA to take the information from their data bases and put it into one retrieval system, so each one independently keeps retrieving past performance information, it's thrown over into a barrier, and we're able to, everyone is able to retrieve information from other agencies on past performance.

Mr. DAVIS. OK, thank you.

Ms. Lee, I've got a few questions for you. It's my understanding that DOD is currently pursuing more hiring flexibility and Civil Service flexibility for acquisition personnel. Can you comment on these efforts, and do you think that a work force exchange program would benefit DOD acquisition personnel?

Ms. LEE. Yes, sir, human capital is an issue. As you know, one of the significant decreases has been at the Department of Defense. We've downsized our total acquisition work force substantially. So we have the real challenges of, I like to say, treating the people we have now right, because we do need to have them be the mentors and we do need to have them continue to support our work.

We also need to look forward to the future at how we're going to recruit and train those new people. But certainly some flexibility in hiring those people. Right now it is discouraging for a college graduate to be at a fair, we've increased the affirmative education requirement for the Department of Defense. Now it must be a college degree plus 24 hours. So we certainly go out and try to recruit these people.

And we can't offer them a job for an extended period of time, versus they can immediately be offered a job. As we all know, as parents, it's good to get them off the payroll, so you like when they pick up the jobs. So I think we need to find a way to more quickly access the folks. We also need to look at, with that very stringent, which I support, educational requirement, the direct hiring right now to the 3.5. We've talked informally about could we change that to allow ourselves to have a larger pool to access.

Mr. DAVIS. How do you think expanding the current definition of commercial services under FAR Part 12 would affect DOD service contracting?

Ms. LEE. There are two pieces on commercial. Right now, and I'm trying to focus our folks as well, there's calling, buying a commercial item and using the Part 12 procedures because you are purchasing a commercial item. I also think there are cases where we ought to use commercial like procedures for the purchase of an item, whether that be a truly commercial item with some additional uniques, or whatever.

So I'm looking at how can we have more simplified procedures for purchases and continue to support commercial item procedures.

Mr. DAVIS. OK. Would you comment further on the DOD PBSA guide? How is the work force utilizing this guide? And can you further elaborate on the issue that needs to be addressed as a result of your PBSA conference discussed in your testimony?

Ms. LEE. We certainly identified in the performance based service contracting, as everyone has said here, and I think as Ms. Styles eloquently put, no matter how well the contracting people understand it, we've got to have the rest of the team there. That is the user and the program manager have got to be thinking about their need in terms of a performance based standard and a measurable result.

So one of the things we found from our conferences, we can educate the people on how to get the contract in place. But we've also got to work with the rest of the community to make sure that they're on board as well and thinking more results oriented and more measurable. It's been a big challenge.

Mr. DAVIS. How does DOD view the proposed use of longer term and award term contracts? What measures could you take to ensure good performance? For instance, the proposed base year for multi-year service contracts is 7 to 10 years. Is this too long, even with the provisions to shorten the performance period for poor performance?

Ms. LEE. It certainly depends on the product or service. It depends on the investment that needs to be made up front for that particular product or service. So I think you need to, again, you need to have it and look at the individual procurement and make the right decision. We currently can use and are using award term contracts, which is an elegant way of, if someone is performing. We found this through studies, that one of the motivators of companies was continued work, and the ability to have that work planned ahead.

So what we have now in award term is when someone is performing well, we can give them an additional time period of performance as a recognition of that. I think that helps us with that as well.

Mr. DAVIS. Do you think it's appropriate to revisit acquisition reform legislatively?

Ms. LEE. Sir, we've always got ideas. And there's more that can be done.

Mr. DAVIS. OK. Thank you very much.

Mr. Turner.

Mr. TURNER. Mr. Woods, what would your opinion be regarding providing incentives to a contractor when the contract expires, if they've done a good job, to give them some financial advantage in the rebidding process? Is that a good idea, or is there really no reason to provide that kind of performance incentive?

Mr. WOODS. I think the better performance incentive, frankly, might be the award term provision that Ms. Lee just mentioned. In that situation, all of the contractors would compete up front, knowing that if they perform well in the contract itself, there would be a provision for extending the contract for good performance. That might be the better way to go.

Mr. TURNER. When we get into acquisition reform, the issue of the Davis Bacon Act always comes up. In many ways, certain reforms could have the effect of undermining the protection that Davis Bacon was intended to give to workers. Could you describe briefly what kinds of issues that we need to be aware of that would in effect erode the protections of Davis Bacon, and are there ways, perhaps, these issues could be dealt with without having to deal with the Davis Bacon issue that inevitably, I think, perhaps comes up? But is there some way to avoid that in terms of trying to address acquisition reform?

Mr. WOODS. As I said earlier, Mr. Turner, we have not looked at Davis Bacon in quite a few years. I would not be prepared, at this time, I think, in response to the Chairman's question, we'll be doing some work, but we're not really prepared to address that at this time.

Mr. TURNER. Thank you. Thank you, Mr. Chairman.

Mr. DAVIS. I'm not sure we're ready to address it either, but I thought I'd ask the question or some questions to get a baseline on it. And there are a lot of stakeholders on that I think we'd want to hear from before we go anywhere. But it would be nice just to hear your input into it.

Mr. WOODS. Sure.

Mr. DAVIS. Let me just thank this panel. I appreciate your bearing with us and we look forward to continuing to work with you on acquisition matters.

Let me take a 2-minute break as we get our next panel up.

We welcome this panel to the witness table. Stan Soloway of PSC, Dr. Renato DePentima, of SRA International, Mark Wagner, of Johnson Controls, Charles Mather of Acquisition Solutions, and Dr. Charles Tiefer, of the University of Baltimore Law School. Thank you all for being with us.

As you know, it's our custom here to swear in our witnesses. Rise with me.

[Witnesses sworn.]

Mr. DAVIS. Mr. Turner has informed me we have votes scheduled in about 20 minutes, 25 minutes. We've read the testimony. Everything that you have is in the record. So you're given 5 minutes to say what you need, with the usual rules. But to the extent that we can expedite that, we can get into questions a little longer.

Mr. Soloway, thanks for being with us. We have a translator here, so you can do that.

STATEMENTS OF STAN Z. SOLOWAY, PRESIDENT, PROFESSIONAL SERVICES COUNCIL; MARK WAGNER, VICE PRESIDENT, FEDERAL GOVERNMENT AFFAIRS, JOHNSON CONTROLS, INC.; RENATO DI PENTIMA, PRESIDENT, SRA CONSULTING AND SYSTEMS INTEGRATION, SRA INTERNATIONAL, INC.; CHARLES MATHER, CHIEF EXECUTIVE OFFICER, ACQUISITION SOLUTIONS, INC.; AND CHARLES TIEFER, PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE LAW SCHOOL

Mr. SOLOWAY. Mr. Chairman, members of the committee, thank you very much for the opportunity to testify before you today on an important and timely piece of legislation. I am Stan Soloway, president of the Professional Services Council, the principal national trade association of the professional and technical services industry. Our diverse membership includes more than 130 companies performing information technology, engineering, maintenance, high-end consulting and many other critical services for virtually every agency of the Federal Government.

Today the professional and technical services sector accounts for more than $125 billion Federal spending per year, and that amount is certain to rise. Indeed, it is clear that the Government's partnership with and reliance on the competitive, commercial services sector must continue to evolve and grow if the Government is to access and capture the cutting edge solutions that will enable the Government to optimize its performance and deliver excellent service to its citizens. For that reason, Mr. Chairman, we applaud your leadership and commitment to fostering an environment that will enable that vital partnership to grow.

We gather today at a unique time in our history, a time of uncertainty, real peril and unique challenges. Some have attempted to use the current crisis as an excuse to roll back the clock, to suggest that the Government's focus on its partnership with the private sector should be put on hold, and that one of our Nation's responses to this crisis should be to curtail our commitment to the public-private partnership and outsourcing.

Mr. Chairman, as you, through your words and leadership have said, such a response is both ill conceived and certain to be counterproductive. So many of the skill sets and capabilities the Government needs, and will continue to need, in its long battle against the scourge of terrorism of all kinds, are resident today in the competitive private, not public, sector. Moreover, beyond immediate national security needs, the Government's responsibility to ensure that the remaining, and vast majority, of its missions are executed in a manner that optimizes both performance and efficiency has never been greater. That will not happen if the Government crawls back into its protective shell; that can only happen if the Government aggressively seeks to bring the pressures of the competitive marketplace to the Government monopoly.

Indeed, if one reviews the Government's expenditures for services over the last decade, there's been a fundamental shift in the type of services being acquired. We've seen declines in research and development, operations and management of facilities, and maintenance of equipment, areas in which the Federal work force has also been reduced. And we have seen real increases in architectural/en-

gineering, professional services, information technology and medical services, increases that track with those areas in which the Government has sought to expand its work force and areas in which the Government has the most difficulty competing with the private sector for people and skills. Nonetheless, far too many highly innovative, cutting-edge providers remain wary of the Government market and all too often opt not to participate.

And that, Mr. Chairman, is why this legislation is even more critical today than when you first began work on it many months ago. Our collective need for smart, flexible, open and effective policies and processes for the acquisition of services of all kinds has never been greater. Over the past decade, we have made tremendous progress in the acquisition process. Much more progress can and must be made, and this legislation will help significantly. The acquisition reforms of the last decade were designed to achieve many goals: greater access to the commercial sector and its innovative offerings; a greater focus on performance, past, present and future; more open communications between buyer and seller; greater degrees of flexibility and innovation; and the beginnings of a true partnership that both serves the needs of the Government customer and protects the interests of the American taxpayer.

Imperfect as the process is today, the reforms of the last decade have put us on the right path and we cannot afford to stray from it. There are those who think more reform is unwise, that somehow the reforms of the last decade were significantly misguided and focused primarily on administrative convenience. One paper I recently read suggested that a good measure of the failure of acquisition reform has been the decrease in lawsuits and disputes which, the author maintains, is indicative of a process that doesn't work and is too focused on the kinds of administrative convenience that can lead to bad decisions and implementation. Such arguments miss the point of previous reforms and the need for further process change and improvement.

Mr. DAVIS. Stan, is your microphone on?

Mr. SOLOWAY. The timer is, does this mean I get to start again?

Mr. DAVIS. No, it's all in the record.

Mr. SOLOWAY. OK.

Mr. DAVIS. We had some debate whether we ought to turn it on or not. [Laughter.]

Mr. SOLOWAY. We strongly support your proposal to dedicate to acquisition work force training a percentage of the administrative fees collected through multiple award Government-wide and GSA schedule purchases. The Government simply has not made the investments in its people that are necessary to foster the kind of high performing business savvy environment the Government needs and the taxpayer deserves.

In a time of tough budgets, such critical elements as training too often are the first to fall by the wayside. When the business environment is more dynamic than ever and changes in solution sets are a daily occurrence, it is crucial that the Government make that investment.

By creating this fund, we believe the resources finally will be available to achieve that highest order of priorities. The Government is blessed with an acquisition work force of committed people.

If you give them the tools, they can do great things. And the most important tool is training.

The proposal for a Government industry exchange falls into this same category. As you may know, when I was at the Defense Department, we proposed a similar concept. And you of course have been the leader in creating the Digital TechCorps. We believe this concept not only will greatly enhance the knowledge base of the Government's acquisition corps, but also be the kind of career enhancing experience that people so often look for in their workplace.

The legislation's call for a regulatory review process is also timely and important. Many regulations and policies that worked in the past are irrelevant in today's environment. Worse, they continue to serve as inhibitors to the full engagement of the competitive technology marketplace. One good example is the treatment of intellectual property, a subject on which this committee has already held hearings, and one on which I believe you need to continue to focus your attention.

Finally, the legislation places a vital spotlight on contract incentives, on that wide range of business arrangements that can drive higher performance. Share-in-savings concepts, award term contracts and more provide the right kinds of incentives and are essential elements of performance based acquisition, are proven to drive efficiency and performance, and are advantageous for all concerned.

Some have argued illogically that such incentive strategies disadvantage the Government. If a supplier, however, is able to drive down costs beyond initial expectations and deliver the same or better levels of performance than initially contracted for, how could that represent a disadvantage for the Government or any other buyer? And why would we not want to reward such innovation and excellence?

Mr. Chairman, let me again express our deep appreciation to you and the committee for your leadership. The Services Acquisition Reform Act is an important legislative initiative that has our full support. Moreover, we stand ready, particularly when it comes to the all important training and education that must accompany its implementation, to play an active role in helping to foster the kind of services acquisition and management environment we all seek.

Thank you very much for your time today. I'll be happy to answer any of your questions.

[The prepared statement of Mr. Soloway follows:]

TESTIMONY

of Stan Z. Soloway
President
Professional Services Council

Before the
Subcommittee on Technology and Procurement Policy
U.S. House of Representatives' Committee on Government Reform

November 1, 2001

Mr. Chairman, members of the committee; thank you very much for the opportunity to testify before you today on an important and timely piece of legislation. I am Stan Soloway, president of the Professional Services Council, the principal national trade association of the professional and technical services industry. Our diverse membership includes more than 130 companies performing information technology, engineering, maintenance, high-end consulting and many other critical services for virtually every agency of the federal government.

Today, the professional and technical services sector accounts for more than $125 billion in federal spending per year, and that amount is certain to rise. Indeed, it is clear that the government's partnership with and reliance on the competitive, commercial services sector must continue to evolve and grow if the government is to access and capture the cutting edge solutions that will enable the government to optimize its performance and deliver excellent service to its citizens. For that reason, Mr. Chairman, we applaud your leadership and commitment to fostering an environment that will enable that vital partnership to grow.

We gather today at a unique time in our history - a time of uncertainty, real peril, and unique challenges. Some have attempted to use the current crises as an excuse to roll back the clock, to suggest that the government's focus on its partnership with the private sector should be put on hold, and that one of our nation's responses to this crisis should be to curtail our commitment to the public-private partnership and outsourcing.

Mr. Chairman, as you, through your words and leadership have said, such a response is both ill conceived and certain to be counterproductive. So many of the skill sets and capabilities the government needs - and will continue to need - in its long battle against the scourge of terrorism of all kinds, are resident today in the competitive private, not public, sector. Moreover, beyond immediate national security needs, the government's responsibility to ensure that the remaining, and vast majority, of its missions are executed in a manner that optimizes both performance and efficiency has never been greater. That will not happen if the government crawls back into its protective shell; that can only happen if the government aggressively seeks to bring the pressures of the competitive marketplace to the government monopoly.

Indeed, if one reviews the government's expenditures for services over the last decade, there's been a fundamental shift in the type of services being acquired. We've seen declines in research and development, operations and management of facilities, and maintenance of equipment - areas in which the federal workforce has also been reduced. And we have seen real increases in architectural/engineering, professional services, information technology and medical services - increases that track with those areas in which the government has sought to expand its workforce and areas in which the government has the most difficulty competing with the private sector for people and skills. Nonetheless, far too many highly innovative, cutting-edge providers remain wary of the government market and all too often opt not to participate.

And that, Mr. Chairman, is why this legislation is even more critical today than when you first began work on it many months ago. Our collective need for smart, flexible, open, and effective policies and processes for the acquisition of services of all kinds has never been greater.

Over the past decade, we have made tremendous progress in the acquisition process. Much more progress can and must be made, and this legislation will help significantly. The acquisition reforms of the last decade were designed to achieve many goals: greater access to the commercial sector and its innovative offerings; a greater focus on performance - past, present and future; more open communications between buyer and seller; greater degrees of flexibility and innovation; and the beginnings of a true partnership that both serves the needs of the government customer and protects the interests of the American taxpayer.

Imperfect as the process is today, the reforms of the last decade have put us on the right path and we cannot afford to stray from it. There are those who think more reform is unwise - that somehow the reforms of the last decade were significantly misguided and focused primarily on administrative convenience. One paper I recently read suggested that a good measure of the failure of acquisition reform has been the decrease in lawsuits and disputes which, the author maintains, is indicative of a process that doesn't work and is too focused on the kinds of administrative convenience that can lead to bad decisions and implementation. Such arguments miss the point of previous reforms and the need for further process change and improvement.

As I noted earlier, your legislation is a vital next step. I would like to focus briefly on a couple of key provisions:

First, we strongly support your proposal to dedicate to acquisition workforce training a percentage of the administrative fees collected through multiple award, governmentwide, and GSA schedule purchases. The government simply has not made the investments in its people that are necessary to foster the kind of high-performing, business-savvy environment the government needs and the taxpayers deserve. In a time of tough budgets, such critical elements as training too often are the first to fall by the wayside. At a time when the business environment is more dynamic than ever, and changes in solution sets are a daily occurrence, it is crucial that the government make that investment. By creating this fund, without taxing the direct budgets of any agency or component, we believe the resources finally will be available to achieve that highest order of priorities. The government is blessed with a workforce of committed people; if you give them the tools, they can do great things. And the most important tool is training.

The proposal for a government-industry exchange falls into this same category. As you may know, when I was at the Defense Department, we proposed a similar concept; and you, of course, have been the leader in creating the Digital TechCorps. We believe this concept not only will greatly enhance the knowledge base of the government's acquisition corps, but also be the kind of career enhancing experience that people so often look for in their workplaces.

Let me cite two other specific provisions of the bill that I think are of special importance and then turn the table over to my colleagues.

The legislation's call for a regulatory review process is both timely and important. Many regulations and policies that worked in the past are simply irrelevant in today's environment. Worse, they continue to serve as inhibitors to the full engagement of the competitive technology

marketplace. One key example is the treatment of intellectual property and technical data and the government's difficulty in adjusting to the new realities of the marketplace of ideas and technology. As you have heard in earlier hearings, there continues to be a significant disconnect between the government's traditional treatment of such matters and current "best commercial practices." If the government wishes to access the fullest possible range of solutions and technologies, then we must address the IP issue head on and adapt government practices to those that govern intellectual property policies in the larger commercial sector. Companies worldwide have learned how to do this without sacrificing or risking their equities; so too can the government.

Finally, the legislation places a vital spotlight on contract incentives - on that wide range of business arrangements that can drive higher performance. From share-in-savings concepts, to award term contracts and more, the right kinds of incentives are essential elements in performance-based acquisitions, are proven to drive efficiencies and performance, and advantageous for all concerned. Yet they remain far too rarely used and understood in the government marketplace.

Mr. Chairman, let me express again our deep appreciation to you and the committee for your leadership. The Services Acquisition Reform Act is an important legislative initiative that has our full support. Moreover, we stand ready, particularly when it comes to the all-important training and education that must accompany its implementation, to play an active role in helping to foster the kind of services acquisition and management environment we all seek.

Thank you for your time today. I will be happy to answer any questions you have.

Mr. DAVIS. Thank you.

Mr. Wagner.

Mr. WAGNER. Thank you, Mr. Chairman.

My name is Mark Wagner, and I do work for Johnson Controls, but I'm also here on behalf of the Contract Services Association, representing 330 member companies with a wide range of Government services. I might also add, I'm a resident of the 11th District of Virginia and very well represented, I might add, in Congress.

Mr. DAVIS. You can have a couple extra minutes. [Laughter.]

Mr. WAGNER. Thank you. I appreciate that.

We're pleased that you've recognized the need for SARA, Mr. Chairman, and applaud yours and the committee's effort. I'd just like to touch on three points because you've got my statement in the record. First, acquisition work force training and performance based contracting, second, shared savings and third, the economics of service contracting.

I combine work force training and performance based contracting because they're inextricably linked. If we don't properly train our acquisition work force in the ways of performance based contracting, we'll never increase the number of performance based contracts in the Government today.

Learning how to develop a performance based contract is hard. It's not easy to write a request for a proposal that addresses the proverbial issue, tell the contractor what you want, not how to do it.

It takes perseverance and a change in mind set to do things differently, not to rely on all of the specifications that clog our Federal shelf space, that have told us over the years how to do things. Acquisition professionals need to resist the temptation to grab those specs, insert them in the RFP, call for metrics on a large number of those specs and then call it performance based contracting. Frankly, that's the worst of both worlds.

Learning how to write a performance based contract is only the first step. As Dee Lee mentioned, there's also a need for training in the source selection under a performance based contract. Acquisition teams need to apply more rigorous due diligence in selecting contractors, particularly for large, best value contracts.

Finally, we must make sure that during the performance of the contract we don't backslide into old ways and to allow the spec based approach to take over the administration of the contract. SARA can go a long way in addressing these issues.

With respect to share-in-savings, we've already discussed the issue of baselining. We've got some personal experience in ESPC, and frankly, I can tell you it's easy to baseline those contracts. It's the best example of shared savings.

But we've also had some experience in base operation support contracts with shared savings that tried and have failed, they haven't worked. One of the other problems is, you have to be able to adequately measure the savings that you're going to apply to the project. If the payback isn't there, the contractor is not going to have the necessary incentive to develop those efficiencies in the first place and those shared savings will fail. Title III of your proposed legislation proposes improvements in shared savings, and I hope we can address those issues.

Finally, this legislation goes a long way in addressing the systemic problem in service contracting by accelerating payments on contractor invoices. This will not only benefit contractors, but the Government as well, by lowering the cost of services to the Government. As service contractors, we don't make products or supplies or weapons systems. Much of our invoices to the Government are to cover paychecks we issue to our workers.

Currently, the Government waits the full allowable 30 days before paying an approved invoice, despite the fact it could be paid much quicker, particularly in this age of electronic payments. This means that contractors will actually have a lag time of at least 50 to 60 days between having to meet payroll and being paid for the work performed.

Extended payment cycles put the burden of financing the capital costs on the contractor. While interest payments can't specifically be charged to the Government, the carrying costs of this debt is ultimately going to be reflected in the margins that contractors include in their bids. For small businesses, this can mean being able to make the next payroll or maybe even survival. The only one benefiting under this current payment scheme are the bankers. We're very pleased that your legislation will address this payment problem.

Thank you, Mr. Chairman, for the opportunity to testify today. And thank you very much for introducing SARA.

[The prepared statement of Mr. Wagner follows:]

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STATEMENT OF

Mark Wagner, Vice President-Federal Government Affairs
Johnson Controls, Inc.
Chairman, Public Policy Council for the Contract Services Association of America

BEFORE
Government Reform Subcommittee on
Technology and Procurement Policy

HEARING ON:
Service Acquisition Reform
November 1, 2001

Mr. Chairman, and members of the subcommittee, my name is Mark Wagner of Johnson Controls. I am here today on behalf of the Contract Services Association of America (CSA), where I serve on the Executive Committee and am the Association's chair of its Public Policy Council.

Now in its 36th year, CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, and Native American owned firms. CSA's goal is to put the private sector to work for the public good.

Johnson Controls, Inc. is a 116 year old Fortune 200 Company with global sales in buildings controls technology, automotive interiors, and facilities outsourcing for both government and commercial markets. We provide facility management and base operations support for the Departments of Defense and Energy, as well as NASA and other federal agencies. Our commercial customers include companies such as Microsoft, Sun Microsystems, IBM, Compaq, EDS, CSC, Hoffman-LaRoche, and Novartis.

I greatly appreciate the opportunity to testify again before you, as I also did on May 22, on services acquisition reform – a subject very important to our membership and, frankly, to all government service contractors.

Services Acquisition Reform -- Introduction

Mr. Chairman, as you noted in your letter of invitation, "*The reforms of the early to mid-nineties have resulted in significant streamlining, cost savings, access to technological advancements, and reduced cycle costs, which have dramatically improved the quality of products and services by the federal government.*" You're well aware, certainly, that the reforms accomplished through passage of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act have not fully translated into streamlining and efficiencies within the government services contracting arena.

At the CSA Annual Meeting, which was held in January 2001, this issue was thoroughly debated. The Annual Meeting is a forum in which our members get together to discuss where the association has been in the past year and where it should be heading in the future; it is generally a very "roll up your sleeves" working meeting for our membership. An important part of the Annual Meeting are breakout sessions in which the membership gathers to discuss and provide input on the KEY ISSUES they believe CSA should focus on during the coming year. As a result of these discussions, the CSA membership decided to push for reform in services contracting. To summarize the views of our members,

> *The trend in contracting for services is significant. The government is relying more and more on private industry to deliver cost-effective, quality services. However, reforming the way services are acquired lags behind that achieved in the past few years for weapons system acquisition. Similar acquisition reform initiatives aimed specifically at services contracting is now needed to help the government continue to reduce its infrastructure and costs.*

So we are very pleased, Mr. Chairman, that you have recognized the need – and are pushing for – a ***"Services Acquisition Reform Act (SARA)"***, which can be viewed as a services equivalent to FASA and Clinger-Cohen that have so effectively brought reform to hardware acquisitions.

Since your hearing in May, we have been working closely with your staff to identify issues that should be addressed in such a services reform bill. I want to commend the dedication and hardwork that Melissa Wojciak, your subcommittee staff director, has put into this effort. I greatly appreciate her – and your – willingness to listen to the views of industry on this important subject. I would like to comment now on the draft of the proposed SARA draft, which (as I understand it) is based on the subcommittee's views as to what is needed, input from government agencies as well as those discussions with industry.

Before proceeding, I would like to note the contributions of the Acquisition Reform Working Group, which each year develops a set of legislative proposals for congressional consideration. Co-chaired by CSA, this multi-association coalition representing hardware and services contractors was established in 1993 to coordinate an industry review and response to the report of the Acquisition Law Advisory Panel (commonly known as the Section 800 panel), which resulted in the 1994 Federal Acquisition Streamlining Act (FASA). Since that time, ARWG has been working closely with the Congress and the federal agencies to develop new initiatives to continue pushing the acquisition reform agenda forward. The ARWG recommendations are aimed at eliminating, or at least lowering, the barriers that make government business unattractive to commercial firms and inhibit greater integration of commercial and government products and services. Much of what industry has proposed for SARA was based on the extensive work of the ARWG members. The ARWG legislative proposals for 2001 were outlined in testimony it submitted to the subcommittee at the May 22 hearing.

ARWG also has provided extensive comments to the House and Senate conferees on acquisition policy provisions in the Fiscal Year 2002 Defense Authorization bill (H.R. 2586 and S. 1438), particularly those sections that affect service contracting.

Services Acquisition Reform Act – Comments

The role of government contracting has entered an era of rapidly changing, commercially driven technological advances. A healthy, competitive and innovative industry meeting the government's needs, specifically those of our defense industrial base (particularly in this time of national crisis), should be closely integrated with the commercial marketplace. The proposed "Services Acquisition Reform Act" (SARA) would allow us to take advantage of the innovations offered in the services arena. It also would put a welcome emphasis on the needs of the federal acquisition workforce.

I would like to comment in general on the major themes of the proposed SARA bill, as well as specifically on a few of its key initiatives.

Workforce Initiatives

Ironically, as we continue to push for cultural and process changes, the acquisition workforce is being reduced without a corresponding reduction in workload required by the "old system." Moreover, fiscal support for education and training consistently comes under budget pressures. We also will reach a crisis as talented acquisition individuals begin to retire; if not addressed, there is expected to be a gap within five years of trained and experienced high-level acquisition personnel. Taken all together, this is very troubling.

As I noted in my May 22 hearing testimony, the training and education of the acquisition workforce has consistently ranked as one of the top issues of concern for the CSA membership because it is a critically important element of the reform process. For the most part, problems that have been identified in connection with the management of service contracts can be traced to inadequate guidance and training for the acquisition workforce. The acquisition workforce dedicated to services contracting is often times far-flung and located in remote areas since local activities contract for their own support services. This is different from the large hardware procurement activities, which tend to be administered from higher level commands. Therefore, training of the acquisition workforce in the services area needs to be focused on "filtering" down to the lowest level buying activities in all locations. Only by getting these people trained on the options available to them under acquisition reform, will true reform be fully adopted into the services industry contracts.

The 1996 Clinger-Cohen Act provisions for specifically funding agency training through individual budget line-items has not worked. To the best of our knowledge, no civilian agency actually has established the required line items. Absent such line items, training is just too easy an item to cut or delay. Innovative off-budget funding sources, instead, are needed. SARA would recommend one method of addressing this shortfall by requiring a percentage of all administrative fees, perhaps 5 or 10 percent, collected by agencies through government-wide multiple award contracts and/or purchases from the GSA schedules be devoted to a "federal acquisition workforce training fund." These funds would be forwarded to the Federal Acquisition Institute (FAI). FAI would be charged to use the monies to both develop and deliver competency-based acquisition training and education, making innovative use of both physical and virtual classrooms akin to the programs of the most progressive colleges and universities. CSA believes that such a focused initiative would go a long way toward providing the federal acquisition workforce the skills and knowledge that they need to do their jobs in a dynamic, innovative, and increasingly technological environment. We also recommend that the FAI be charged to rely on the private sector for the development and delivery of these programs (through the use of multiple award task order contracts). Many private sector firms have extensive experience in the development of course material and the provision of acquisition education and training programs to both private sector and government employees.

We also support the development and utilization of a personnel exchange program between the government and private sector to promote a better understanding of and appreciation for acquisition issues confronting both parties. This is another important innovation in SARA.

Business Management Reform

- **Statutory and Regulatory Review.** SARA would establish an Acquisition Regulatory Review Committee to review all federal acquisition regulations to determine the necessity of a statute or regulation, the interoperability between regulations and the proper implementation of the statutes and regulations that are essential to the conduct of government contracting. This review would be similar to that mandated by the Congress through the Acquisition Law Advisory Panel, established by section 800 of the Fiscal Year 1991 National Defense Authorization Act (P.L. 101-510). The panel's monumental report was the basis for the 1994 Federal Acquisition Streamlining Act. It has been 10 years since the formation of the Section 800 panel. Much progress has been made; however, many of the recommendations made by the panel were never considered. And layers of new laws and statutes have been placed on the acquisition system, despite acquisition reform. Periodically reviewing our laws and statutes is necessary to ensure that what we have on the books contributes to a streamlined and effective process that allows the government to take advantage of commercial practices while at the same time – and most important – protecting the interests of the U.S. taxpayer.

- **Payment Terms**. When the primary asset being delivered is employee labor, payment thirty days after receipt of invoices for expenses incurred up to thirty days prior to preparation of the invoice results in a very expensive asset being "financed" by the contractor. Service contractors need to have improved cash flow, especially since interest expense or cost of this financing is not an allowable cost and, therefore, erodes a service contractor's already low profit margin. Most government contractors do not pay on a once-per month payroll cycle and, in the services industry, a more frequent pay cycle is far more likely. Acquisition regulations for service contracts need to encourage an invoicing frequency that is more closely tied to a contractor's pay cycle. SARA is intended to address these issues.

Contract Incentives

- **Shared Savings and Contract Efficiencies.** SARA would promote greater use of "share-in-savings" contracts. CSA has seen how effectively these can work in the past. Special attention needs to be paid to ensuring that any cost savings contractors are able to recognize in performance of services not only is shared with the contractor but that measures are put into place to ensure that performance levels are not sacrificed in order to save money. However, with properly written performance standards that identify the true requirement of the buying activity, this should not be a problem. Contracts that specify simply a minimum number of hours to be delivered should also include minimum performance standards that can adequately measure efficiency when it is realized rather than punish the contractor for delivering too few hours.

  A concept similar to the SARA "share- in-savings" initiative is one outlined in an Administration directive (May 3, 2001), requiring federal departments and agencies to identify and implement ways to reduce energy use and report back to the President through the Secretary of Energy. Authorized by the Energy Policy Act of 1992, Energy Savings Performance Contracting (ESPC) is an alternative financing option which allow federal agencies to leverage private sector investment to upgrade federal facilities with new energy efficient equipment (lighting, chillers, boilers, building controls, etc.). The up-front investment in the equipment is designed and financed by energy service companies and paid off over time (up to 25 years) with savings on utility costs, which are defined as the energy bills and maintenance costs. The Department of Energy, as well as the Department of Defense, has created several contracting mechanisms that federal agencies may use to develop ESPCs at their facilities. A number of different energy service companies (*e.g.* Johnson Controls, Honeywell, Duke, Sempra, Noresco and others) hold these contracts (which are Indefinite Delivery and Indefinite Quantity, IDIQ, contracts). Today, many ESPC projects are being developed at various federal sites throughout the nation.

Commercial Services Acquisition

- **Performance Based Services Acquisition.** This is not a new concept. One of the very first performance based contracts (in 1907) was for a "flying machine," which was ultimately developed by the Wright brothers. The idea briefly resurfaced in the 1960s but got more attention in 1991 when the Office of Federal Procurement Policy (OFPP) issued a policy letter to emphasize the use of performance requirements and quality standards in defining contract requirements, source selection and quality assurance. And, last year the Department of Defense decreed that 50% of all service contracts would be performance based by the year 2005. Furthermore, section 821 of the Fiscal Year 2001 National Defense Authorization bill established an order of precedence for acquiring services, with a decided preference for performance-based contracts or task orders. This should be extended on a government-wide basis – which SARA would rightly do.

  Under performance based services acquisition (PBSA), the government identifies its needs – it focuses on the "WHAT" is needed, not the "HOW" – that part is left to the contractor to determine. PBSA holds great promise to reduce costs while increasing service quality; it capitalizes on private sector expertise and leverages technological innovations. And small businesses, our nation's most innovative sector, should benefit from such contracts.

  The main stumbling block to full and successful implementation of performance-based contracting remains TRAINING. Implementing PBSA requires new evaluation techniques, new management approaches

(involving the entire acquisition team) and improved contract relationships. First, acquisition teams, including contracting officers, need to understand how to write performance work statements (or, a better term would be a *statement of objective* for performance based solicitations). Second, they also will need to develop proper evaluation methods for performance based bids. This would include requiring specific market research to know what are the capabilities available in the commercial marketplace. Performance based services acquisition means going after innovative solutions. Third, those who will manage the contracts once awarded need to learn and understand performance based metrics and how to properly measure outcomes under a performance base contract. In other words, the people involved in contract oversight need to avoid falling back onto the old ways of doing business. Ultimately, it involves a changed mindset – both within the government (which is more comfortable with mandating how something should be done) and with industry (which now must understand the government's expectations).

- **Removing Obstacles to the Purchase of Commercial Services.** SARA would attempt to address one area that has not fully benefited from the reforms enacted under FASA and the Clinger-Cohen Act. This is the area of services, especially professional and technical services. In fact, many government buyers and commercial sellers would argue that it has become more difficult to purchase services since FASA and the Clinger-Cohen Act, particularly with their corresponding implementing regulations under FAR Part 12. The two principal concerns are (1) the definition of commercial item as it applies to services and (2) the perceived prohibition on time-and-material contracts and labor-hour contracts.

To fully understand the full implications of these issues, I recommend for the subcommittee's review an article written by Richard J. Wall and Christopher B. Pockney of Ernst and Young. Both have been active in commercial item acquisition reform. This article, which I ask to be included in the record, has been reproduced with permission from the Federal Contracts Report, Vol. 76, No. 3, pp. 76-84 [July 17 2001]; copyright 2001 by The Bureau of National Affairs, Inc.

As Mr. Wall and Mr. Pockney note in their in-depth analysis:

> *Today, buyers and sellers of commercial professional and technical services are confronted by two difficult requirements. First, FASA defines "commercial item" in such a way that, in order to qualify, professional and technical services have to be sold in the commercial marketplace at established catalog or market prices for specific tasks. Second, the government interpreted FASA's accompanying conference report to bar contracts based on hourly rates – that is time and material (T&M) and labor hour (LH) contracts. In combination, these two present a formidable barrier to market entry and create a market condition that is contrary to customary commercial practices. This leaves buyers and sellers with few alternatives.*

To address the first issue, we believe the definition of commercial item must be changed. In essence, what private industry wants is that professional and technical services be accorded the same definition as all other supplies and services. There is no need to require that such services be sold at established catalog or market price when Congress repealed that requirement for all other supplies and services under the Clinger-Cohen Act. We are pleased to have been given the opportunity to work with the subcommittee on a more workable definition. We would like to offer the following as a start:

> *Services of a type offered or sold in the commercial marketplace under terms and conditions similar to those offered to the Federal Government.*

Also, a major inhibitor to increasing the purchase of services through FAR Part 12 has been the regulatory limitation on the use of time-and-material contracts and labor-hour contracts. Authorizing the use of such contracts would simply reflect how we all buy things commercially in our own personal lives. Commercial services, such as maintenance and repair, domestic cleaning services, limousine and drivers services, waste removal and environmental testing, software engineering, legal and accounting, specialized consulting, etc., are all frequently provided on an hourly fee basis. Simply put, it is a customary commercial practice. Such contracts are necessary because often the amount of effort required is not known well enough to enter into

fixed-price contracts. However, it would be a mistake to conclude that such contracts do not contain prudent fiscal controls. The competitive forces of the commercial marketplace demand that quality services are provided in an efficient manner so that unnecessary days/hours are not spent. Moreover, the buyer has considerable control.

To gain even greater benefit of the important reforms enacted under FASA and the Clinger-Cohen Act, the government should be allowed, indeed encouraged, to use customary commercial practices in the purchase of commercial services. We believe Congress has already made its position on this matter clear. The report (#106-292), accompanying the Senate version of the FY01 National Defense Authorization Act, recommended that the Department of Defense (DOD) utilize the flexibility provided in FASA to allow the use of other than firm-fixed price contracts for the acquisition of ancillary commercial services when this is the customary practice in sales to the general public. While this language helps clarify the issue, it appears that clarification of the statute is needed in order to be more specific about the contract types that may be used to acquire commercial items. Because the statute does not provide flexibility to use contract types that are customarily used in standard commercial practice, the government's access to significant commercial capability is impeded.

To sum up these points, the fix is surprisingly simple and could be implemented almost immediately. We also believe this is what both buyers and sellers want. We are certainly eager to work with the subcommittee on this.

SOCIO-ECONOMIC LAWS

- **Service Contract Act Exemption (SCA).** The Service Contract Act (SCA), enacted in 1965, is designed to provide basic protections to workers employed on government service contracts. The objective was to protect those workers for whom the marketplace does not adequately guard against unfair wage and benefit practices (*e.g.,* unskilled and semi-skilled workers). As such, it is a necessary protection for classes of workers that are predominantly controlled by the buying activities of the Federal government. CSA members do not argue that issue. However, we are concerned that, except in very limited circumstances, the Department of Labor does not specifically permit a straightforward "commercial service exemption" from the SCA (at least at the subcontract level). This is inconsistent with the legislative objective of encouraging more commercial companies to seek federal procurement contracts. Certain laws do apply in the commercial marketplace (*e.g.,* minimum wage, and occupational health and safety rules), and retaining skilled workers depends on the ability of a firm to meet the demands of the market. In order for the Federal government to become the primary customer in the commercial market, the SCA wages should not be superimposed upon an essentially commercial service, especially at the subcontract level. If a company can demonstrate that the majority of its total business is driven by commercial buying, it should be allowed to exempt itself from the SCA provisions. At a minimum, this exemption should be allowed at the subcontract level even if the prime contractor is covered under the SCA, when the services are being provided by a commercial subcontractor.

  We continue to work with the Department of Labor to resolve these issues, and look forward to working with the subcommittee to address this further.

Summary

In closing, let me reiterate what I said in my May 22 testimony, "*the road to acquisition reform will be filled with rough spots and abuses, some of them quite significant – but nothing that we cannot overcome.*"

Thank you for this opportunity to share my views with the subcommittee and I will be happy to answer any questions.

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Contracting for Commercial Professional and Technical Services: The Federal Acquisition Streamlining Act's Unfinished Business

By Richard J. Wall
and Christopher B. Pockney

Commercial Item Acquisition

One of the most confounding commercial item acquisition issues is the difficulty, if not outright impossibility, of purchasing commercial professional and technical services under the policies, procedures, and practices spelled out in Federal Acquisition Regulation (FAR) Part 12, "Acquisition of Commercial Items," argue two members of Ernst & Young Government Contract Services. More than six years after the enactment of the Federal Acquisition Streamlining Act, the issue remains a priority concern for private industry.

The FAR Council's December 2000 proposal to expand the types of contracts that would be authorized for commercial item treatment does not go far enough to overcome the statutory barriers imposed by FASA, the authors maintain. Because FASA has been interpreted as barring certain types of professional and technical services contracts--time and materials and labor hour contracts--from being acquired under FAR Part 12, the only solution is a statutory fix, they say.

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The authors wish to acknowledge the contributions of Cathleen D. Garman, Contract Services Association of America, and James J. Serafin, Government Electronics and Information Technology Association.

The 1995 issuance of regulations to implement the Federal Acquisition Streamlining Act (FASA) [1] did not resolve all the issues of commercial item acquisition. Some were later addressed by the Clinger-Cohen Act,[2] which further refined the Truth in Negotiations Act (TINA)[3] and the Cost Accounting Standards (CAS). Others were addressed by regulations that bolstered market research and price analysis techniques for commercial items and enabled subcontractors to share the benefits of commercial item financing and performance-based payments. However, notwithstanding these impressive legislative and regulatory efforts, a number of troubling issues remain unresolved.

In December 2000, private industry's Acquisition Reform Working Group (ARWG) sent then President-Elect George W. Bush a number of legislative and regulatory proposals that would bring government procurement policies closer to customary commercial practices.[4] ARWG also provided a similar analysis to Congress, where commercial item acquisition issues have gained some recent attention.[5] For example, during the fiscal year 2001 budgetary cycle, the Senate Armed Services Committee expressed its belief that the Department of Defense (DOD) should authorize use of other than firm-fixed price (FFP) contracts for the acquisition of ancillary commercial services when such contracts are commonly used in sales to the general public.[6]

Today, buyers and sellers of commercial professional and technical services are confronted by two difficult requirements. First, FASA defines "commercial item" in such a way that, in order to qualify, professional and technical services have to be sold in the commercial marketplace at established catalog or market prices for specific tasks. Second, the government interpreted FASA's accompanying conference report to bar contracts based on hourly rates--that is, time and materials (T&M) and labor hour (LH) contracts. In combination, these two present a formidable barrier to market entry and create a market condition that is contrary to customary commercial practice. This leaves buyers and sellers with few alternatives.

Within the past year, the government has made two attempts to modify the definition of "commercial item" as it applies to commercial services. In August 2000, the government proposed to add definitions of "catalog price" and "market price" to the "commercial item" definition applicable to professional and technical services.[7] The private sector, principally represented by the Council of Defense and Space Industry Associations (CODSIA), strongly objected.[8] In December 2000, the government proposed to expand the contract types that would be authorized for commercial items, so that T&M and LH pricing mechanisms could be used when acquiring commercial services.[9] CODSIA did not believe that proposal accomplished much,[10] and a draft letter by the American Bar Association (ABA) Public Contract Law Section expresses a similar view.[11]

The difficulty of purchasing commercial professional and technical services under FAR Part 12 is perhaps the most significant piece of unfinished business left over from FASA's commercial item acquisition reforms. Indeed, some would argue that this is one area where FASA actually exacerbated the problem.

It is strange that, of all the products and services that fall under the broad definition of "commercial item," professional and technical services is the only one for which the application of FAR Part 12 is conditioned on pricing (i.e., catalog or market) and contract type (i.e., no T&M or LH contract). No other commercial product or service, including even "non-developmental items," is subject to such constraints. Unfortunately, recent government proposals would seem to worsen the problem.

So how did this situation come to pass? Was it intentional? Does it make sense? Can anything be done about it, or is this situation hopeless and irresolvable? What has been the impact thus far, and what can be expected in the future?

In an attempt to address these questions, this article will trace the origins of the problem and assess the competing perspectives. To be sure, strong views are held by all sides, and the issues may not be so simple to overcome. However, this important challenge is worthy of the acquisition community's best efforts to resolve.

Perpetuating Outmoded Concepts

The long-standing problems of the acquisition community in buying and selling products and services from the commercial marketplace are well documented and do not bear repeating here. Suffice it to say that the government's rules, whether in the form of law or regulation and often both, historically were viewed as impenetrable barriers that denied the government access to commercial products, processes, technologies, talents, and prices.

One area that received enormous attention was the laws and regulations on contract pricing, accounting, and payment.[12] Long before FASA, the government and private industry were engaged in spirited public debate over the need for more reasoned rules in this complex area. Although some attempts were made at legislative and regulatory reforms, almost all failed. Eventually, however, a general consensus evolved about what needed to be done.

One core issue was what to do about the increasingly obsolete concept of "established catalog or market prices of commercial items sold in substantial quantities to the general public."[13] This concept was developed in the early 1960s to exempt contractors from the requirements of TINA and CAS.[14] Gaining an exemption frequently determined a commercial company's willingness to do business with the government. As time passed, the exemption became more difficult to get, mostly due to the following regulatory definitions implementing the concept:[15]

> ***Established catalog price*** meant price recorded in a form regularly maintained by the manufacturer or vendor, such as a catalog, price list, schedule, or other verifiable and established record, published or otherwise available for customer inspection, and the current or last sales price to a significant number of buyers constituting the general public.
>
> ***Established market price*** meant current price established in the course of ordinary and usual trade between buyers and sellers free to bargain that could be substantiated by data from sources independent of the manufacturer or vendor.
>
> ***Commercial item*** meant supplies or services regularly used for other than government purposes and sold or traded to the general public in the course of normal business operations.
>
> ***Substantial quantities*** meant sufficient quantities regularly sold to constitute a real commercial market. Services must be customarily provided by the offeror, using personnel regularly employed and equipment regularly maintained solely or principally to provide the services.
>
> ***General public*** meant a significant number of buyers other than the government, affiliates of the offeror, or for government end use (including items acquired under the Foreign Military Sales program).

While these regulatory definitions may have worked well for the commercial marketplace of the 1960s, they were obsolete by the 1990s and became difficult to satisfy. Catalogs and price lists were not necessarily published any more and could change frequently. Commercial discounting policies and practices were often considered proprietary and not available for customer inspection. The "independent source" criterion for established market price was the Achilles' heel of the exemption. The commercial item's "sold or traded" criterion tended to exclude items that were leased or licensed, modified, old or discontinued, and newly introduced into the commercial marketplace.

Congress best summed up the situation in 1989–five years before FASA.[16]

> The Department of Defense regulations implementing the "Truth in Negotiations Act" require contractors to submit certified cost or pricing data in cases where the Government's interest is adequately protected by prices that have been tested in the market place. Problems include: (a) the failure of some contracting

officers to grant exemptions in competitive procurements; (b) rigid percentage requirements for determining whether an item qualifies for the commerciality exemption; (c) the application of this exemption to new items, outdated items, and modified items; and (d) the application of the competitive and commercial exemptions to spare parts and contract modifications.

Eventually, there was widespread agreement that the concept of "established catalog or market prices of commercial items sold in substantial quantities to the general public" was unworkable.

Although FASA retained this concept, it also attempted to create an alternate exemption, which essentially was an "if all else fails" commercial item exemption.[17] However, the alternate concept was encumbered with other rules and was soon scrapped under the Clinger-Cohen Act.

The Clinger-Cohen Act replaced both the established catalog or market price exemption and the alternate exemption with a single exemption for any contract for the acquisition of a commercial item.[18] Moreover, offerors may only be required to submit such information on the prices at which the same item or similar items have previously been sold as is necessary for evaluating the reasonableness of the price for the procurement.[19] Such prices may be catalog prices or market prices, but they do not have to be. They might be the offeror's "going prices," supported by any information that could demonstrate price reasonableness.

Since this is not an article on contract pricing, the point is simply that at the time of FASA, there was widespread agreement that the old pricing concept of "established catalog or market prices of commercial items sold in substantial quantities to the general public" was obsolete and needed to be removed from laws and regulations governing TINA and CAS.

So why then, given this agreement, did it make sense to place this outmoded concept in the definition of "commercial item" when it came to professional and technical services?

Evolution of a Definition

FASA's definition of "commercial item" might be best described as a confluence of ideas that had been considered at earlier stages in the legislative process. Some of the earlier initiatives are summarized below as they were introduced. Each failed to pass during its respective legislative session.

S. 1957, "Nondevelopmental Items Acquisition Act of 1990."

Commercial product ***means any product***, component of a product, or modified version of a product that is or has been sold in substantial quantities to the general public.[20] (emphasis added)

S. 260, "Nondevelopmental Items Acquisition Act of 1991."

Commercial item ***means any item of supply*** that:

(A) requires no modifications or only minor modifications to meet the needs of the procuring agency;

(B) regularly is used for other than Governmental purposes; and

(C) is sold or traded to the general public in significant quantities in the course of normal business operations.[21] (emphasis added)

H.R. 3161, "Commercial Items Acquisition Act of 1991"

Commercial item means a ***product or service*** that:

(A) regularly is used for other than governmental purposes; and

(B) is sold or traded to the general public in the course of normal business.[22] (emphasis added)

The trouble with these definitions of "commercial item" was that they were far too narrow to achieve any meaningful reform. They only embraced manufactured products sold in significant or substantial quantities. They also tended to exclude items that were leased or licensed, modified, old or discontinued, and newly introduced into the commercial marketplace.

Progress toward a more meaningful definition of "commercial item" was markedly advanced by the efforts of the so-called "Section 800 Panel" during 1992.[23] In fact, FASA's definition of "commercial item" is largely attributable to the definition recommended by the panel which was based on suggestions offered by numerous public and private sector contributors.[24]

The panel concluded that the existing statutes created barriers to the acquisition of manufactured products because they disrupted established manufacturing methods, sources of supply, and personnel practices.[25] Interestingly, the panel did not believe the statutes created the same type of barriers to the acquisition of commercial services.[26] The panel observed:[27]

> With some exceptions, companies that sell commercial services to DOD appear to be able to comply with statutes governing service contractors ... ***with less disruption to existing practices***... The Panel concluded that it did not have sufficient information to recommend exempting "pure" service contractors from additional Government-specific statutes and regulations. However, the Panel believes that further study on this issue could show a need for broader relief for service contractors ... (emphasis added)

Accordingly, the Section 800 Panel decided to limit its recommended definition of "commercial item" to property (i.e., manufactured products).[28] However, on closer analysis, the panel conceded that some types of services ancillary to the acquisition of property (i.e., "ancillary services") also had to be included in the definition of "commercial item."[29] To them, it made no sense to acquire equipment as a commercial item but not to acquire the ancillary installation and maintenance services as a commercial item.

The panel's only caveat was that the services had to be offered contemporaneously to the general public under similar terms and conditions, so that the government and commercial services would be provided by the same workforce, plant, or equipment.[30] Although Congress initially adopted this caveat in FASA, Congress removed it in 1999 for the practical reason that using the same workforce, plant, and equipment was not always feasible.[31]

Things moved quickly after the Section 800 Panel issued its report in January 1993. H.R. 2238, the "Federal Acquisition Improvement Act of 1993," was introduced in May 1993, and the companion Senate bill, S. 1957, the "Federal Acquisition Streamlining Act of 1993," was introduced in October 1993. Both bills passed in June 1994, and went to a House-Senate conference committee for resolution of their differences.

As passed, both bills substantively adopted the Section 800 Panel's definition of ancillary services, although such services were not formally designated as "ancillary services."[32] However, one major difference in these bills concerned other services, such as professional and technical services, which were not ancillary to the acquisition of property. S. 1957 did not cover other services, while H.R. 2238 covered:

> Services offered and sold competitively, in significant quantities, in the commercial marketplace at established catalog prices or standard rates and under standard commercial terms and conditions.[33]

Unlike the Section 800 Panel, the conference committee was willing to tackle the question of other than ancillary services. While subsequent events arguably support the panel's conclusion that further study was needed, Congress was certainly justified in taking some action under FASA. The momentum for reform was strong, and there was no guarantee of a second chance. The definition ultimately adopted in FASA for professional and technical services was:

> Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions.[34]

The subtle changes in wording from H.R. 2238 would eventually prove significant. FASA's conference report provides some explanation, although the explanation is principally directed at other than ancillary services.[35] It is important to note the last sentence, which has been interpreted by the government to mean that T&M and LH contracts were prohibited.

> ... the Senate bill would include in the definition of commercial items those services that are procured for support of a commercial item [ancillary services]. The House amendment would include, ***in addition to such services***, services [professional and technical services] that are offered and sold competitively, in significant quantities, in the commercial marketplace at established catalog prices or standard rates and under standard commercial terms and conditions.

> The conference agreement would include those commercial services that are offered and sold competitively in substantial quantities in the commercial marketplace, based on established catalog prices for specific tasks performed, and under standard commercial terms and conditions.
>
> ***The definition would cover only those commercial services that are sold based on established catalog prices for specific tasks performed. It would not include services that are sold based on hourly rates without a fixed catalog price for a specific service performed.*** (emphasis added)

The legislative definition of "commercial item" for other than ancillary services underwent further change under the Clinger-Cohen Act because of what was widely believed to be a simple oversight in FASA. The words "or market" were added to form the phrase "based on established catalog ***or market*** prices for specific tasks performed" (emphasis added).[36] The oversight was so obvious that the government's final rule implementing FASA--issued Sept. 18, 1995--anticipated that Congress would make this change.[37]

However, the Clinger-Cohen conference report went further by stating "market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror."[38] Unfortunately, this definition was obsolete, and it was eventually removed from the FAR in 1997.[39]

Once FASA and the Clinger-Cohen Act were enacted and their implementing regulations issued, the FAR 2.101 definition of "commercial items" as applicable to professional and technical services was:[40]

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

Life After Reform

For providers of professional and technical services, practical problems with the FAR 2.101 definition of "commercial item" were inevitable, especially if the government interpreted the statutes and accompanying conference reports to mean that T&M or LH contracts could not be used to purchase professional and technical services.[41] Unfortunately, this is what happened, much to private industry's disappointment.[42]

A sad irony was that one of the principal methods of purchasing professional and technical services in the commercial marketplace was expressly prohibited by regulation, although arguably not by law. Another sad irony concerned the references to catalog and market price. On one hand, Congress recognized that these were obsolete

concepts and removed them altogether from TINA and CAS. On the other hand, Congress perpetuated these obsolete concepts in the definition of "commercial item." This was counter-reform, and private industry warned:[43]

> ***FASA's definition of commercial item implemented at FAR 2.101 is not realistic for professional and technical services.*** The situation was not improved by FARA [Clinger-Cohen Act] and in some ways was made more confusing with its reference to established catalog and market prices, now eliminated from TINA and Cost Accounting Standards. The provision requiring prices for specific tasks under standard commercial terms and conditions is often not relatable to the way professional and technical services are typically sold. While the definition of commercial items may suit the purposes of Part 12 (e.g., limiting laws, reducing clauses) in this area, it is an obstacle in negotiating a fair and reasonable price under Part 15. (emphasis added)

Despite persistent pressure from private industry, there has been little progress on this issue. It has been a recurring theme in ARWG's annual compilation of recommended legislative initiatives, and, as noted earlier, it was the lead item in ARWG's submission to then President-Elect George W. Bush in December 2000.

Private industry also has rarely passed up an opportunity to press the point when commenting on proposed rules involving commercial items. For example, in January 2000, the government proposed to clarify requirements relating to the "Changes--Time-and-Material or Labor-Hours" clause.[44] While agreeing with the proposed amendment to this clause, CODSIA again urged the government to allow T&M contracts for FAR Part 12 purchases (i.e., commercial items).[45] CODSIA pointed out that the only type of contract expressly prohibited by FASA for the acquisition of commercial items was cost-type contracts,[46] and, arguably, a T&M contract is not a cost-type contract. It is clearly not listed among the cost-reimbursement contracts in FAR Subpart 16.3 or among the cost-type incentive contracts in FAR Subpart 16.4. T&M and LH contracts are addressed separately in FAR Subpart 16.6.

In August 2000, the government proposed to amend the definition of "commercial item" at FAR 2.101 to implement two separate legislative initiatives: (1) Section 803 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, and (2) Section 805 of the National Defense Authorization Act for Fiscal Year 2000.[47] Section 803 required the government to clarify the meaning and application of the term "purposes other than government purposes."[48] Section 805 removed the FASA requirement–initially recommended by the Section 800 Panel--that ancillary services be provided to the federal government by the same workforce responsible for providing such services to the general public.[49]

Inexplicably, the government also proposed to add definitions of "catalog price" and "market price" to the FAR 2.101 definition of "commercial item" as applied to other than ancillary services. CODSIA had several problems with this proposed rule, and strongly protested adding definitions of "catalog price" and "market price." CODSIA said:[50]

> ... ***the proposed rule would reinstate the outmoded concepts of catalog price and market price that***

> ***eventually gave rise to the commercial pricing reforms under the Federal Acquisition Streamlining Act and Clinger-Cohen Act.*** In fact, the concept of catalog price and market price were deleted from the requirements of the Truth in Negotiations Act in favor of a more simplified basis for establishing price reasonableness: "appropriate information on the prices at which the same or similar items have been previously sold that is adequate for evaluating the reasonableness of the price for the procurement."
>
> ... perpetuating these outmoded concepts [catalog and market price] is not in the best interests of either the Government or industry. It would, as before, serve as a barrier to market entry and make it ***more difficult for the Government to acquire the professional and technical services it needs.*** (emphasis added)

In December 2000, six years after FASA, it appeared that the government was at long last willing to take up the T&M and LH contract issue. The government proposed to add language that discusses pricing mechanisms for acquiring commercial services available on a T&M or LH basis within the FAR Part 12 contract type restrictions.[51]

While the government did not intend to authorize use of T&M or LH contracts, per se, it proposed to expand the use of indefinite delivery contracts at FAR Subpart 16.5. That is, the government would allow an indefinite delivery contract with established fixed hourly rates for acquiring commercial services, provided that FFP orders for specified tasks (or fixed price orders with economic price adjustment provisions) would be placed against that contract.[52] Reportedly, the government believed that this was the most it could do under existing statutes.

While CODSIA applauded the December 2000 proposal, it clearly was not enough.[53] Some groups said the proposal merely legitimized what was already being done in the field by contracting officers.

> We generally agree with the thrust of the proposed changes to FAR Parts 12 and 16. Nonetheless, we believe that more needs to be done in order to solve the problem. ***In our view, if market research indicates that commercial services are available on a T&M basis or LH basis, then it should be an appropriate contract vehicle for the Government to use when acquiring such services from the commercial marketplace.*** This is consistent with FAR 12.213, which states that these customary commercial practices should be considered for incorporation into the solicitation and contract if the contracting officer considers them appropriate in concluding a satisfactory business arrangement and they are not otherwise precluded by law or regulation. (emphasis added)

The ABA Public Contract Law Section also commented on the proposed rule, urging that T&M and LH contracts be allowed for the purchase of commercial services generally.[54]

> The Section welcomes the action by the Councils to address the issue of acquiring commercial services under FAR Part 12 using additional contract types. This has been a long-standing goal of the Section since the implementation of FASA. With particular regard to professional, technical, and other commercial services, the Section believes that the ***current contract-type limitations in FAR are an unnecessary barrier to market entry and deny the Government access to such services from non-traditional commercial suppliers*** ... Accordingly, in addition to the Council's proposed change to the FAR ... the Section recommends an additional change to FAR Part 12 expressly permitting the acquisition of ancillary services using T&M and LH contracts. (emphasis added)

Practical Problems in Definitions

Up to this point, this analysis has covered the evolution of the "commercial item" definition and the various legislative and regulatory initiatives for implementing and refining this definition. In practice, the definition has undoubtedly proven to be difficult to administer. Certainly, there will be varying impressions of how well the rules serve the needs of the government and private industry based on anecdotal experiences.

While such experiences should be seriously studied, the likelihood of disputed facts and extraordinary circumstances limits their usefulness for purposes of this analysis. Instead, perhaps an objective basis can be found in three post-FASA cases involving other than ancillary services.

Aalco Forwarding Inc. (October 1997)

In what may have been the first post-FASA case involving commercial services, Aalco Forwarding and 118 other firms protested the terms of a solicitation issued by the Army Military Traffic Management Command (MTMC) for transportation services.[55] The solicitation implemented MTMC's pilot program to reengineer DOD's personal property shipping and storage. The solicitation was issued under the FAR Part 12 commercial item acquisition procedures and contemplated multiple FFP indefinite delivery contracts for a base year plus options for two additional years.

Aalco Forwarding contended that MTMC was improperly acquiring transportation services under FAR Part 12 because the movement of household goods for military personnel was not like movement of household goods for civilian personnel. Moreover, it said international shipment of household goods could not be properly considered a commercial item because international shipments are not based on established catalog prices or market prices.

Aalco Forwarding's overriding concern was that the solicitation requirements were inconsistent with customary commercial practice

and imposed greater financial risk to the service providers. For example, MTMC required offerors to freeze their rates for three years, when the customary commercial practice was to use one-year contracts.

MTMC maintained that it had conducted a benchmarking survey of commercial shippers, examined commercial contracts, reviewed trade publications, and interviewed carriers, agents, forwarders, and relocation companies. MTMC said that while it had generally applied customary commercial practices in the solicitation, it also had executed a waiver under FAR 12.302(c) in order to include certain provisions which were acknowledged to be inconsistent with customary commercial practice.

With respect to established catalog or market prices, MTMC said that while there was no standard tariff for the entire origin-to-destination movement of international shipments, various separate components could be priced based on established market rates (e.g., priced by weight for origin services, transportation services, and destination services).

The General Accounting Office denied the protest, observing that the determination of "commercial item" is largely within the discretion of the agency and not to be disturbed unless it is shown to be unreasonable. GAO found that there were established market prices for specific tasks (i.e., component market rates) and referred to the Clinger-Cohen Act conference report definition of "market price."

Envirocare of Utah Inc. (June 1999)

In a protest before the U.S. Court of Federal Claims, Envirocare of Utah challenged the terms of a solicitation issued by the Army Corps of Engineers for hazardous waste removal at sites within the Formerly Utilized Sites Remedial Action Program.[56] The solicitation contemplated multiple indefinite delivery contracts for a five-year base period plus one five-year option period. The solicitation was not issued under the FAR Part 12 commercial item acquisition procedures.

Envirocare challenged the Army's failure to use FAR Part 12 procedures to acquire radioactive waste disposal services. Envirocare conceded that it did not have established catalog prices for such services, but said market prices could be obtained in the form of quotations directly from the competition. However, the government's expert witness, a health physicist who supervised a state's radioactive materials program, said that no established market price for hazardous waste removal existed and that unit disposal rates had to be determined on a case-by-case basis.

The court denied the protest, finding that radioactive waste disposal services were not a commercial item because there was no established catalog or market price. As GAO did in *Aalco Forwarding*, the court referred to the Clinger-Cohen Act conference report definition of "market price." The court cited the health physicist's testimony that there was no market rate, and found that asking a competitor about price would not satisfy the "substantiated from sources independent of the offeror" criterion contained in the Clinger-Cohen Act conference report because the competitor was also an offeror and, therefore, not a "source independent."

Carlson Wagonlit Travel Inc. and American Express Travel Related Services Co. Inc. (November 1999)

Carlson Wagonlit and American Express Travel Related Services Co. protested the terms of a solicitation for travel management services in the Navy's Eastern Region.[57] The Navy contemplated a contract for a base year plus eight six-month options. An unusual feature of the solicitation was the Navy insistence on a "no cost" contract under which the contractor would derive compensation from commissions paid by airlines and other transportation providers. The offerors were to propose a share of those commissions for the Navy. The solicitation was not issued under the FAR Part 12 commercial item acquisition procedures.

Carlson and American Express argued that because travel management services were commercial services, they should be acquired under FAR Part 12. Since the Navy's commission-based pricing provisions were not a customary commercial practice, they would not be permitted under FAR Part 12, according to the protest.

The Navy countered on two fronts. First, it said the commission-based pricing was a customary commercial practice for 25 percent to 80 percent of the commercial marketplace. Second, it maintained that travel management services were not a "commercial item" because portions of the service requirements were not sold in substantial quantities in the commercial marketplace based on established catalog or market prices. The Navy cited the following mandatory requirements as precluding the procurement from being considered as the acquisition of a commercial item: mobilization contingency operations, evacuations, booking of lodging in government quarters, and reconciliation of centrally billed accounts.

GAO denied the protest, finding that the solicitation's commission-based pricing provisions were a customary commercial practice. Further, citing *Aalco Forwarding*, GAO left undisturbed the Navy's determination that the travel management services being acquired were not "commercial items." GAO also cited *Envirocare of Utah*, stating that "procurement for removal of five types of waste was not acquisition of commercial services where there was no established catalog or market price for one of the five items." That is, if one component of the requirements fails to be a "commercial item," all components fail--a "broken chain" argument.

These three cases provide some interesting, if not disturbing, insights. In all three instances, GAO and U.S. Court of Federal Claims gave great deference to agencies in deciding what was a commercial item for purposes of the FAR Part 12 commercial item acquisition procedures. The regulations appear to provide a broad basis for agencies to do whatever they wish in this area.

The more disturbing aspects of these cases concern the application of the "established catalog or market price" criterion and perhaps validate private industry's fears. Whether a particular service was a commercial item was not decided on the basis of market acceptance, as with all other commercial products and services under the "commercial item" definition at FAR 2.101. Rather, it was decided based on whether there

was an established catalog or market price for the commercial service. Moreover, although the established catalog or market price concept was previously only applied to sole-source contracts to determine fair and reasonable prices, in these cases it was applied in competitively awarded FFP-type contracts for an entirely different purpose.

The problems with the current definition of "commercial item" are best illustrated through *Envirocare of Utah*. Setting aside the merits of the court's decision to deny the protest, what is perplexing is its underlying logic for concluding that there was no established market price.

This logic provides clear and convincing evidence of what is wrong with the "sources independent" criterion. First, "offeror" has almost always been construed as meaning the immediate offeror and not the other competitor-offerors. Second, contrary to the health physicist's opinion, established market rates can be determined on a case-by-case basis, much as GAO did in *Aalco Forwarding*. Third, GAO's reading of *Envirocare* in deciding the *Carlson and American Express* cases--that is, if one component fails to be a "commercial item" then all components fail--is irrational. It runs totally counter to the reason the "commercial item" definition allows for modifications of a type customarily available in the commercial marketplace or minor modifications of a type not customarily available in the commercial marketplace to meet government requirements.[58]

There was certainly enough justification to use Part 12 commercial item acquisition procedures in the *Envirocare* and *Carlson and American Express* cases, contrary to what actually happened. There appeared to be little question that in both cases the substantive services being acquired by the government were sold in substantial quantities in the commercial marketplace.

In *Envirocare*, is there any question that the same hazardous waste removal services are purchased by major corporations and state and local governments? In *Carlson and American Express*, how different is it to book a room at government quarters, as opposed to a preferred hotel or corporate apartments? Are the military mobilization requirements of the Navy in *Carlson and American Express*, where travel management services *were not a commercial item*, any different from the mobilization requirements of the MTMC in *Aalco Forwarding*, where transportation services *were a commercial item?*

In *Envirocare* and *Carlson and American Express*, the determinative factor was not whether the services were available in the commercial marketplace, but rather the apparent lack of an established catalog or market price. This criterion is not applied to any other commercial product or service.

Unfortunately, this is the path created by FASA and the Clinger-Cohen Act, and the developing case law will only exacerbate the problem. The mixing of well-known and widely recognized outmoded concepts into new case law does not bode well for commercial item acquisition reform.

T&M and LH Contracts

It is not clear what perceived problems underlie the current prohibition on using T&M and LH contracts in acquiring professional and technical

services as a commercial item. T&M and LH contracts were not targeted by the Section 800 Panel, which did not address other than ancillary services except to say that further study was needed. Although Congress precluded use of services that are sold based on hourly rates without a fixed catalog price for a specific service performed, no reason was given in the conference reports for FASA and the Clinger-Cohen Act. No rationale has been articulated in any of the *Federal Register* notices implementing FASA or the Clinger-Cohen Act or any modifications thereafter.

Absent a clear statement of the problem, it is necessary to rely on general comments made by government rulemakers and others engaged in the public debate over T&M and LH contracts. Perhaps it is only necessary to examine the FAR itself and note that T&M and LH contracts are regarded among the least desirable of the contract types.

According to the FAR, T&M contracts only may be used when it is not possible at the time of contract award to estimate accurately the extent or duration of the work or to anticipate costs with any degree of confidence.[59] Their use, like that of LH contracts, is limited as follows:[60]

> A time-and-materials contract may be used (1) only after the contracting officer executes a determination and findings that no other contract type is suitable; and (2) only if the contract includes a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.

T&M and LH contracts have been likened to cost-type contracts, which have been proscribed by FASA for the acquisition of commercial items under FAR Part 12. But is this a fair comparison? On closer inspection, T&M and LH contracts deserve more recognition for their ability to mitigate the government's risks. A simple comparison between a T&M contract and a cost-plus-fixed-fee (CPFF) contract is shown in Table 1.

Table 1
Comparison of T&M and CPFF Contracts

Cost Element	T&M	CPFF
Labor Rate	Fixed	Incurred
Labor Hours	Incurred	Incurred
Material Costs	Incurred	Incurred
Indirect Costs	Fixed	Incurred
Profit	At Risk	Assured

The only true variables at play in a T&M contract are the hours taken to perform the work and the material costs. All other performance costs are fixed at the time of award, and to that extent T&M contracts more

resemble an FFP contract rather than a CPFF contract. From a services contract standpoint, it is arguable that the most difficult to control cost variables are fixed though the fully-burdened labor rates. Another thing is certain: profit is not assured on T&M contracts.

Even the variables at play are subject to some degree of control. The "Payment Under Time-And-Materials and Labor-Hour Contracts" clause requires that the hours worked be supported by individual daily timecards or other substantiation approved by the contracting officer.[51] The contracting officer is also required to withhold 5 percent of payments for labor, up to $50,000. The clause imposes controls over material costs as well, requiring the contractor to obtain materials at the most advantageous prices. Finally, the clause requires the contracting officer to establish a ceiling price and the contractor to notify the contracting officer when cumulative expenditures are expected to exceed 85 percent of the ceiling price in the next 30 days.

In the commercial marketplace for professional and technical services, use of the T&M and LH contract, or some comparable form, is a customary commercial practice. The circumstances for use are typically what the FAR already recognizes--that is, when it is not possible at the time of contract award to estimate accurately the extent or duration of the work or to anticipate costs with any degree of confidence.

It would be a mistake to conclude that commercial buyers of such services do not impose a large degree of cost control. Controls come in the form of project estimates and phased budgets, close review of submitted billings, and price ceilings.

Another possible reason for proscribing T&M and LH contracts relates to the statutory provisions for government examination of contractor records. During the public debate leading to FASA, private industry argued for simplicity and eliminating the need for postaward audits. This is why the TINA and CAS requirements were ultimately removed.

T&M and LH contracts are subject to audit requirements imposed under the Armed Services Procurement Act and the Federal Property and Administrative Services Act,[52] which authorize the agency to inspect the plant and audit the records of a contractor performing T&M and LH contracts. However, allowing the use of T&M and LH contracts would not be inconsistent with these statutory requirements.

As the old adage says, it may be necessary to give up something in order to get something. It is reasonable for the government to have audit rights over the labor hours and material costs on a T&M contract. Professional and technical service firms that sell services by the hour undoubtedly already have the necessary accounting systems. What must be off-limits to the government, however, are those elements of cost that are fixed, such as labor rate, indirect cost, and profit.

Finishing FASA's Unfinished Business

It should be possible to fashion a solution that allows for use of T&M and LH contracts in acquiring commercial items while still protecting the interests of the government.

The first step is fixing the law. The definition of "commercial item" must be revised by removing the obsolete "established catalog or market price" criterion. The accompanying committee report must clearly state that the guidance contained in the conference reports of FASA and the Clinger-Cohen Act is void and that Congress does not intend to proscribe T&M and LH contracts or to define terms such as "market price." This needs to be done quickly in order to stem the tide of decisions like *Envirocare* and *Carlson and American Express*. In the future, the question of what is a commercial item should be decided on its market acceptance and not the basis for its pricing.

Next, the uniform contract format for commercial items should be amended to allow T&M and LH payment provisions. That is, the payment provision contained in the "Contract Terms and Conditions -- Commercial Item" clause could be tailored to include T&M and LH provisions, along with an appropriate audit clause that is consistent with customary commercial practice.

The T&M and LH issue will not go away. It will become more unsettling as the government increasingly looks to professional and technical service firms to satisfy its requirements. It is also fair to observe that, as a practical matter, contracting officers will resolve the issue themselves and the rulemakers will be left to legitimize an established practice, as with the December 2000 proposed rule.

This important challenge is worthy of the acquisition community's best efforts to resolve.

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[1] Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, Oct. 13, 1994. The Act was implemented primarily under Federal Acquisition Circulars (FAC) 90-32 and 90-33.

[2] Federal Acquisition Reform Act of 1996 (FARA), Pub. L. No. 104-106, Feb. 10, 1996, later named the "Clinger-Cohen Act."

[3] Truth in Negotiations Act, Pub. L. No. 87-653, Sept. 10, 1992, as amended. The Act was codified at 10 U.S.C. §2306 for defense agencies and at 41 U.S.C. §254(d) for civilian agencies.

[4] Acquisition Reform Working Group (ARWG) letter, Dec. 18, 2000. ARWG is comprised of 10 member associations. See also FCR "Defense Industry Group Sends Wish List of Changes to New Bush Administration," Jan. 2, 2001.

[5] ARWG letter, Feb. 16, 2001. See also FCR "Industry Group Wants CAS Board Removed From OMB, Scope Narrowed" March 6, 2001.

[6] Senate Report No. 106-292, May 12, 2000, page 330.

[7] Federal Register, Vol. 65, No. 167, Aug. 28, 2000, pages 52,283-52,286.

[8] Council of Defense and Space Industry Associations letter, Oct. 27, 2000. CODSIA is comprised of eight associations, representing 4,000 member firms. See also FCR "Commercial Items Guidance Should Not Alter Statutory Definition, Industry Says," Nov. 7, 2000.

[9] Federal Register, Vol. 65, No. 251, Dec. 29, 2000, pages 83,291-83,293.

[10] CODSIA letter, Feb. 27, 2001.

[11] Draft comment letter of the ABA Public Contract Law Section, expected to be sent to FAR Council in late July.

[12] See FCR "A Light Through the Haze of Commercial Pricing," Feb. 23, 1993, and FCR "Grading Commercial Pricing Reform–Safe Harbors at Last?," Dec. 4, 1995.

[13] See ABA Public Contract Law Journal, "Surviving Commercial Pricing Rules," Summer 1994.

[14] Formerly at FAR 15.804-3 and 48 CFR 9903.201-1.

[15] Formerly at FAR 15.804-3.

[16] Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Report No. 101-62, "DOD's Inadequate Use of Off-the-Shelf Items," Oct. 30, 1989.

[17] FASA Sections 1204 and 1251.

[18] FAR 15.403-1(b)(3) and 48 CFR 9903.201-1(b)(6).

[19] FAR 15.403-3(a)(1).

[20] 101st Congress, 2nd Session, S. 1957, Section 4(e), Nov. 21, 1989.

[21] 102nd Congress, 1st Session, S. 260, Section 4(c), Jan. 24, 1991.

[22] 102nd Congress, 1st Session, H.R. 3161, Section 132 (a)(3), Aug. 1, 1991.

[23] Report of the Acquisition Law Advisory Panel, "Streamlining Defense Acquisition Laws," January 1993. The Section 800 Panel was formed under Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Nov. 5, 1990.

[24] Section 800 Panel report, page 8-17.

[25] Section 800 Panel report, page 8-19.

[26] Section 800 Panel report, page 8-19.

[27] Section 800 Panel report, page 8-19.

[28] Section 800 Panel report, page 8-19.

[29] Section 800 Panel report, page 8-19.

[30] Section 800 Panel report, page 8-19.

[31] Section 805, National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Oct. 5, 1999.

[32] Section 8001 of S. 1587, June 8, 1994, and Section 7001 of H.R. 2238, June 27, 1994.

[33] Section 7001 of H.R. 2238, June 27, 1994.

[34] FASA Section 8001.

[35] House Report No. 103-712, Aug. 21, 1994, page 229.

[36] Section 4204, Pub. L. No. 104-106, Feb. 10, 1996.

[37] Federal Acquisition Circular (FAC) 90-32, Item III, Sept. 18, 1995.

[38] House of Representatives, Conference Report, Pub. L. No. 104-106, Feb. 10, 1996, page 967.

[39] FAC 90-45, Item V, Jan. 2, 1997.

[40] FAR 2.101.

[41] Early on, CODSIA had urged the government to "clarify that the use of non-cost type contracts other than firm fixed-price contracts may be appropriate (e.g., time and materials, labor hours, etc.)"

[42] CODSIA letter, May 1, 1995.

[43] CODSIA letter, Oct. 7, 1996.

[44] Federal Register, Vol. 65, No. 15, Jan. 24, 2000, pages 3,761-3,762.

[45] CODSIA letter, March 24, 2000.

[46] Section 8002, Pub. L. No. 103-355, Oct. 13, 1994. It should be noted that the government was more restrictive on permissible contract types than FASA. That is, FASA only prohibited use of cost-type contracts. The FAR 12.207 provision only allowed FFP, FFP with economic price adjustment, and indefinite delivery contracts.

[47] Federal Register, Volume 65, Number 167, Aug. 28, 2000, pages 52,283-52,286.

[48] Section 803, Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, Oct. 17, 1998.

[49] Section 805, National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, Oct. 5, 1999.

[50] CODSIA letter, Oct. 27, 2000.

[51] Federal Register, Volume 65, Number 251, Dec. 29, 2000, pages 83,291-83,293.

[52] Proposed rule at FAR 12.207-2.

[53] CODSIA letter, Feb. 27, 2001.

[54] Draft comment letter of the ABA Public Contract Law Section, expected to be sent to FAR Council in late July.

[55] Comptroller General Nos. B-277241.8 and 277241.9, Oct. 21, 1997.

[56] Envirocare of Utah Inc. v. United States, U.S. Court of Federal Claims, No. 99-76C, June 11, 1999.

[57] Comptroller General Nos. B-283408 and B-283408.2, Nov. 17, 1999.

[58] FAR 2.101.

[59] FAR 16.601(b).

[60] FAR 16.601(c) and FAR 16.602.

[61] FAR 52.232-7.

[62] 10 U.S.C. §2313 and 41 U.S.C. §304C.

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Answers to Follow-up Questions
Service Acquisition Reform Act (SARA) Hearing
November 1, 2001

Mark F. Wagner
Vice President for Government Affairs, Johnson Controls, Inc.
Chairman, Public Policy Committee, Contract Services Association

1. Do you believe the current regulatory review process is sufficient to address existing regulations and statutes that are barriers to government pursuing private sector solutions?

Answer: No. The government and industry would be well served with a periodic review or "house-cleaning" process that identifies regulations and statutes that have outlived their usefulness or have become burdensome because they are outdated. A periodic review would also serve to reinforce needed rules currently on the books. We need a regular systematic process that brings all stakeholders together to help review the statutory and regulatory landscape.

2. How will the preference for acquisition of commercial items affect the full and open competition requirement currently in place? How are the interests of government protected if the definition of commercial services is expanded? What appropriate other mechanisms exist to ensure that federal agencies can exercise the appropriate degree of oversight?

Answer: The federal government regularly and safely buys many commercial items every day. Determinations can be made as to whether a reasonable price is being paid through market analysis, price comparison or limited competition. To look at it another way, in our personal lives we all purchase commercial items and services, such as buying a new computer or having an oil change in our cars. We avoid getting "ripped off" by shopping around and comparing prices.

3. What barriers exist to federal agencies utilizing commercial best practices through the current FAR apart 12 definitions and existing commercial services definitions?

Answer: Serious consideration should be given to broadening the available contract types to include standard commercial-type contract vehicles, such as "time and material" or labor-hour contracts. In the commercial marketplace support is regularly acquired on a fixed rate per hour or day because the method is flexible and predictable. And, the competitive forces of the commercial marketplace ensure that quality services are provided in an efficient manner so that unnecessary days/hours are not spent. While the 1994 Federal Acquisition Streamlining Act (FASA) did not prohibit its use, the implementing regulations do not recognize this contract type – thus impeding the government's access to significant commercial capability.

4. What have you seen as barriers to utilizing the contract incentives contemplated in SARA? What are the federal agency concerns about using such tools?

Answer:
Longer term contracts – Some agencies are concerned that longer contracts lock them in too long and reduce flexibility. However, if not used they miss the benefit of the contractor's ability to make investments to produce efficiencies. The solution is to build into the contract appropriate and periodic review procedures with options to terminate, extend or renegotiate.

Shared Savings contracts – In order for them to be effective several things must be successful. 1) "Comptroller-types" in the government often do not like the fact that the government is paying for finance charges in shared savings contracts such as Energy Savings Performance Contracting. It must be recognized that finance charges are a cost of doing business in these investment deals. 2) The government must be able to properly baseline current costs. Without a solid baseline as a foundation, shared savings will sink under the weight of disagreement between the government and contractors. 3) The government has to be willing to adequately compensate contractors for saving initiatives. If not, there won't be the necessary incentive to develop the efficiencies in the first place.

Award Term contracts – If contractors perform well, they should be "awarded" with additional option years on the existing contract; the criteria for determining quality performance would be established at the onset of the contract. And, this method could be reversed to penalize non-performing contractors by shortening contract terms. This innovative concept guarantees the needs of the government are met, while giving the contractor an incentive to achieve or exceed the agreed-upon performance criteria.

5. In your view, what does the DCMA proposal included in SARA accomplish for DOD service contracting?

Answer: It could provide consistency in approach for contracts, which would bring efficiency to the process and savings to the contractor and the government.

6. If we move forward with a separate training fund, how do we ensure that the best interests of the government are established as the primary principle of training while incorporating private sector best practices?

Answer: It would be wise to dedicate the training dollars for this primary principle by incorporating private sector best practices and requiring measurable outcomes in the form of true performance based contracts developed within the government.

7. In your view, what evidence suggests that performance-based acquisition will positively impact the small business community.

Answer: First, CSA members, both large companies like my own and my colleagues from small firms, agree that performance base acquisitions lead to better contracts and increased efficiencies for the customer. Second, innovative ideas and processes are very much alive and well in small firms. But they can only be allowed to be implemented and fostered under performance base contracts.

8. Professor Tiefer suggested in his testimony that the proposal in legislation to designate commercial business segments would create a kind of back door by which traditional contractors could get traditional, non-commercial work treated as commercial items. Is that your reading as well?

Answer: Commercial businesses are often unable or unwilling to do business with the Government because of the added costs and systems requirements associated with Government-unique practices and policies, which can increase costs and detract from competitiveness in the commercial marketplace. The current statutory definition has been interpreted narrowly in some cases to exclude internal components, processes, and services that have not themselves been directly sold in the commercial marketplace, even though they are intrinsic to the end items that the commercial entity does sell in the commercial marketplace. This "business segment" concept is particularly important for service contractors since the statutory definition of stand-alone commercial services is somewhat ambiguous and, thus, is subject to multiple definitions. FAR Part 12 is rarely used in service contracting because, while the company may believe the service is clearly commercial, the contracting officer often does not view it in that context. For many commercial service companies, this means a difficult choice – either forego the business opportunity or accept a contract under FAR Part 15 with its many Government-unique requirements (in these cases, often setting up separate divisions to handle the government work). Examples of services that would benefit from the "business segment" concept are those involved with fleet management, fleet overhaul, and ambulance services.

9. How can the government guarantee that a share in savings program would not simply line the pockets of favored defense contractors?

Answer: First, shared savings contracts can be competitively procured similar to other contracts. Second, the government shares in the savings. We must make sure that it is equitable on both sides. Finally, what may be perceived as an undo "lining of contractors pockets" may actually be the monetary return for taking on a certain amount of risk. Far too often the government wants the contractor to take on risk without adequate compensation. In the private-private sector, the bigger the risk the higher the reward.

Mr. DAVIS. Well, thank you very much.

Dr. DiPentima.

Mr. DIPENTIMA. I'm testifying today on behalf of the 500 corporate members of the Information Technology Association of America. Having said that, I should state up front that I have a personal interest in acquisition reform. Prior to joining SRA, I was for many years the Deputy Commissioner and CIO of Social Security. As such, I chaired the initial IT——

Mr. DAVIS. You've been on both sides of it, then.

Mr. DIPENTIMA. I've been on both sides, that's really my point.

I chaired the IT acquisition review board, whose findings were in large part encompassed in FASA and in Clinger-Cohen. So I've sort of enjoyed the argument from both sides of the table.

I'd like to focus very briefly on just some of the elements of the legislation. First of all, I concur with the recognition that there is a training gap and a dearth of experienced acquisition professionals. Despite the passage of Clinger-Cohen in 1996, its implementation has been inconsistent from agency to agency. It has been my observation that as a matter of practice, the emphasis has been on audit requirements rather than on the act's training provisions. I believe there is a demonstrated need for a civilian equivalent of the present acquisition work force vested in the Defense Acquisition Work Force Improvement Act.

The Service Acquisition Reform Act would establish an acquisition training fund paid by the administrative fees of 5 to 10 percent collected from existing fees on Government-wide multiple award contracts. ITAA has not taken a position on those financing mechanisms. As president of a company with a portfolio of Government-wide acquisition vehicles, in fact, we did over $200 million in GWAC awards last year, I would support the funding mechanism. The earmarked funds are minimal compared to the benefit of a better trained GWAC acquisition work force.

There is a crucial need for trained acquisition professionals to facilitate speedy procurement through the GWACs and the schedules in response especially to the recent national emergency.

ITAA agrees that performance metrics for such training are important. Such metrics might include agency confirmation of every contract officer's knowledge and skill level before his or her warrant is granted. ITAA supports establishment of a chief acquisition officer role to be held by a career employee within an agency who should serve as an agency representative to the procurement executive council. From my own experience in procurement reform, and currently as the chairman of the industry advisory council's CIO liaison committee, I also agree with this. It would be especially useful if this type of position would foster improved strategic planning for major acquisitions.

Third, revision of the standard payment terms will benefit Government and industry. Remedies that would eliminate routine delays in payments would aid small and large businesses alike. Another important reform to streamline timely payment would be the elimination of pre-validation requirements.

Finally, rigorous implementation of the fiscal year 2001 National Defense Authorization Act, particularly emphasizing elimination of overly burdensome paperwork requirements, would be a welcome

improvement. To my knowledge, little has changed since 1995 when I left Government service. To cite one example, and I wish it wasn't true, at the Government direction, my company has spent days of manpower reporting on billing a discrepancy of 1 cent. We rounded the wrong way and billed the Government incorrectly by 1 cent. We spent somewhere between $3,000 and $5,000 correcting this paperwork.

ITAA and others in industry stand ready to support this legislation.

Finally, I noticed some institutional resistance to performance based contracting and share-in-savings, despite the Government's publicized interest in pursuing them along with other commercial items, procurement under FAR Part 12. ITAA members, SRA and our industry partners in the professional service business would benefit from expanding the commercial acquisitions to include services. The Government would benefit most.

However, while the FAR currently recognizes performance based contracting as an allowable cost, there is no general agreement about the content, style or format of performance based contracts. Most would agree that a contract is performance based if it specifies results instead of processes and includes measurable performance standards, clearly defined by the customer. The Government should decide what it wants and convey those requirements clearly and succinctly to industry.

Since this legislation contains so many reforms of vital interest to the IT service sector, it is impossible to address them all.

Of course, you have our written statement. Mr. Chairman, I thank you for your attention, and we'd be happy to answer any questions you may have.

[The prepared statement of Mr. DiPentima follows:]

TESTIMONY

OF

DR. RENATO DIPENTIMA

PRESIDENT, SRA CONSULTING AND SYSTEMS INTEGRATION
SRA INTERNATIONAL, INC

BEFORE THE

HOUSE SUBCOMMITTEE ON PROCUREMENT POLICY AND TECHNOLOGY
2154 RAYBURN BUILDING

ON THE

SERVICES ACQUISITION REFORM ACT (SARA)

ON BEHALF OF THE

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

NOVEMBER 1, 2001

Dear Mr. Chairman and Subcommittee Members:

I am Renato DiPentima, President of SRA Consulting and Systems Integration, of SRA International, Inc. SRA is an IT company headquartered in Fairfax, VA. which employs about 2000 employees mostly doing work for the Federal government. I am testifying today on behalf of the 500 corporate members of the Information Technology Association of America (ITAA). Many of ITAA's member firms provide computer software and IT services to the Federal government. For that reason, we are especially pleased to be able to testify on Chairman Davis' legislation being introduced today, the Services Acquisition Reform Act, or SARA.

ITAA believes that it is most appropriate for Congress and this Subcommittee to consider changes to the acquisition of services by the Federal agencies. This has been the fastest growing sector in federal IT procurement. Since the passage of FASA and the Clinger-Cohen Act, there has been at least a 36% increase in the value of orders for information technology services and equipment under the Government-wide Acquisition Contracts, better known as GWACs. And GSA's Federal Supply Service IT schedules have risen from $10 Billion in FY 1999 to $13.3 Billion in FY 2000. The just completed fiscal year will be another record setter. Much of this dramatic increase is attributed to IT services.

As the nation moves to a wartime footing, it is particularly important that the Federal government have fast, efficient access to the IT solutions that best meet agency needs. Clearly, business as usual approaches must be give way to the business of defending freedom and democracy at home and around the globe. Steps that you take in services acquisition reform should be undertaken so as to build public confidence, improve the delivery of critical government services, and raise the level of agency performance and interagency cooperation across the board.

ITAA, through its Procurement Policy Committee, appreciates having had the opportunity to work with your staff in recommending some of the provisions contained in SARA. I will be commenting on those provisions today in more detail. Since SARA covers such a wide range of subjects, however, the Procurement Policy Committee has not yet had the opportunity to decide ITAA's position on all provisions. We will be glad to continue to work with Congressman Davis and the Subcommittee staff as the legislation winds its way through the legislative process.

Allow me to share perspective on portions of the bill where ITAA does have a stance:

Acquisition Workforce Recruitment and Retention:
By the middle of this decade, the government will face significant retirement numbers, particularly within its acquisition workforce. Agencies will be left to attract not only talented individuals, but also those individuals capable of being schooled in the new contracting practices that have evolved over the last decade. These individuals will be called upon to facilitate the government's increasing complex programmatic requirements.

Recognizing the growing urgency of the government's human resource needs, ITAA is pleased to support the Chairman's goal to establish an acquisition workforce recruitment and retention pilot program. This program will assist agencies in right-sizing their workforces and ITAA stands ready to assist the Subcommittee in this important effort.

Government-Industry Exchange Program:
ITAA supports any exchange program that improves the communication between government and industry. We have already endorsed H.R. 2678, the Digital Tech Corps Act of 2001, which Congressman Davis has introduced with several cosponsors. ITAA is very supportive of extending this program or establishing a similar program for the acquisition workforce.

Acquisition Workforce Training Fund:
Hand in hand with recruitment as a human resources issue for the government over the next few years is the capacity for the government to train its acquisition workforce. Throughout the nineties, the government embarked on a substantial reform of the Nation's acquisition laws and regulations. This reform laid the foundation for innovative acquisition methodologies to streamline and improve the government's purchasing process.

For acquisition reform to be of any value, however, those who implement the acquisition system must understand how it works. Despite programs put in place with previous acquisition reform legislation such as the Federal Acquisition Institute, training programs throughout the government are still insufficient. ITAA has long been a supporter of increasing funds for employee training. We have also been highly critical that these funds were too often those first cut when budget reductions were necessary. ITAA, however, has yet to take a position on the funding of this training from a percentage of the fees already collected by agencies from government-wide acquisition contracts or the Federal Supply Service schedules. We will be glad to advise the Subcommittee of our views in the near future.

Telecommuting for Federal Contractors:
ITAA appreciated having the opportunity to testify on this issue at an earlier hearing held by this Subcommittee. We fully support updating the rules and regulations that allow federal contractors more flexibility in managing their workforce.

Establish a Chief Acquisition Officer:
While ITAA fully supports the naming of a Chief Acquisition Officer, we are skeptical that this position should report to the agency head. The experience with the Chief Information Officer position has demonstrated that it is difficult to legislate agency cultures. Many CIOs do not report to their agency heads and we believe that this should be remedied first before adding another requirement in statute that may not be fully implemented.

Establish a Procurement Executive Council:
ITAA supports the establishment in statute of this Council. Increased communication among the Chief Acquisition Officers across all the major federal agencies will benefit everyone. Industry will gain from the having the CAOs discuss common problems and challenges which we believe will result in more standardized procedures among the agencies.

Establish a Regulatory Review Process:
Despite a decade of acquisition reform from the Federal Acquisition Streamlining Act to the Clinger-Cohen Act, many laws and regulations still inhibit greater use of commercial practices. Some of these I will mention in this testimony. What government and industry needs is a continuous review of these laws and regulations. By so doing, we will maintain a constant critical eye on acquisition law, always working toward the optimization of the acquisition process. For this reason, ITAA supports the review process to identify unnecessary laws and regulations. ITAA would also appreciate the opportunity to participate in this review process.

Shared Savings Initiative:
ITAA has supported the Share-in-Savings initiative since the Clinger-Cohen Act hearings. We believe that it offers federal agencies another procurement approach to achieve needed IT modernization. This approach has been particularly successful in the state and local government arena and there are also now some federal examples of successful implementation. We applaud Congressman Davis for including this provision in SARA, which will provide more flexibility to the agencies, and contractors that select to use the shared savings approach. Share-in-savings has a track record of success in the Federal government where it has been tried. The private sector has willingly invested in upgrading the government's infrastructure. The companies were paid from the savings, and the government agency benefited from the modernization. This is a win-win contract and legislation is probably needed to encourage more agencies to try this innovative approach.

FAR Part 12 Contract Flexibility:
ITAA has long advocated correcting what we perceive was an oversight in the reform of FAR Part 12. Federal IT contracts vary widely in terms of scope, complexity and risk. Clearly, no single contract approach will meet the needs of every program. We, therefore, support the addition of other contract types to include standard commercial contract vehicles such as "time and material" or labor hour contracts. We believe that the federal customers should have the same variety of choices in selecting the most appropriate contract vehicle that currently exists in the commercial sector.

Clarification of Commercial Services Definition:
ITAA has been advocating this change ever since the enactment of the Clinger-Cohen Act. The definition of "commercial service" was intended to be the same as that of "commercial item" when the Act was passed by Congress. Unfortunately, the definition of commercial services was altered slightly, but significantly enough that IT companies may have difficulty in meeting the definition when selling a service to the federal government. In many cases, services failing to meet the definition are not exempt from the onerous Cost Accounting Standards (CAS). ITAA believes that the changes in SARA would give commercial services acquisition parity with commercial products.

Conflict of Interest:
In many instances, the Federal government may be denying itself the services of companies with the deepest and best understanding of particular agency requirements. Many firms elect to forego opportunities to provide front-end consulting to government agencies in order to comply with procurement rules that would bar them from pursing the larger development,

implementation and maintenance contracts. ITAA supported the provision in the early drafts of the Clinger Cohen Act that revised the Federal government's rigid Conflict of Interest (COI) requirements. ITAA believes that the commercial sector's flexibility in selecting the best contractor to provide a total solution should also be extended to Federal customers. The proposed language would allow a contractor that provides architectural design and engineering services for an information system to also provide that system. This would entail a limited exception to the FAR's OCI rules in order to encourage information technology companies to compete for design and engineering work.

Limitation on Commercial Liability:
Federal contracting officers are reluctant to limit the amount of liability a contractor must accept, even though the common practice in the commercial marketplace is to cap liability at the total contract value level, a multiple of it, or a specific dollar amount. By forcing contractors to assume all of the risk, the Federal government will attract fewer competitors or companies who will offer only low risk solutions, but at higher prices. Again, ITAA commends the sponsors for considering this change to align more closely with commercial practices.

Trade Agreements Act Exemption for IT Products:
This is another area where ITAA has long advocated reform. This complex provision is little understood by many in both industry and government, but it results in onerous tracking, monitoring, and risk for the IT vendors and a restriction on products available to Federal agencies. The purpose of the Trade Agreements Act is to encourage countries to sign the GATT Treaty by precluding federal agencies from purchasing products made in non-signatory countries. There is no evidence, however, that the ACT has compelled more countries to sign nor has it forced companies to change their manufacturing sites. It does deny to the Federal government the widest array of products available. Compliance with TAA imposes significant administrative burden and costs on IT companies that they would not otherwise incur without TAA. For the companies and contractors subject to this Act, the requirement to track where every product is manufactured at any point in time requires them to establish and maintain very elaborate tracking systems which are not needed in their commercial business. We commend the sponsors of SARA for agreeing to reform this outdated provision.

Cooperative Purchasing:
ITAA has continued to support the program of allowing state and local governments to purchase off the GSA IT schedules. We believe that this program should be optional to the vendors, but it could provide local governments, in particular, an attractive vehicle for the acquisition of IT products and services. ITAA strongly supported Congressman Davis' legislation two years ago when you introduced a bill to offer this option during the Y2K transition.

This concludes the provisions within SARA where ITAA has established positions. We will be considering all the other provisions in SARA and providing feedback to the Subcommittee. We also stand ready to assist you in any modifications or additions to SARA. ITAA again commends the Chairman for taking on this important and timely reform effort. Thank you for the opportunity to submit our views.

DR. DIPENTIMA'S RESPONSES TO QUESTIONS POSED BY CONGRESSMAN DAVIS

1. Do you believe the current regulatory review process is sufficient to address existing regulations and statutes that are barriers to government pursuing private sector solutions?

   Response: Passage of additional regulations related to the competitive process would severely impair a stream-lined process. I believe that the existing regulatory review process is adequate and if the SARA provisions designed to combat the shortage of trained acquisition professionals are passed both Government and industry will be better able to ensure compliance with existing statutes. Uniform enforcement of the current regulations by knowledgeable contracting officers and specialists is the best solution.

2. How will the preference for acquisition of commercial items affect the full and open competition requirement currently in place? How are the interests of government protected if the definition of commercial services is expanded? What other mechanisms exist to ensure that federal agencies can exercise the appropriate degree of oversight?

   Response: The preference for the acquisition of commercial items may have an initial impact on smaller businesses; however, many small businesses entering the government marketplace come with commercial services. An expanded definition of commercial services grants the Government broader access to commercial best practices and the expected efficiencies. Market forces and existing Federal Acquistion regulation controls provide for sufficient oversight.

3. What barriers exist to federal agencies utilizing commercial best practices through the current FAR Part 12 definitions and existing commercial services definitions?

   Response: FAR Part 12 ,"Acquisition of Commercial Items," is not currently so broad as to allow rapid procurement of some standard commercial consulting and professional services. If the definition were expanded, the Government would have better access to certain commercial products that would not be otherwise available without a waiver of some Government mandated requirements. Expanding FAR Part 12 might allow the Government's procurement dollars to go further, foster competition between commercial and historically Government service entities, and expand access to commercial best practices. The competitive marketplace would regulate the quality and cost of services purchased. However, in my view, an expansion of FAR Part 12 without additional training of acquisition professionals would be ill considered.

4. Can you discuss Organizational Conflict of Interest (OCI) further? How has this impacted the ability of the government to acquire commercial solutions? How do we address OCI and maintain the integrity of the contracting process?

   Response: The Government can disadvantage itself by imposing an OCI during early stages of the acquisition process. In order to avoid such an OCI, qualified contractors often opt not to respond to preliminary solicitations in favor of an opportunity to participate in major development acquisitions that are expected to be released. It may be in the best interests to the government to utilize the contractor who has performed the requirements analysis or preliminary work who would otherwise be conflicted out of participation because that contractor has already invested the time to fully understand an agency's requirements. The Government's duty to guard against contractor fraud and impropriety is reserved in the protest process.

5. If we move forward with a separate training fund, how do we ensure that the best interests of the government are established as the primary principle of training while incorporating private sector best practices?

Response: The overriding goal of ensuring that acquisition professionals are trained to protect the Government's interest will pervade the training. Acquisition professionals are not now equipped to operate in the wake of acquisition reform and an understanding of how to manage GSA Schedules and GWAC vehicles can only help to improve the competitive environment.

6. In your view what evidence suggests that performance-based acquisitions will positively impact the small business community?

Response: Performance-based contracting allows all businesses, both large and small, to respond with creative, imaginative solutions. GSA Schedules and GWAC vehicles using performance-based contracts have allowed small businesses to compete on a more level playing field with minimal investments in bids and proposals. Data should validate that the total dollars awarded to small businesses has increased dramatically since procurement reform and since use of Schedules and other GWAC vehicles has increased.

7. Is there really a problem with the government accessing the full range of commercial technology solutions? The GSA Schedules and various multiple award vehicles that exist seem to include virtually all of the major players in the commercial marketplace.

Response: Most of the major IT players have multiple contract vehicles in place to compete for business in the government marketplace, but a broadened definition of commercial items to include professional services would increase the Government's access to commercial contractors and would further stream-line and speed acquisition of such services under FAR Part 12.

8. How can the government guarantee that a share-in-savings program would not simply line the of favored defense contractors?

Response: The nature of the share in savings program allows all companies to propose solutions that can be evaluated on their own merit so the existence of such a program does not inherently advantage "favored defense contractors." To the extent that the Government behaves equitably in evaluating and selecting companies for participation in such programs (as the FAR currently requires), no favoritism will exist. Government drafters are free under the existing regulations to mandate or negotiate such rights (including termination rights and rights to recoup, prospectively terminate, or time-limit any unbargained for profits that may be realized by participating contractors) as may be necessary to protect the Government's interests. The Government will determine whether the cost-benefit analysis supports continuation of a particular share-in-savings program.

Mr. DAVIS. Thank you very much.

Mr. Mather.

Mr. MATHER. Mr. Chairman, distinguished subcommittee members, ladies and gentlemen, it is a privilege and honor to appear today before the House Subcommittee on Technology and Procurement Policy. My name is Chip Mather, and I'm a partner with Acquisition Solutions, Inc., a company which I co-founded to assist Government agencies to identify and implement acquisition best practices.

We currently provide acquisition support services to over 60 Federal agencies, which provides us a unique understanding of the considerable challenges agencies face in implementing new acquisition policies and practices. From that knowledge base, I'm pleased to have the opportunity to offer opinion and perspective on the proposed Service Acquisition Reform Act and how your actions will serve as a positive force to assist agencies to take full advantage of commercial best practices in acquiring services.

In the time I have from my prepared statement, I first want to commend Chairman Davis and the committee for focusing their attention on this important topic. Service contracting has increased in both size and importance within Government acquisition. In 1985, services accounted for 23 percent of the Federal contract dollars. Today that percentage has nearly doubled and is still growing.

But perhaps more important, yet I think little understood, is the significant transformation agencies are undergoing in acquiring these services. Agencies are going from being the direct provider of service to the citizen to managing contractors who are the service provider. Clearly, the acquisition of services is an increasingly critical factor in agencies' ability to perform their mission and provide service to their constituents.

However, it is also clear there has been little change in the way agencies plan, acquire and manage service contracts. While a gross generalization, we believe current legislative budget and acquisition systems are for the most part still focused on buying capital assets, things, and not acquiring results. For example, as someone who has witnessed the power of performance based contracting and the positive results that occur when both parties focus on the outcome and results, I am struck by how this truly superior method of acquisition has had limited implementation within the Federal Government.

That is why we believe the proposed SARA legislation is so important. It identifies and removes legislative impediments to implementing innovative service acquisition methods, such as share-in-savings incentives. It raises the dollar thresholds on Service Contract Act and Davis Bacon Act from levels set 40 plus years ago. It authorizes the use of additional contract types and clarifies definition of commercial items, both of which will make it easier for agency use to FAR Part 12, acquisition of commercial items for their service requirements.

Perhaps of greater significance, the proposed legislation contains what we consider are two critical components that have the power to appreciably improve the Government's acquisition of services. First, the legislation provides an alternative funding mechanism to provide much needed training to the acquisition work force. You

cannot do expert level buying with people who have not had expert level or even advanced acquisition training.

Even in the best of years, the training budget available from traditional funding methods has failed to meet the new demands of a professional acquisition work force. Improved training opportunities for the acquisition work force is more important than ever in the face of downsizing, retirements and changing workplace demographics. The proposed acquisition work force training funds would guarantee that much needed funds were available to help ensure that critical training requirements were being met.

Second, the establishment of a senior acquisition official will move acquisition from the back room to the board room within civilian agencies. Long recognized as a strategic function within the Department of Defense, the establishment of a senior acquisition official will provide a strong voice within agencies of the importance of horizontal acquisition. Through the office of a senior acquisition official, the essential alignment of the goals and objectives of the acquisition will be integrated with the agency goals and objectives.

Consider this: if agencies' heads asked how much of their budget, and by extension, their agencies' service delivery, was expended through contracts or grants, I think they would have a significantly different view of the role of acquisition in their organizations. One cabinet level department, budgetary object class data indicates that a full 60 percent of their budget authority is expended through contracts and grants. By any measure, the office that is responsible for this level of support must be viewed as a strategic asset.

Your proposed establishment of a senior acquisition official recognizes the strategic value of acquisition and places the appropriate focus for this function within an agency. We understand that implementing change of the magnitude necessary to alter the Government's acquisition processes to focus on results requires a multifaceted approach to identify and remove legislative and regulatory impediments, provide proper incentives, positive and negative, and hold managers responsible for results.

One thing is clear. This is not just a procurement problem. Acquisition is much larger than procurement. Implementation of a new service acquisition model that adopts and embraces the best practice of the commercial section requires the collective efforts of Congress, the administration, senior agency officials, program managers, requestors, contracting officers and industry. There must be top down support, bottom up implementation.

In closing, we at Acquisition Solutions commend Chairman Davis and the committee for proposing legislation that focuses on the vital role of service contracting. We believe that SARA is an important step to moving the Government to a new model for the acquisition of services.

Thank you, and I'll be happy to answer any questions the committee might have.

[The prepared statement of Mr. Mather follows:]

MATHER

Proposed
Services Acquisition Reform Act

Hearing: November 1, 2001

Written Testimony of Acquisition Solutions, Inc.

submitted to the

Subcommittee on Technology and Procurement Policy
Committee on Government Reform U.S. House of Representatives

This document is Acquisition Solutions' written testimony on the working draft legislation entitled, "Services Acquisition Reform Act," which we have had the privilege to review. This written testimony provides our views on the specific questions the Subcommittee asked us to address.

Comments on the overall concept of SARA

No market segment is more critical to government today than the services sector. Yet despite acquisition reform and the fact that services contracting has come to dominate federal buying, there has been little meaningful change in the way agencies plan acquire, and manage service contracts.

The fundamental nature of the problem is that "It takes the team." It takes Congress to remove impediments and set the legislative framework, the Administration to set goals, agencies to provide top-management support and unwavering attention, agency program managers to realize that the "right type" of services acquisition is the ticket to mission-critical results, and a workforce capable of this more difficult type of acquisition. The pieces are only just starting to come together.

We understand that implementing change of this magnitude requires a multifaceted approach to removing impediments and providing proper incentives, both positive and negative. However, no amount of policy or legislation can succeed unless the agency managers with the requirements and contracting personnel are capable of and willing to adopt and embrace these new practices and approaches. There must be top-down support and bottom-up implementation.

That is why the proposed SARA legislation is so important. It covers four of the five key factors for improvement of service contracting: educate the workforce, remove legislative and regulatory impediments, embrace experimentation and look for results, and move acquisition from the back room to the board room. That leaves one key factor for the executive branch: encouraging experimentation and promoting implementation. The motivation should be there.

Consider this: if Agency Heads asked how much of their budget, and by extension their agencies' service delivery, is expended through contracts or grants, we believe that they would view the role of acquisition in their organizations significantly differently. In one civilian agency where the top procurement official is several organizational layers below the Secretary, the answer is … a full 60 percent. In our view, that makes acquisition a boardroom issue and the acquisition organization an important strategic and mission asset.

We at Acquisition Solutions commend Chairman Davis and the Subcommittee for proposing legislation that focuses on the vital role of service contracting. We believe that SARA is an important step to moving government to a new model for the acquisition of services.

Key Issues Concerning Services Acquisition Reform:

Acquisition Workforce Training Fund: *What is your view of a proposed fund that would collect five percent of the total revenue generated by multiple award contract vehicles to establish a training program for centralized training of all acquisition personnel? What type of performance metrics do you believe we need to establish for acquisition training?*

In our view this is a positive and necessary action. First, we believe that training of the existing workforce is critical if meaningful change is to be achieved. Improved training of the acquisition workforce is more important than ever in the face of downsizing, retirements, and changing workplace demographics. Not only has the size of the workforce diminished significantly, but too few of those remaining have the appropriate mix of skills needed to meet the complex challenges of 21st Century contracting that include—

- Performance-based contracting
- Performance measurement
- Public-private competition
- Public-private partnering
- Commercial acquisition best practices
- Market research and strategic sourcing

Traditional funding for training has in the past proved inadequate to handle the demand and the need. This problem was exacerbated with the introduction of college degree and business course credit requirements for the 1102 (contracting) career field. Even in the best of years, the training budget from traditional funding methods has failed to meet the new demands of a professional acquisition workforce. The proposed alternative funding pool would assist in meeting the increased training requirements that we know agencies are and will continue to be faced with meeting. Issues such as fair and equitable distribution of funds as well as ensuring that the collected monies would not artificially "expire" will have to be addressed for the program to succeed.

We believe that a standard acquisition training program is essential to create a professional acquisition workforce across the Government. Acquisition is more than contracting, and the acquisition workforce is more than contract specialists and contracting officers. Program management and other non-procurement acquisition career fields should be included in any professional acquisition workforce initiatives.

We recommend that the Subcommittee and the Administration build on the excellent efforts the Department of Defense has implemented under the Defense Acquisition Workforce Improvement Act (DAWIA) and the establishment of the Acquisition Corps. We particularly like the designation of the three skill levels that recognize achievement of both educational and experience requirements. In fact, we see resumes indicating DAWIA level 3 achievements being listed along with college degrees and other educational accomplishments. We strongly believe the program should be adopted Government wide.

However, the objective of this Subcommittee and those who will be charged to implement acquisition workforce training should be to provide not simply more training, but more *effective* training to create an acquisition workforce of mission-focused business leaders. We note that a significant number of contracting officers have attended performance-based contracting classes, returning to their agencies with a stack of slides on theory, and a refuse collection and custodial service contract example and then asked to "try" performance-based contracting on a mission-critical program. If measured against the degree to which performance-based contracting has been adopted, the "success" of this training must be questioned.

We understand that GAO is studying commercial best practices for training. We are anxious to see the results of this review and hope that the recommendations will be quickly acted upon. The acquisition workforce of today and tomorrow must be prepared to use innovative techniques that produce better outcomes from federal contracts. Consequently, the focus in this area should not be simply on the "CON" 101 and 201-type courses, but more advanced courses that focus on developing the business relationships as well. This will require training to move away from teaching compliance with process and into a more case–study-based application of best business practices. The successful conduct of an acquisition should not be determined by compliance with regulations, but rather achievement of mission objectives.

There should be at least two types of metrics employed: program metrics and training source metrics. The first program metrics should be developed to benchmark the state of training in the acquisition workforce, so that improvements in the training profile can be measured. Training source metrics would measure the effectiveness of training delivered by both public-sector and private-sector providers of training services. We believe these should be defined by executive-branch program management.

Chief Acquisition Officer: *In your view, what role does the procurement executive or a chief acquisition officer need to hold within an agency in order to ensure that greater strategic planning is part of the overall acquisition process?*

We believe the establishment of a Chief Acquisition Officer represents one of the most important aspects of the proposed legislation. As noted earlier, acquisition is currently (and will become even more) a critical factor in an agency's ability to perform its mission and deliver service to the citizen. The appointment of a career Chief Acquisition Officer (CAO) at a level above the agency Senior Procurement Executive (SPE) and on par with the Chief Financial Officer and Chief Information Officer would bring acquisition out of the "back room" and up to the table of agency business leadership.

However, there is an important distinction in terminology we would like to make. "Acquisition" is a broader term than "procurement" or "contracting" and it encompasses a broader community. To be responsible for "acquisition" implies input into the agency's strategic and program approaches to meeting mission requirements. To be effective, the CAO must be on a par with and able to work with agency senior management to make such initiatives as performance-based service contracting a reality.

Congress has had the foresight to enact the Results Act (with implementation the responsibility of agency program mangers and CFOs) and the Clinger Cohen Act (with implementation the responsibility of agency CIOs). Why is it that years later, implementation has been spotty? We believe that it is because the "third leg of the stool" is missing. A properly positioned CAO would integrate the requirements of these laws through the acquisition process … to ensure that the agency's acquisitions are crafted around the results or outcomes tied directly to the agency's mission.

In the private sector, it is widely recognized that finance, information technology, and purchasing are three essential (and equal) legs of the stool.

According to the consulting firm McKinsey and Company, a single point of acquisition leadership is often the first clear signal of an organization's commitment to a strategic approach to acquisition. They report that these individuals report to the highest organizational level, sometimes to the chief executive and that the function must be a horizontal, integrated process encompassing most areas of spending as well as important users. To quote from the 1997 McKinsey Quarterly Report, "…Without a single point of leadership, it is difficult for an organization to establish, implement, control, and sustain the vision of a strategic acquisition function over time."

Other private-sector experts share this view. Bernard Trottier, Manager, A.T. Kearney, Ltd., reports, "Effective use of procurement is squarely positioned as a 21st century boardroom issue."

We point to what we consider to be the successful DoD implementation of their Senior Acquisition Official as a model for the civilian agencies. The Senior Acquisition Official is positioned at a level above the Senior Procurement Official. For example, within the

Air Force, SAF/AQ (Assistant Secretary of Air Force for Acquisition) is at a level above SAF/AQC (Deputy Assistant Secretary (DAS) of the Air Force (Contracting))

Regulatory review process: *Do you believe it is constructive to again take a review of the regulatory and statutory process surrounding acquisition to determine what barriers exist to reform?*

We believe that statutory and regulatory review should be a *continuous* process. While in our view, current law and regulation do not pose major impediments to most acquisition activities, we have observed that when activities attempt to implement new best practices and procedures they often run into impediments embedded in (or perceived to be embedded in) existing rules and regulations, many of which are outdated but "still on the books." However, we note that you cannot review existing guidance or direction without context. It is only by applying the guidance to a "real life" acquisition that embedded impediments (or perceptions) will become apparent.

To encourage innovation and adoption of best practices, we believe there must be an easy mechanism to identify and remove restrictions to adoption. With today's pace of change, any guidance over a year old should be suspect. Rather than wait for large formal review programs like the Section 800 Panel, agencies must be able to identify restrictions that impede their ability to improve their acquisition process and results as they are encountered.

For example, we are aware that some agencies attempting to implement share-in-savings arrangements were informed by their legal departments that unless their program was one of the pilot programs authorized under Clinger-Cohen they did not have legal authority to enter into a share-in-savings arrangement. Arguments that share-in-savings is a form of incentive contracting and authorized under general contracting authority were countered with the observation that debt collection and energy conservation share-in-savings programs all have specific authorities.

Additionally, we are aware that current funding rules impede share-in-savings initiatives. Budget and legal officials correctly point out that committing to share savings from future appropriations may run afoul of anti-deficiency provisions. If share-in-savings is to become the valuable tool that it may prove to be, impediments like these must be addressed.

The point of these examples is to show the types of issues that agencies must be able to identify to both OMB and Congress for either regulatory or statutory relief if they are to be successful in implementing new practices.

Finally, we would caution the Subcommittee that legislating best practices may not achieve the desired results. In our view, best practices must be carefully applied by the agency to the specifics of the acquisition. What may be a best practice in one instance may be a disaster in a similar situation. Additionally, legislating best practices runs the

risk that agencies will react as described above in the share-in-savings example — namely, that unless the specific best practice is sanctified by statute, agencies are not authorized to adopt that practice. For these reasons, we recommend the Subcommittee consider other methods of encouraging agencies to adopt best practices.

While we think that creative acquisition can occur within the current framework of law and regulation, there are many who do not hold this position. So yes, we believe it would be a constructive process to review the current regulatory and statutory process surrounding acquisition to identify barriers — *provided* the emphasis is on what barriers can be removed, as opposed to what guidance can be added.

Performance-based contracting: *Although the benefits of performance-based contracting are widely recognized, this type of contracting is still not sufficiently utilized. To what extent are agencies utilizing performance-based contracting for services? In Acquisition Solutions' view, what government-wide mechanism can be implemented to address these challenges?*

While effective use of performance-based acquisition is, in our view, not widespread, pockets of capability are developing. There are a number of factors that contribute to this state:

- Performance-based acquisition is not solely a procurement responsibility.
- The foundation for performance-based contracting is how the requirement is perceived and described, a job which is appropriately that of the program office with the requirement.
- Sometimes program offices refuse to go along with the contracting office in writing performance-based specifications.
- Performance-based contracting is harder to do than time-and-materials or level-of-effort contracting.
- Performance-based contracting requires a highly skilled, cross-functional acquisition team.

To implement a performance-based approach, it is important to understand the magnitude of the change involved and the limitations of the current civil service performance system that makes team based recognition difficult.

For the past 10 years, efforts to encourage adoption of performance-based approaches to acquiring services have focused on the contracting officer. In working with agencies, we recognize that contracting officers, who otherwise might be supportive of the concepts, have limited authority to direct needed changes to how the requirements are defined. The answer is not to give them that authority, but for agencies to task program officials with this responsibility.

While simple in concept, performance-based contracting requires that agencies radically change their methods of defining requirements from directing contractor performance to identifying outcomes. This change radically departs from standard "safe" practices. It requires a leap of faith that the process will work … that the contractors will understand the outcomes and on their own initiative will be able to determine *how* to meet the requestor's objectives. This is contrasted with the process where the statement of work is drafted in a manner whereby the requestor has considerable confidence that if the contractor follows the direction of the SOW, that they will produce acceptable results. Of course we all understand that these long-held beliefs often do not prove to be true, but still most people involved in the acquisition process believe them to be so.

In our view, the primary need is to educate the greater acquisition community. In fact, we are aware of and have participated on projects to contribute to this effort. The second need is to experiment and develop some success stories … and create an atmosphere where agencies want to "tell their stories."

With regard to educating the community, we are particularly pleased to have the opportunity to discuss our views on performance-based contracting, because we are championing a new approach: use of a Statement of Objectives (or SOO). The use of a SOO approach, as opposed to a traditional, tightly specified Statement of Work is, in our opinion, the ultimate in emerging best practices for performance based contracting. It focuses both parties on outcomes and results and places the appropriate responsibility for tasks where the expertise resides…the government for understanding the problem it is trying to solve and the constraints that exist and industry, for proposing creative solutions along with performance measures showing how their solution will achieve the government's objective. In short, it drastically reduces the upfront work required in the development of the requirements and it ultimately leads to a contract wherein the expert — the contractor (not the government) — performs the contract in a manner it has proposed (and the government has evaluated and approved), to be the most effective and efficient means of meeting the objectives. While the process requires additional effort and analysis during the evaluation and negotiation phases, the result is a more cost efficient and effective contract. In our experience, cost savings can result as well.

We are glad to say we are working with a number of agencies on these and other pioneering approaches to performance-based acquisition. They are clearly the progressive exception to the general rule, but it is a little too early to tell their stories.

Barriers to commercial practices: *In Acquisition Solutions' view, what barriers exist to federal agencies utilizing commercial practices through the current FAR Part 12 definitions and existing commercial services definitions?*

At best, the definition of commercial items is complex and difficult to understand. The proposed clarification of the "commercial items" definition with regard to services should

help those agencies that have carefully studied and seen their potential actions limited by the definition.

Similarly, expanding the types of contracts that can be employed will also assist adoption of commercial practices.

We do note that the issue of contract type is a regulatory impediment that is not based strictly on statute. FASA section 8002 (d) USE OF FIRM, FIXED PRICE CONTRACTS- directed that the Federal Acquisition Regulation shall include, for acquisitions of commercial items--(1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and (2) a prohibition on use of cost type contracts.

FAR 12.207 imposes significantly more restrictive language stating as follows:

> **12.207 Contract type.**
>
> Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.

But we make this observation: These legislative changes will permit regulatory changes that conform better to actual practices at work in the acquisition workforce.

Procurement reforms of the past decade have brought the federal acquisition process much closer to commercial practice. Yet areas remain that could be improved. The ones of greatest concern to Acquisition Solutions include:

- **A failure to understand what the real problem is:** Clarifying the "commercial items" definition with regard to services should help some agencies that have carefully studied and seen their potential actions limited by the definition. Similarly, expanding the types of contracts that can be employed will also help. While the definition is confusing, we believe the real issue is that it focuses primarily on pricing concerns. If competition exists, these concerns become moot. So the problem is not the definition *per se*. The real problem is competition. In our view, the current definition of commercial acquisition is driven solely by pricing concerns — the determination of fair and reasonable pricing — that do not exist if the requirement is competed.

- **An ill-prepared workforce:** In commercial practice, purchasing agents are not process experts, they are commodity experts. Because market research is an integral part of their job, purchasing agents know the market, technology, strength, weaknesses, risks, and pricing of their commodity. There is no need for cost and pricing data. They understand and manage the risk inherent in the

commodity and the risk caused by market conditions. In contrast, federal buyers are frequently not knowledgeable about the product or service they are buying. The answer is not simply *more* training, but more *effective* training to create an acquisition workforce of mission-focused business leaders. The acquisition workforce of today and tomorrow must be prepared to *use innovative techniques* that produce better *outcomes* from the contracts they award. This means a better understanding of the commodities and services they are buying and about the programs they are supporting.

- **Contractors as enemies rather than partners:** Unfortunately, while we were beginning to see more partnering and cooperative relationships between government agencies and their contractors, the push for public-private competition using the OMB Circular A-76 process has revived the "us versus them" environment. While that process is outside the scope of this hearing — and is one that is being addressed in other venues — we note this mindset as a barrier to use of commercial practices.

- **Fear of long-term contracts and relationships:** In the commercial world, companies favor long-term associations with their business partners. With the promise of a long-term relationship, suppliers have more incentive to absorb start-up costs and to invest resources in the hope of future gains. Authority for longer-term contracts — when outstanding performance warrants extending the relationship — is a good idea.

Share-in-savings: *Share-in-savings contracting is an innovative tool that would allow agencies to better leverage limited resources for a greater return on investment. This contracting tool is not widely utilized today. In Acquisition Solutions' view, why are agencies hesitant to using this contract mechanism? Are there impediments to share-in-savings contracts?*

While we consider share-in-savings the ultimate in performance-based contracting, there are a number of challenges that can help explain why, outside of energy and debt collection services, the program has not been widely adopted. Through work we performed for the General Services Administration, we identified 10 impediments to implementation of share-in-savings arrangements. These challenges include issues of—

- Authority
- Incentives
- Funding Issues
- Pre-Qualifying Candidate Projects
- Baseline and Measurement
- Marketplace Realities
- Risk
- Acquisition Methodologies
- Industry Acceptance and Support

- Contractual Vehicle

While no single impediment was considered fatal to implementation of a share-in-savings arrangement, the identified barriers must be considered and mitigated if the program is to be successful.

From a statutory perspective, the three primary challenges are—

- Authority, either lack of or the "chilling effect" of the Clinger-Cohen Act pilots, mentioned above.
- Incentives, e.g., keeping the savings, or what's in it for the agency to compel "going out on the limb."
- Funding issues, such as the Anti-Deficiency Act and multi-year contracting.

While share-in-savings is a great concept, it is our belief that the actual opportunities to implement the purest form of this technique will be limited. On the other hand, application of share-in-savings via existing techniques (like value engineering change proposals and incentive programs) offers significant opportunities for innovations and savings during contract performance.

Notwithstanding the fact that Acquisition Solutions advocates the appropriate use of innovative tools — actually *because* we advocate the *appropriate* use of innovative tools — we do not favor legislating the use of these tools. In fact, this approach can backfire. As we mentioned earlier, language in the Clinger-Cohen Act intended to promote the use of share-in-savings IT contracting through pilots authorized by OFPP actually had a "chilling effect" on such experimentation.

We believe it preferable to ensure there are no statutory or regulatory barriers to the use of these tools. Legislating techniques such as share-in-savings contracting, award-term contracting, and the like can lead to interpretation (by some) that if a certain technique is not mentioned in the FAR then it cannot be used. Even the existing FAR designations of specific contract types imply that other, more innovative, contract types are not permitted.

Rather than legislating practices, we believe that tools, innovative techniques, and best practices should be encouraged through leadership from the top echelons of the Office of Federal Procurement Policy and the Department of Defense on down through the ranks of all agencies and reflected in training metrics … and agency experimentation should be encouraged by Congress.

In summary, no market segment is more critical to government today than the services sector. That is why the proposed SARA legislation is so important. It covers four of the five key factors for improvement of service contracting: educate the workforce, remove legislative and regulatory impediments, embrace experimentation and look for results,

and move acquisition from the back room to the board room. That leaves one key factor for the executive branch: encouraging experimentation and promoting implementation.

We at Acquisition Solutions commend Chairman Davis and the Subcommittee for proposing legislation that focuses on the vital role of service contracting. We believe that SARA is an important step to moving government to a new model for the acquisition of services.

This completes Acquisition Solutions' testimony. Thank you again for the opportunity to present our views. We commend the members of this Subcommittee for undertaking the difficult and challenging task of reforming services contracting.

Acquisition Solutions™ (www.acqsolinc.com) is a small business established in 1996 with the express purpose of assisting federal agencies to identify and implement acquisition reform and successful practices. Unlike other firms, this is our core capability. Our business is to help federal agencies do their business.

Follow-up Questions from the Honorable Tom Davis
Prepared by Acquisition Solutions

Do you believe the current regulatory review process is sufficient to address existing regulations and statutes that are barriers to government pursuing private sector solutions?

We have a number of thoughts on this matter. First, we believe that statutory and regulatory review should be a *continuous* process, not an occasional grandiose effort. Rather than wait for large formal review programs like the Section 800 Panel — a year-long effort that generated 55 recommendations in four areas — agencies must be able to identify restrictions that impede their ability to improve their acquisition processes and move quickly to remove those restrictions.

Second, the higher the "codification" of the restriction — statutory, government-wide policy or regulation, or department/agency/bureau/office — the harder (or simply impossible) it is to remove the restriction. This argues that legislation should not used to solve or dictate operational matters.

Closely related to the above, any review of legislation or regulations must be made with a solid grounding in and understanding of what takes place "in the field." It is only when the rules are applied to real situations that problems show up, especially when multiple requirements are in force. For example, it would make sense, in establishing multiple award indefinite delivery, indefinite quantity (IDIQ) contracts, for agencies to be able to set some portion of the awards aside for small business. However, it is nearly impossible to structure this type of award arrangement given the current small business partial set-aside rules. The set-aside rules predate and do not presuppose GWACs, and when attempting to put the two together, the result tends to be an either-or "force fit" in the field. The rules take away the sensible "good government" approach of being able to award contracts to both large and small businesses under a single solicitation. (Note that some agencies are getting around this impediment by structuring the solicitation to conduct two separate competitions; one for full and open and one for small business set aside awards.

Finally, what we need is a better way to raise implementation problems and resolve them. The current regulatory review process is highly structured and controlled by the hierarchy of the existing bureaucracies. Sometimes public officials find themselves "toeing the (party) line" even though they may not personally believe in the position. We recall the story of former OFPP Administrator Steve Kelman sitting on the desks of journeymen procurement staff … asking them directly (and getting answers) about what wasn't working in the system. Much of what he learned in such informal sessions became the fodder for reform. So, we encourage your efforts and encourage your staff to work with the Administration to establish streamlined methods to identify and remove impediments to the implementation of acquisition best practices.

How will the preference for acquisition of commercial items affect the full and open competition requirement currently in place? How are the interests of government protected if the definition of commercial services is expanded? What other mechanisms exist to ensure that federal agencies can exercise the appropriate degree of oversight?

Regarding the first question, there are really two different issues. As interpreted in the Federal Acquisition Regulation, FAR Part 12 implements the preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 "by establishing acquisition policies more closely resembling those of the commercial marketplace." Commercial items may be purchased using the procedures and competitive standards related to—

- Simplified acquisitions and the test program for certain commercial items (FAR Part 13);
- Sealed bidding (FAR Part 14); or
- Contracting by negotiation (FAR Part 15).

As such, the preference for commercial items has no meaningful impact on the full and open competition requirements currently in place. The competitive procedures for acquiring commercial items are dependent upon which of the authorized competitive processes the contracting officer chooses to apply to the acquisition. For example, if the commercial item requirement is below $5 million, the contacting officer can choose to use FAR Part 13 Simplified Acquisition Procedures (with its associated competitive requirements). The contracting officer could also choose to apply FAR Part 14 Sealed Bidding or Part 15 Contracting by Negotiation with their full and open competitive requirements.

In the FAR today, with a solid foundation in statute, there are multiple standards of competition, only one of which is full and open competition prescribed under the 1984 Competition in Contracting Act. That standard applies to Part 14 and 15 contracting, while several different standards apply to the methods in FAR Part 8.4 and 13. This is a "good thing," as it enables agencies to craft the type of acquisition and degree of competition needed to meet the mission requirement. Full and open competition is *very expensive* for both government and for private-sector firms proposing on government work. It is a standard that would rarely if ever be used when industry is buying for its own use. *Full and open competition is not a standard commercial practice.*

Regarding the second question, to a large degree, the expansion of the definition of commercial services actually brings the definition more in line with current acquisition practices in many agencies … and certainly more in line with standard commercial practices. As to those points, we support it. Finally, regarding the latter two questions, we would argue that a definition alone will not necessarily protect the interests of the government nor ensure that agencies exercise proper oversight. In our view, these are issues related more to proper contract award and management which go to the context of

human resources, training, and performance, not to provisions of statute and regulation. In this regard, the oversight required for the acquisition of commercial items is no different than the acquisition of any other item or service.

In your view, what makes a contract performance-based? What would you consider an agency success in performance-based acquisition?

We like the following definition, which is an abbreviation of the one currently in the FAR: "*Performance-based contracting* means structuring all aspects of an acquisition around the desired outcomes of the requirement." We would add three (and only three) descriptors of performance-based contracts, as follows:

- Performance-based contracts describe the requirements in terms of objectives or required results rather than methods of performing the work.
- Performance-based contracts use measurable performance standards (related to quality, timeliness, quantity, etc.) and establish means to measure performance.
- Performance-based contracts have means to adjust payment to reflect degree of performance success.

We would also make it clear that a contract need ***not*** *be firm fixed price, as some currently think, to be performance based. Unfortunately, legislation has established such contracts to be number one in the order of precedence for performance-based contracts, an action that essentially dismisses or is ignorant of the complexities involved in selecting contract type. Now, it is how that statute is being implemented that causes us "double worry." Firm-fixed-price contracts that have been force fit to an inappropriate requirement can cost the government a lot of money as contractors seek to cover their risks.*

As to your last question, we have two measures of success in performance-based service acquisitions. The first is when agencies express their requirements in terms of the program's objectives, soliciting multiple mission-supporting *solutions* from the private sector … so the competition is not a competition of labor categories or hourly rates … *but of ideas, unique solutions and a reputation for performance!* Second, and most importantly, a contract is performance-based when the contract is structured so that both parties are focused on the result achieved. Success is accomplishment of the stated objectives.

How do you believe that SARA will facilitate greater strategic planning in the acquisition process? In your work with government agencies, are acquisition personnel trained to integrate Government Performance and Results Act goals throughout the process?

In our view, one of the most important aspects of SARA — and the one that is most likely to positively affect strategic planning — is the establishment of the CAO position in civilian agencies. In the Department of Defense, the equivalents of CAOs have been in place for nearly ten years. By and large, the defense acquisition corps is better trained and the planning and acquisition mechanisms are more sophisticated. They include use of integrated product teams (cross-functional acquisition teams established during the planning phase) and life-cycle acquisition approaches.

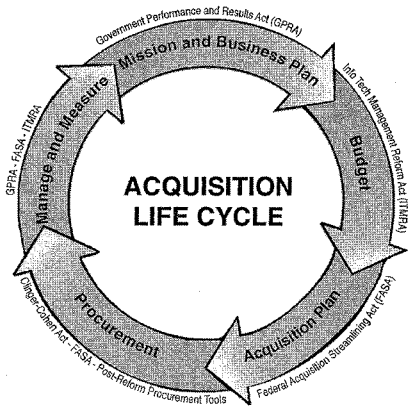
On average, we have seen little integration of GPRA and acquisition. The major exception is the Coast Guard's Deepwater project which is built on GPRA and is "light years" ahead of the typical acquisition today. Deepwater is an attempt to "buy the mission" and not simply replace capital assets.

We do not understand why organizations that expend the majority of their resources through the private sector, universities, and similar non-federal entities fail to recognize the criticality of having an experienced acquisition leader at an organization level of sufficient authority to implement these duties and successfully set the framework for managing these non-federal relationships.

Can you comment further on procurement versus acquisition? In your view, have federal agencies done a good job of understanding that concept?

Acquisition is not procurement. Acquisition is not contracting. However, procurement and contracting are part of acquisition. Acquisition is far broader and far more all-encompassing than simply the efforts of contracting officers and contracting officer's technical representatives.

Acquisition begins when an agency decides it has a performance need, not when a requisition, specification, or solicitation arrives in the contracting office. In agencies today, those decisions are made under the processes required by the Government Performance and Results Act (GPRA). The Information Technology Management Reform Act (ITMRA, part of the Clinger-Cohen Act) establishes important requirements for capital planning, investment review, and performance measurements for information technology used by or acquired by agencies. Finally, the Federal Acquisition Streamlining Act (FASA) requires cost, performance, and schedule goals for



every acquisition — and it requires that agencies achieve 90 percent of those goals. Together, these laws link tightly together the requirements of GPRA, ITMRA, and FASA with regard to mission and program performance planning, capital planning, acquisition planning, and performance management and measurement. *Under the law, all of these processes (and the people involved in them) are part of the acquisition life cycle.* See our illustration.

In response to your second question, by and large, no … agencies do not understand that concept. The FAR, unfortunately, contributes to the confusion by giving both terms the same definition! FAR Part 2 defines *acquisition* as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract." It defines 'Procurement' as "see Acquisition."

A senior executive level procurement chief in a civilian agency told us the following:

> "I have found there to be an ongoing sense of confusion. I would rather call it a confusion between Procurement/Acquisition and Program Management though. I continually see critics (e.g. GAO, OMB, Hill, IGs, etc.) routinely criticize an agency's implementation of a project focused on the procurement of the goods/services. At least in our case, it has almost always been a factor of defining needs — which is by definition a PM responsibility (e.g., committing to a requirement, establishing a sound configuration management to control the inevitable requirement changes, establishing a schedule for the contractor AND THE AGENCY to commit to AND funding the effort in a timely fashion. In each of the above cases, the PM shop is the lead and the procurement office is the facilitator. Usually, the auditor/oversight/investigator uses their access to the procurement system as a tool to find the problems with a project. Unfortunately, the procurement process gets caught up in the dirty bath water and gets more than their fair share of the blame. I can cite numerous examples where we have been given the proverbial pile of chicken x!y#z and turned it into edible stuff only to be criticized for not being perfect."

Understanding the difference between acquisition and procurement is better in defense agencies than civilian agencies, and it is probably better in contracting offices than outside of them. As an example, we once visited an agency Chief Information Officer — responsible (as are CIOs in other agencies) for his agency's IT and information architecture and investment review board process — and talked about our services. After listening for awhile, he said, "I don't do acquisition." Our stunned response? "You don't do anything but acquisition! Nearly everything you want to accomplish will be performed by a contractor."

Acquisition begins with mission and program needs and includes planning and budgeting. Many more people are involved than are aware they are involved. Clearly, there is much still to be learned in how the broader mandate for **ACQUISITION** wrought by statutory reform to date can be implemented *and* deliver results.

Have you looked at any of the smaller agency budgets for acquisition? In your experience does it fall below 40%, 20% of their total budget?

We do not have much hard data on other agencies, although it would make for an interesting GAO study. We would recommend that any study include widely recognized benchmarks dealing with various aspects of private sector buying, such as those available from the Center for Advanced Purchasing Studies at Arizona State University. Unfortunately, the Federal Procurement Data System (currently being 'reinvented') has been shown to produce unreliable data. However, there are other sources, including the Consolidated Federal Funds Report maintained by the U.S. Census Bureau, and official budget documents which can provide some of the data for analysis of this issue.

We believe a report of this type would show the increasing importance of acquisition within agencies and bolster your call for a CAO. *We compiled an illustrative table and have appended it to this narrative report.*

Generally, in agencies that have them, grant programs are a larger part of an agency's budget than is procurement. Combined with procurement, they are a significant portion of most agencies' budgets.

What is clear is that the dollar amount and percentage of services has increased over the last 25 years. As noted in the testimony, this is changing the very relationship between agencies and their constituents and is finding agencies increasingly reliant on contractor support.

Have you spoken with federal agency contracting officials about the difficulties they have in identifying funding for training programs? In your time with the Air Force, did you encounter difficulties in funding training?

We have, and they have spoken loud and clear that funding for training is inadequate. We quote one of our federal clients who spoke bluntly, "Congress/GAO/FAI have paid a lot of lip service to training the federal workforce to keep pace with today's challenges, but the truth is the money just isn't there." Clearly, there is frustration behind those words, but the message is clear. Front-line acquisition officials are feeling the pinch and are not happy about it. More to the point, they believe the lack of such funding will increasingly affect their ability to support the agency missions through acquisition.

There are significant inconsistencies across the government. Some agencies specifically identify training as a line item in their budget; many do not. As a result, in the words of

one of our clients, "training seems to be one of the first things to go when budgets are flat or reduced."

A second federal agency client told us, in her words, "Securing funding for acquisition training is almost impossible. In order to enable every acquisition professional to meet all of the training (non-college courses) requirements to meet the minimum standards, I would require about $300,000. In 2001, we received $21,000 ... The average annual amount spent on acquisition training is approximately $75 per person, which is a pathetically low number."

Improved training of the acquisition workforce is more important than ever in the face of downsizing, retirements, and changing workplace demographics ... not to mention changes in the complexity of the goods and services being procured! Not only has the size of the workforce diminished significantly, but too few of those remaining have the appropriate mix of skills needed to meet the complex challenges of 21st Century contracting that include–

- Performance-based contracting
- Performance measurement
- Public-private competition
- Public-private partnering
- Commercial acquisition best practices
- Market research and strategic sourcing

Regarding your last question, our experience is that the Air Force is an agency that is truly dedicated to training, and is, in fact, one of the best we have seen in the Government. The Air Force has taken the Defense Acquisition Workforce Improvement Act to heart and managed training around certification requirements, tracking individual contracting officers to make sure they have appropriate training for their position. For example, when Chip Mather, one of Acquisition Solutions' co-founders, was in the Air Force, he was unaware that he was missing a mandatory course for Level 3 certification. The organization identified the requirement and arranged for training.

How can the government guarantee that a share-in-savings program would not simply line the pockets of favored defense contractors?

In our opinion, the safeguards should be inherent in the process. There is significant risk and reward built into a share-in-savings approach and, one can be assured, these types of arrangements will draw oversight and audit due to their very nature.

Under a share-in-savings contract an agency's project or investment is funded up-front using *contractor* resources. Contractors are later paid (in part or in full) out of the savings, efficiencies, or increased revenues generated by contract performance, *if any*. If the cost data doesn't show any savings, the contractor doesn't get paid. There is clearly an incentive to perform.

Share-in-savings contracting is the ultimate in performance-based contracting, because the terms and contractor's performance tie directly to the contractor's payment. *If the anticipated savings or increased revenue don't materialize, the contractor is not paid.*

However, if the contract is properly structured, the program office's happiest day should be when they are having their picture taken with a large oversize check representing the contractor's share in the savings! If the contractor is paid out of a share in the savings, the Government should encourage the contractor's efforts. Consider the current success of debt collection and energy share-in-savings programs. The programs are structured so the contractors can make additional profits if they are able to collect debts or further reduce energy costs. The more the better!

If the share-in-savings contract is properly structured, the contractor's pockets cannot be "lined" unless they achieve truly superior results. If they achieve superior results, then the payment is made out of the larger savings pool. This is truly a win-win for both parties.

In summary, if the contractor performs and achieves efficiencies for the government, it should reap the benefit. The benefit is not paid, however, if the contractors do not deliver.◊

[Note the following pages summarize data we collected on the topic of "Agencies' Spending on Procurement, Grants, Salaries as Compared to Total Budget."]

Agencies' Spending on Procurement, Grants, Salaries as Compared to Total Budget FY-2000	Total Agency Budget[1]	Federal Salaries[2]	Procurement[2]	Grants[2]	Visual Comparison of Budgets for: ■ Grants Procurement Salaries	Visual Comparison to Total Agency Budget: ■ Grants Procure ment Salaries Other
Dept. of Housing & Urban Development (HUD)	$16 Billion	$663 Million	$1.1 Billion	$6.6 Billion		
Dept. of Health & Human Services (DHHS)	$394 Billion	$3.7 Billion	$4.5 Billion	$190 Billion		
Dept. of Agriculture	$72 Billion	$4.7 Billion	$3.5 Billion	$17.2 Billion		

[1] FY 2000 Budget Authority as presented in Table 5.2 of the Budget for Fiscal Year 2001, Historical Tables
[2] FY 2000 Consolidated Federal Funds Report at http://harvester.census.gov/cffr/index.html

Agencies' Spending on Procurement, Grants, Salaries as Compared to Total Budget FY-2000	Total Agency Budget[1]	Federal Salaries[2]	Procurement[2]	Grants[2]	Visual Comparison of Budgets for: ■ Grants ■ Procurement ■ Salaries	Visual Comparison to Total Agency Budget: ■ Grants ■ Procurement ■ Salaries ■ Other
Dept. of Interior	$8 Billion	$3.3 Billion	$1.4 Billion	$2.8 Billion		
Justice Department	$19 Billion	$7.1 Billion	$3.6 Billion	$3.9 Billion		
Dept. of Labor	$31 Billion	$938 Million	$1.3 Billion	$6.7 Billion		
Federal Emergency Management Agency (FEMA)	$3 Billion	$254 Million	$242 Million	$2.2 Billion		

Agencies' Spending on Procurement, Grants, Salaries as Compared to Total Budget FY-2000	Total Agency Budget[1]	Federal Salaries[2]	Procurement[2]	Grants[2]	Visual Comparison of Budgets for: ■ Grants Procurement ■ Salaries	Visual Comparison to Total Agency Budget: ■ Grants Procure ment ■ Salaries Other
Environmental Protection Agency (EPA)	$7 Billion	$1.2 Billion	$992 Million	$4 Billion		
Department of Education	$32 Billion	$306 Million	$899 Million	$26.8 Billion		

Mr. DAVIS. Thank you very much.

Professor.

Professor TIEFER. Thank you, Mr. Chairman. I'm Professor Charles Tiefer and the author of "Government Contract Law: Cases and Materials."

I'm going to launch into a couple of points on the bill. First of all, I have already, with respect to what the bill would do with respect to the Davis Bacon Act and the Service Contracting Act, I sense from what I've heard already today some tentativeness in legislating in this area. I think that tentativeness is well advised.

The history of successful procurement reform legislation is that it needs to be bipartisan. The particular sub-proposal there to exempt commercial subsidiaries on commercial contracts from these statutes is not simply a matter of trimming the way these statutes work, it's not just a matter of easing the paperwork burdens. It would make a partial repeal of these statutes, including when they applied to very large contracts affecting very large numbers of employees. I think it would be a polarizing and ideological proposal, and I think it would bring down on the bill the kind of opposition that would hold the bill back.

Second, and that's the only provision of the bill I'm saying that about, second, the bill has a provision that would say that if a traditional Government contractor creates something that's called a commercial business segment, this segment of the business would be treated as though it was selling commercial products, which I take to mean that it would be exempt from the Truth and Negotiations Act, be exempt from TNA.

There is no safeguard built into this provision. It is very easy for a traditional Government contractor, like a General Dynamics or Lockheed, to gerrymander its products to say, oh, let's create a division and we'll put all our small numbers of commercial products and our small numbers of privately sold products in there, and now it's a commercial division.

And on that basis, if I understand how the provision would work, that division would be free to engage in what would otherwise be defective pricing. Without safeguards, a provision like that is dangerous.

The third provision I would comment on in the bill, and here I am not speaking for consensus of the witnesses, to put it mildly, is that I express a number of cautious about share-in-savings programs. They have been tried in some areas, but in other areas they have not been tried. They have the potential to be very risky.

First of all, something that's not been said about them is that they are a back door financing provision. They are a provision by which a program that is not getting money from the appropriations, through the appropriations prices, gets financed by contractors. Under some circumstances, what that means is the Government is borrowing from the contractor, instead of, which is expensive, because contractors borrow in the marketplace, at higher interest rates.

Furthermore, there can be a long term lock in. Imagine if 10 years in 1991 we took a 10 year lock in contract and the contractor said, well, I will do better over the next 10 years than our current technology, which at that time would have been 286s or 386s. And

over the following 10 years, while in general arrangement one could have changed contractors, changed technology, the contractor would say, it's not economical for me, I'm still saving the Government over what it was doing in 1991 by keeping those 286s and 386s in place.

Well, 10 years later you don't want to be using the technology that you were using 10 years ago. So that's the risk with the long term lock in arrangement which is SIS.

I'm going to simply say in conclusion that I salute the Chairman, Mr. Davis, and I salute the Ranking Minority Member Mr. Turner for holding this hearing. There is a great tradition on this committee going back to Jack Brooks and Frank Horton, who to my mind wrote the Competition and Contracting Act in this room. Procurement reform legislation is a thankless task. You have to put in long hours. It's pretty tedious on arcane points. I'm appreciative that you're doing it.

[The prepared statement of Professor Tiefer follows:]

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TESTIMONY BEFORE THE
SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY
HOUSE COMMITTEE ON GOVERNMENT REFORM

by Professor Charles Tiefer

ANALYZING THE PROPOSED SERVICES ACQUISITION REFORM ACT

I thank the Subcommittee for the opportunity to testify on the "Services Acquisition Reform Act," the proposed bill on procurement of services. Currently, I am Professor of Government Contracts at the University of Baltimore Law School. I was Solicitor and Deputy General Counsel of the U.S. House of Representatives in 1984-95, where I took part in numerous Congressional oversight investigations of government contractor abuses. My writings on government contracting issues include a casebook for law students, GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 1999 & Supp. 2001)(co-authored with William A. Shook), and many articles, such as one in Legal Times of Washington this week about pragmatic government contracting since the September 11 attack, *Buying for Uncle Sam: Practical Mind-Set Now Prevails for Government Contracting* (Oct. 29, 2001).

That article praises Congress for putting ideology and partisanship aside and moving ahead with procurement legislating since that attack. I particularly applaud this Subcommittee, one of the chief centers of procurement expertise in the Congress, for not letting the events since September 11 deflect it from its important procurement legislating duties. The Subcommittee's effort is a praiseworthy one, all the more so because the Subcommittee will hear differing viewpoints about the best way to proceed.

Overall: More Caution About Abolishing Safeguards in a Quest for "Acquisition Reform"

Congress followed a consistent direction generally labeled "acquisition reform" in FASA in 1994 and FARA in 1996. This direction involves greater dependence upon the hoped-for competitive functioning of the market through "commercial" procurement practices. Acquisition reform advocates seek to replace traditional procurement safeguards such as formal competition under the Competition in Contracting Act (CICA), pricing regularity and disclosure under the Truth in Negotiations Act (TINA), and accounting consistency under the Cost Accounting Standards (CAS). I discussed this direction in *Congress and Commercial Procurement*, 32 Procurement Lawyer, Spring 1997, at 22 (co-authored with Ron Stroman, former committee counsel). The issue facing Congress today is how aggressively to push further with such commercialization and other acquisition reform. I suggest caution, for three reasons.

Questioning Overaggressive Acquisition Reform in General

First, FASA and FARA, and implementing regulations, went quite far. To go too much further too fast would risk stripping off valuable safeguards without the protection of an actual competitive market. These risks include excessive sole-source procurement from politically favored contractors, and defective pricing (for fixed-price contracts) or accounting games (for cost reimbursement contracts) in which the taxpayers are unduly taken advantage of.

During the past half-dozen years, evaluations by inspectors general, public interest groups, and the press have highlighted the downside risk - the risk of producing waste, abuse, and contractor profiteering at taxpayer expense through relaxation of safeguards. Proposals of further steps in the direction of relaxing more safeguards deserve careful scrutiny. I particularly commend to the Subcommittee's attention the superb recent comprehensive study of Professor Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001), and the report by the Project on Government Oversight, *Defense Waste and Fraud Camouflaged as Reinventing Government* (1999).

Pragmatism Since September 11

Second, there is particular reason for caution in the changed situation after the September 11 attack. As I discussed in my recent Legal Times article, procurement policymaking has necessarily taken a pragmatic turn of late, away from one-sided ideologies exemplified in certain variants on "acquisition reform." For example, the nation learned from September 11 that the supposed savings from having airport security screening services performed commercially, actually meant that we put a vital public protection in the hands of low-paid, high-turnover contractor employees, and suffered grievously as the apparent result.

Since September 11, the proper direction for procurement reform has been away from the one-sided ideology that, under the label "commercializing" or "acquisition reform," puts too much trust in dropping the public's safeguards in the contracting process. Instead, we need a more balanced quest for the public interest - which includes preserving, and only cautiously relaxing, the special protections found in government contracting against waste and abuse of public funds, and against failures in accomplishing public missions, particularly in contexts where a competitive market does not truly exist.

This is particularly true when the issue arises of creating exemptions from the established

laws about labor standards such as the Service Contract Act (SCA) and the Davis-Bacon Act (DBA). It is no secret that proposals to repeal, partially, these acts through exemptions typically arouse sharply divergent reactions on ideological lines. Such proposals arouse the same types of reactions that would arise from proposals for exemptions from the National Labor Relations Act or other long-standing, settled pillars of the existing system of federal labor laws. Since September 11, progress in procurement legislating has occurred by eschewing this kind of ideologically polarizing proposals in favor of pragmatism.

Services vs. Goods

Third, government acquisition of services poses special contracting concerns not found in purchases of goods. It is no accident that the federal government has routinely depended upon competition among private suppliers for goods from weapons to office equipment, and just as routinely depended upon either public employees working in-house, or acquisition methods that involve many additional governmental safeguards, for services. This is simply because there are more obstacles to a truly competitive market, and to other assurances of achievement of the public interest, in the acquisition of services than in goods.

Even in the private sector, there is much more of a national competitive market in goods, for we expect to see goods readily supplied and transported from one end of the nation to the other and even from overseas. Services, on the other hand, are less fungible and less transportable, more labor-intensive, and less able to be given simply-compared fixed prices. This basic difference between goods and services is why there is a nationwide Uniform Commercial Code for goods, but no U.C.C. for services; why there is a nationwide consistent pattern of law about sales of goods, but wide geographic variations in, say, legal stances as to the levels of wages and conditions for labor in the provision of services. The market for goods is often a uniform nationwide one; the market for services, and the established law for services, has historically varied from more-unionized states in the Northeast to less-unionized ones like Mississippi or Virginia. In sum, goods and services do not have the same kinds of national competitive markets; it is not surprising that procurement law has been more confident in relying upon informal market functioning as the safeguard in the procurement of goods, and relied more upon formal safeguards in the procurement of services.

SARA's Titles

The comments here will be organized title-by-title by the proposals in the draft for the Services Acquisition Reform Act (SARA). As previously stated, I commend this Subcommittee for pressing on with procurement legislating, and not being derailed by the events since September 11. Nevertheless, my comments will focus on aspects of SARA that raise concerns. In particular, Title III, as to "Contract Incentives," seems to offer sweetheart deals at odds with traditional protections for the fisc in general, and full and open competition in particular. Title IV, as to "Commercial Services Acquisition," seems to set aside the safeguards of TINA, against defective pricing, and CAS, against accounting game-playing, in contexts where there is no true market fixed-price competition as an alternative safeguard. And Title VI, as to "Socio-Economic Laws," would create exemptions from the labor standards legislation of SCA and DBA that are ideologically polarizing. These titles deserve close consideration.

Title II - Business Environment Reform

Section 204 would establish a committee with private sector representation to propose eliminating or modifying current regulations. Typically, "private sector representation" signifies contractor trade associations. Contractor trade associations already routinely enjoy a large voice in procurement policymaking. For example, the trade press has consistently reported about contractor trade associations in connection with the development of SARA. See Melanie I. Dooley, *Contractor Groups Draft Wish List for Rep. Davis's Service Acquisition Reform Act*, 76 BNA Fed. Cont. Rep. 307 (Sept. 25, 2001); *Rep. Davis Set to Introduce SARA Bill At Oct. 25 House Hearing*, 76 BNA Fed. Cont. Rep. 419 (Oct. 23, 2001)("(SARA) draws heavily on recommendations provided by industry groups, including the Contract Services Association and the Professional Services Council"). Such interest groups have the inherent conflict that their first interest in proposals for eliminating regulatory safeguards is, not unexpectedly, their own financial interest rather than the public interest. Of course, they urge that their self-interest and the public interest coincide, and this may be true - or not.

In any event, the voice that needs amplification in considering the elimination of fisc-protecting safeguards is not the voice of well-organized contractor trade associations, but other voices that balance the self-interest of contractors: the voices of the government's own experts on waste such as inspectors general; the government's experts on procurement law and policy in the government's internal academies such as the Judge Advocate General School and the Defense Acquisition University; private academics of diverse persuasions such as those in the George Washington University program on government contracting; public interest groups of diverse persuasions; and, both public and private labor organizations.

Title III - Contract Incentives

Excessively Risky Share-in-Savings

Earlier this year, I previously prepared a full-length critique of "Share-in-Savings," available through the website of the Project on Government Oversight, which is incorporated here by reference. The risks involved in Share-in-Savings contracts deserve more attention in the public discussion. "Share-in-Savings" contracts are a form of long-term backdoor spending which locks the government into potentially sweetheart deals to particular favored contractors. The SIS contract cuts out the appropriators and other overseers. It precludes the government from the often-superior alternative of making its own changes over time, either in how it does work in-house or in how it would contract-out the work. The supposed benefits of contractors investing their own capital are actually tantamount to the government borrowing inefficiently, through the back door, from contractors who must pay high interest rates to raise capital, instead of efficiently through the Treasury which pays a much lower interest rate to raise capital. This is a risky type of contracting. Legislation should tiptoe into it cautiously with limited and tailored pilot programs, not set it in full-scale motion and then just hope for the best.

Entrenching Incumbents: Longer Contract Terms and "Awards"

Traditionally, Congress strived for full and open competition, as in the Competition of

Contracting Act of 1984 (CICA) for which this Committee enjoys illustrious recognition on a bipartisan basis. CICA was one of the great products of the fruitful bipartisan procurement collaboration on this Committee of Rep. Jack Brooks (D-Tex) and Rep. Frank Horton (R-N.Y.). As CICA recognized, the government's problem is spurring competition and avoiding the tendency of procurement officers, if allowed to act too informally, to make sole-source purchases on a convenient but sub-optimum basis from those contractors who enjoy favor for one reason or another. In a situation where a contract could expire and be competitively recompeted, the incumbent is exactly just such a potentially favored contractor for whom contracting officers experience excessive temptations to continue a sole-source arrangement. However, the expiration of a contract should provide an occasion to spur competition over the successor contract. Not only might a competitor come along who offers the government a better deal than the incumbent, but simply having such competition keeps incumbents from accruing what would otherwise be, in effect, locked-in monopoly profits.

Lengthening the contract term, or giving advantages in recompetitions to incumbents, are in the opposite direction from CICA's full and open competition mandate. They either preclude all competition with incumbents (by a lengthened term involving the incumbent keeping the contract that much longer without recompetition), or favor the incumbent (the proposal of the incumbent getting 10% bonus points). I would ask the supporters of this proposal whether there is any hard evidence of excessive turnover in the recompetition of contractors. Absent such data, the GAO has often upheld protests of awards to incumbents, in recognition that incumbents already enjoy undue advantages in securing successor contracts. The need is to foster rather than reduce competition, by letting contracts expire, and then formally recompeting the successor contracts without favoring the incumbents.

Title IV - Commercial Services Acquisitions

Performance-Based Acquisition: Not a Panacea

The Federal Acquisition Regulation (FAR) already has provisions favoring performance-based contracting, in FAR Part 37. These were boosted by section 831 of the FY 2001 DOD Authorization (Pub. L. No. 106-398), through regulations published at 66 Fed. Reg. 22082 (May 2, 2001). There is a pilot program established by section 821 of the same act, which allows commercial item acquisition methods, within defined limits, by the DOD for performance-based contracting.

It is far too early to have results from this pilot program. Performance-based service acquisition has risks as well as potential benefits; loosely defined performance standards can result in contractors simply making savings by providing a service that meets the standards but is inferior for reasons not caught by the standards. Not to overstate the matter, but the private airport security screening before September 11 may well have been considered a commercial service that could have been procured on performance-based standards. In retrospect, the public now wishes such functions were performed either wholly by government personnel or with far more rigorous and comprehensive standards for performance. Expanding the DOD pilot program for performance-based contracting should await results from that pilot program.

Commercial Services Definition, and, Deeming T&M and LH Contracts to be Commercial-Type Contract Vehicles: Over-Broadening the "Commercial"

FASA and FARA struck a number of sensible compromises between allowing commercial procurement (FAR Part 12 procedures) in specific competitive contexts, and, not allowing it in other contexts. Specifically, section 8002(d) of FASA struck a sensible compromise in defining the types of contracts that may be used for commercial contracting, but not going so far as to do so for Time and Material (T&M) or Labor-Hour (LH) contracts unless the services have catalog or market prices. For years, contractor trade associations have continued to push to obtain what those sensible compromises withheld. See Richard J. Wall & Christopher B. Pockney, *Contracting for Commercial Professional and Technical Services: The Federal Acquisition Streamlining Act's Unfinished Business*, 76 BNA Fed. Cont. Rep. 76 (July 17, 2001)(a comprehensive and well-written recapitulation of contractor proposals in this regard). Now, this proposed section would extend commercial treatment in that direction.

T&M and L-H contracts are like cost-reimbursement contracts in that the main risks - of how much the service will cost, which depends upon how much labor time and how much materials will be used - are carried by the government, not the contractor. When the government carries the risk, and yet there is no established market price for the whole task, the government should be cautious about eliminating its safeguards and bargaining tools. What is at issue is by no means the elimination of hoary outdated government safeguards, but whether the government will have the tools to control costs effectively as to contracts for which the contractor virtually escapes risk.

In a leading recent protest, *Carlson Wagonlit Travel Inc. et al.*, Nos. B-3834089 et al. (Nov. 17, 1999), the GAO upheld the Navy's contracting for travel management services by requiring the providers share with the government the commissions they would receive from airlines and so forth. The contractors protested that theirs was commercial contracting and the Navy should not be allowed to use such overweening cost-control measures for commercial contracting. Notwithstanding this argument, the government won by showing some of the components of the contractors' services were not true "commercial items."

That the Navy won was a beneficial outcome. The Navy was not defending some outdated military specification; this was an ingenious and laudable effort to protect the fisc. The government might have lost that protest if this proposed legislative provision had been in effect, for the provision would relax the definition of "commercial services" and thereby allow contractors to bar such governmental efforts as interfering with commercial practices. Laudable government efforts at cost control should not be thwarted in this way.

Designation of Commercial Business Segments

Apparently this section caters to service-providing companies that would seek lucrative government services contracts, at the potentially inflated prices possible without TINA disclosures, and without meeting the criteria for commercial services or qualifying for exemptions. In fact, these could be sole-source contracts without significant market competition.

Worse, although the ostensible goal of this provision is presumably to induce more service offers and proposals from contractors which traditionally have undertaken only private and not government work, this provision could even apply to traditional government contractors.

Such traditional government contractors would simply lump into a so-called "commercial business segment" enough "commercial" work to qualify - say, all the (perhaps quite limited) work they do for the private sector, plus, all the work they do on a "commercial" basis for the government. For a traditional government contractor to create such a "commercial business segment" is as easy as for a state legislature to redistrict enough voters of just one party into a particular district artificially to creating a one-party "segment" of the state quite at odds with the character of the state or its nongerrymandered communities as a whole. Actually, it is easy for a traditional government contractor to "gerrymander" a commercial business segment since businesses have great latitude in drawing the lines for their business divisions.

It is not explained why a traditional government contractor would not set up such a division and then be free to engage in defective pricing (being freed thereby from TINA) or cost-allocation game-playing (being freed thereby from CAS). Take Lockheed Martin or General Dynamics or any traditional government contractor. Suppose it decides to sell fleet management services to supportive branches of the military - e.g., it acquires some subsidiaries to handle cargo shipment in support of some overseas deployments by the branches of the military who look upon that contractor with favor. The company would simply have to set up a division in which it put all its private sector and "commercial" work, have this qualify as a "commercial business segment," and then, sell these services from there - freed from the regular government safeguard of the requisite TINA disclosures. By this provision, the company would be freed to sell those services on a sole-source basis with potentially excessive prices, no longer restrained by having to show that the services themselves were commercial (market-priced). In short, creating a designation of "commercial business segments" which would then enjoy commercial exemption status could be tantamount just to repealing the statutory safeguards of TINA and CAS against waste and fraud.

Title V - Technology Access

Trade Agreements Act Exemption for IT

This may be a beneficial proposal. There is a well-known problem that contractors must certify compliance with the requirements of the Trade Agreements Act and its implementing regulations that products be U.S. made or from other compliant countries (excluding, say, China). The rules of origin, including the "substantial transformation" test, can be subtle and complex in this regard. Sometimes they do not so much serve the goals of the Buy America Act but are simply a trap for the unwary government contractor not easily able to be sure of their application to a product that contains some components from foreign countries. An exception was made in this regard for information technology in certain respects in 1997 and has been proposed for some commercial items in certain respects earlier this year. 66 Fed. Reg. 41561 (Aug. 8, 2001).

I have published a number of articles about trade agreements, see, e.g., Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 Minn. J. Global Trade 45 (1998). I would favor a statutory exemption that simply eliminated a snare for contractors, as long as it did not substantially undermine the Buy America Act. Much depends on the precise wording of the final provision. The Subcommittee might clarify where it stands if the prospect were of the U.S.

military ceasing to buy American-made IT commercial products in favor of products wholly made in China and not especially superior in price or quality.

Premature Legislating on Intellectual Property Rights

I have not been able to review details of the proposed section 502. What is especially unclear is why there is any necessity to do something statutory in this regard. The government has already considerably liberalized its intellectual property licensing system as to contractors, and is, even now, in the process of becoming further contractor-friendly in this regard.

Specifically, the Defense Department has spent years developing an Intellectual Property training guide, which will direct DOD contracting officers to contract with commercial companies for intellectual property on a contractor-friendly basis. (There is an excellent description of this effort in Martha A. Mathews, *DOD Adds 10 Core Principles to Second Draft of Intellectual Property Training Guide*, 75 BNA Fed. Cont. Rep. 117 (Jan. 30, 2001). Reports on successive drafts of the guide have been given to the ABA Public Contract Law Section by Holly Emrick Svetz of the law firm of Piper Marbury.). Presumably this Subcommittee could conduct an oversight hearing on pace and direction of that development as an alternative to enacting new legislation on the subject. Frankly, the aspect of intellectual property in government procurement that deserves more attention is the escalating cost of pharmaceuticals in the nation's health care programs, where the government invests large resources in research without our seniors receiving affordable prescription drugs.

Questions About Cooperative Program

On the face of it, section 503 would merely allow state and local governments to take advantage by a cooperative program of something like the GSA Multiple Awards Schedule for IT products. But, there is some question about the wisdom of trying to make national GSA schedules into a powerful vehicle for displacing local suppliers to state and local governments. I have noted the many reasons why state and local governments may prefer their own suppliers. Charles Tiefer, Free Trade Agreements and the New Federalism, 7 Minn. J. Global Trade 45 (1998). Imagine a minority IT business trying to get started serving in the centers of the large cities, or an IT business trying to get started in rural states, and to do so in part by competing for the local public contracts. Such businesses might well not find it worthwhile to qualify for the nationwide GSA schedules just in order to compete locally. They do not have to at present. They might have to, down the road, if this provision becomes law.

If the GSA schedules offered such tremendous discounts that states and local governments would benefit hugely from a cooperative program, that would be one thing, but I question whether the GSA schedule discounts are so large. It would be useful to know whether this is a proposal that is being sought primarily by the state and local governments themselves out of an expectation of large discounts, or primarily by the would-be national suppliers that would displace potential local competitors.

Title VI - Socio-Economic Laws

The Unwisdom of Backdoor Relaxing of DBA and SCA Requirements

Section 602 would prohibit flow-down of Service Contract Act (SCA) requirements to

commercial subcontractors on commercial contracts. Section 603 would prohibit flow-down of Davis-Bacon Act (DBA) requirements to commercial subcontractors on commercial contracts. Together, these might produce a considerable relaxation of labor standards. There are no limits in these changes as to the size of the companies or projects exempted from labor standards. It will be entirely possible, as commercial contracting increases, for large-scale construction projects - military warehouses, civilian courthouses - to be commercial, and for large parts of such federal construction work to be done by commercial subcontractors on commercial contracts. Apparently even these large projects would be relieved from the wage standards of the Davis-Bacon Act. Similarly, it would be entirely possible, as commercial contracting increases, for large-scale service contracts - janitorial, clerical, even information technology services - to be commercial and apparently thereby able to escape the standards of the SCA.

There is nothing about such large contracts for large projects being commercial that undoes the point of labor standards, which aim at the federal government's purchasing power not being used to depress wages or benefits. The federal government can either throw its weight into maintaining, or lowering, labor standards; DBA and SCA are for maintaining those standards; apparently these provisions would lower them. Merely because the service contracting is "commercial" does not make it impractical for service subcontractors to obey the DBA and the SCA. As discussed earlier in the testimony, there is a fundamental difference between the market for goods, and the market for services. Labor standards vary with the particular labor market in a particular region, very different in, say, the urban Northeast or the San Francisco Bay area vis-a-vis lower-wage parts of the South.

Even when subcontracted services are "commercial" - as in a construction or clerical services subcontract that is offered in a market-like way - the subcontractor who takes on a large-scale subcontract does not have practical difficulty obeying the substantive mandates that maintain labor standards in their locality. There is sometimes criticism of the administrative burden of the SCA, but the proposed SARA provisions do not focus in on relieving commercial subcontractors just from the asserted paperwork burden, but rather would substantively release them to undermine wages. The DBA and the SCA assure that competitions are not won by depressing labor standards from their levels in the locality of the contractor or subcontractor. These statutes fulfill their same functions of maintaining labor standards in a large-scale services subcontract, whether a commercial subcontract for a commercial contract, that they have traditionally fulfilled in their other settings.

We know that Congress has repeatedly rejected efforts through either the front or back doors to repeal DBA and SCA, as having support only from an ideologically limited bloc rather than broad pragmatic support. Right now the country faces an economic recession, the worst time of all to propose that the federal government should use its purchasing power to force a downward spiral of labor standards. In the wake of September 11, there is a strong advantage for Congress, in legislating procurement changes, to eschew ideological proposals that divide the country in favor of pragmatic solutions that can have broad support. The provisions to create exemptions from SCA and DBA should be considered in that light.

I thank the Subcommittee for the opportunity to submit this testimony.

Mr. DAVIS. Thank you very much.

Professor Tiefer, I'm going to start with you. I'm so glad you're here, because it's good, when you have everybody zigging, to have somebody zagging a little bit. I have a couple questions. I recognize from a Davis Bacon perspective politically what that does to any proposal. And we want to get a proposal through.

But I just would ask this. If we get a report from GAO and it talks about the thresholds, losing Government money and maybe they ought to be readjusted for inflation or whatever, and we don't move ahead because it's politically not viable, my question is, who's being ideological about it? Not that I'm not very pragmatic about it, and that I even want to reach it.

I want to see what the facts are, and I think we have that duty to the public, to lay out what the facts are before we proceed. But if nothing else, I'm a realist, and there are some very good things I think we can move through here and I can assure you I want everybody at the table before this thing moves. Not everybody is going to like every piece of it. That's why I appreciate your being here today.

Share-in-savings contracts, they can be risky, but I think they're riskier for the contractor, having sat on that side, than they are for the Government. Because the downside is really borne by the contractor. A tremendous upside could be gained.

But having been in local government and having been in charge, you're the No. 1 guy in a local government, which has the second largest county budget in the country. Share-in-savings allowed us to do some things we just couldn't have done otherwise, because we could not take the risk. These were savings we were trying to achieve. You do run the risk over time of maybe over-paying for something, if a contractor does it.

But I think there are some places where that is usable, but as you say, there are some places where it would be wrongly used. That's why there's a huge training component in this.

I guess the philosophical difference we have here is, do you trust your procurement officers to make these decisions, the guy in the agency buying for the agency, that Federal employee who is out there trying to do the best for their agencies, do we want to give them all the tools they need to save that agency money, or do we want to prescribe rules and regulations that certainly stop them from abusing it, but also stop them from doing some other good things for that agency in the meantime?

And listen, there has been a tendency, if you go back 150 years in Government contracts, to over-regulating and under-regulating. We never seem to get the right balance.

So I think your testimony is helpful. There should always be a cautionary note. There is no question that if you send contracting officers out there without the right training, without the right guidance, even if you give them additional tools, there are going to be abuses going on. People are human, they make mistakes. You have a buddy system, all these kinds of things.

And yet if you put too many restrictions on what they do, they can't get the job done. Finding that balance is important, and I hope you'll be a part of that dialog as we move through trying to get it. I'm not sure what it is. Please comment.

Professor TIEFER. Mr. Chairman, I doubt if I had put a proposal on the table and had said about it a bunch of criticisms that I could have achieved the philosophical expression that you just said. That's all I would say.

Mr. DAVIS. I appreciate you, and I'm glad you're here.

Mr. Wagner, if you were to eliminate the need for the Service Contract Act, to be flowed down to commercial subcontracts of covered primes, how are we to be certain that the service class of employees are not being taken advantage of in the areas of wages and benefits?

Mr. WAGNER. I don't think you can. And I think it would be a bad idea, quite frankly. I think it can become, it's the great equalizer, if you will, to make sure that workers and payments aren't being abused, and that you don't have contractors diving to the bottom, if you will, on the backs of their subcontractors.

Mr. DAVIS. OK. Dr. DiPentima, let me ask you, can you comment on the impact of the Trade Agreements Act on the IT community? Are IT companies forced to manufacture the same items in separate facilities because of the TAA?

Mr. DIPENTIMA. I think it's both ITAA's position as well as my own that really has to be looked at. When you look at the complexity of some of these products nowadays, not only IT, look at the automobile industry as an example. I think that really has to be looked at. I think we're limiting ourselves too much. I think your proposed bill has the right slant, the right view on how you should be examining it.

Mr. DAVIS. OK. For Mr. Wagner and Dr. DiPentima, would both of you comment on training within your companies? How do you keep your own employees current on the latest business practices, the latest technology, and how do you measure the effectiveness of that training?

Mr. WAGNER. We do this, do facilities support in a commercial marketplace as well. We're constantly learning from the other side of our business, trading employees back and forth, bringing those best practices. We have a data base of those best practices that we share among our project managers. Because there's always new and good ideas out there.

I think a lot of this is sharing of the information and the ways to do this. One of the problems I think we find, and problems in the Government, is we're trying to recreate the wheel all the time. I don't think we do as good a job of sharing good processes as much as we could.

Mr. DIPENTIMA. Mr. Chairman, we see training as a strategic investment for us, quite frankly. We like to believe we live on sort of the higher end of the food chain. We like to find complex problems and solve them. And you can only do that if you have very well trained people. We spend a substantial amount of our indirect funds on training people. Every person has a training plan. We try to have three or four training experiences for each person a year.

Not all of it is just in time training. We run our own internal SRA university in which our employees help train themselves. We have a wide variety of training videos, CDs, training labs and the rest. We put a lot of energy and a lot of our money into training our folks. I might add, unlike the days when you're on a large

CICS COBOL mainframe systems where you could train someone and maybe get 2 or 3 years out of that training, you're lucky if you get 90 days out of some of the training nowadays on the newest packages and the newest tools.

Mr. DAVIS. OK, thank you.

Professor Tiefer, let me just ask you, let me anticipate your reaction. Training is a very important component, but you still need a policeman, even if you train these contracting officers, to look over and check them, is that right?

Professor TIEFER. Actually I wanted to say, as someone who's in the business, as a professor of training people, I couldn't agree—training in Government contracting, which is what you're talking about. I did want to ascertain whether some of that money could be spent in law schools for training. As long as it's so, I'm a strong supporter of it. [Laughter.]

Mr. DAVIS. I don't know how to react to that. They seem to have done a good job of training you, that's all I can say.

I think it needs to be there across the board. Government contracts is not probably one of your most sought after areas in law school, is it?

Professor TIEFER. I've seen many people running in the opposite direction.

Mr. DAVIS. I never took a Government contracting course in law school. I went to the University of Virginia Law School. And yet I became general counsel for a billion dollar company, PRC. I wish I had taken it, it should be basic to understanding. Hindsight.

Mr. Soloway, can you further address the need for us to revisit the intellectual property law in order to improve Government access to the commercial marketplace? And why do you think it's appropriate, assuming that's it, why do you think it's appropriate to revisit IT issues legislatively?

Mr. SOLOWAY. I think intellectual property, Mr. Chairman, is one of those issues that falls into a broad category of technology challenges and technology issues that serve as primary inhibitors to a lot of the technology based from engaging with the Government. Let me just share a couple of examples with you.

If you go out and talk to the commercial technology base, particularly in the information technology arena, you'll find that a very large percentage of those companies will not do business with the Government, particularly in research and development and developmental areas, where they're not dealing with finished commercial capabilities. The principal reason they give is the risk of their intellectual property, which is the greatest capital that they have in their companies.

So what they have found in the history of Government, in the old days when Government was the principal owner and progenitor of technology, there was a practice of, the Government owned and controlled most of the intellectual property. Today when exactly the reverse situation exists where you have probably three quarters of the research and development in this country being done in the commercial sector, the Government is no longer the owner nor the principal customer for a lot of that intellectual capability, that technology. I think it requires us to re-look at the cultural and

other practices that have been driving Government procurement in this area for a long time.

Mr. DAVIS. All right. Mr. Mather, I'll start with you on this, but it's for everybody.

How are the interests of Government protected if the definition for commercial services is expanded? Are there other mechanisms to assure that Federal agencies can exercise an appropriate degree of oversight? Any thought on that?

Mr. MATHER. Yes, I think the definition of the commercial items, though, it goes really to which section of the FAR you're going to use. I mean, it literally just says, am I going to use Part 15, full and open competition, or am I going to use Part 12 with commercial items. Honestly, from a contracting officer perspective, which I was in the Air Force for 19 years, it really doesn't make that much difference to me. I can use the Part 12 procedures which give me commercial terms and conditions. I have the commercial changes clause, I have the commercial disputes and default.

The procedures are basically the same after that, though. I'm looking for competition. I'm looking to structure the acquisition in such a way that I can maximize the value. So while the definition will allow those folks that have read very carefully, you know, a lot of agencies are not making this distinction between labor hours and commercial items, those that do are going to the other sections of the FAR and applying those.

This will allow more agencies to use Part 12 commercial procedures, which will simplify with the commercial items.

Mr. DAVIS. And frankly, most contracting officers try to find competition because it covers them, right?

Mr. MATHER. Absolutely.

Mr. DAVIS. And that's just the nature, that you want to be covered.

Mr. MATHER. Exactly.

Mr. DAVIS. And yet, at the same time, there's a buddy system sometime, particularly if somebody's been reliable 10 times straight and has delivered for you, that you'd kind of like to nudge it their way. We get concerned, or I hear concerns sometimes on the schedules that you get on the scheduler or you get it on the GWACs, but then after that, you're not getting the competition after that, and that has been a concern that's been raised here. I'd like for anybody that would like to comment on that to do so.

Mr. SOLOWAY. Mr. Chairman, before we do that, I'd like to go back to Mr. Mather's point for a second. I think the other point on commercial services that's important to remember is that internal to the Government, it's important for the contracting work force to understand the authorities that are available to them. But Part 12 requires competition. It's not like using Part 12 you can escape competition. That's one of the prerequisites.

Mr. DAVIS. Right.

Mr. SOLOWAY. But it's also important to the outside world, as we try to access more commercial capabilities, that they have a clear understanding of what the rules of engagement are going to be, and the way in which those rules are, to the maximum extent possible, concurrent with best commercial practice, while still protecting the Government's equities.

I'll give you one quick example. When I was at DOD, I had a company, a very large company, come to see me. Their commercial division had decided to stop selling commercial products to DOD. This is under Part 12. The reason was an invoice which they said was one in a series they had submitted, I'm sorry, from the Government, where the Government had handed them a requirement for a commercial product under Part 12 to which they had added 15 contract clauses, several of which were statutorily prohibited under Part 12. All for an invoice worth about 59 cents.

So this company's general counsel——

Mr. DAVIS. That's a lot more than the penny.

Mr. SOLOWAY. Yes, it's a little bit more than the penny that Rene talked about. But someone in your position can understand the general counsels in this company said, this is just not worth it. It's putting us at certain risks and so forth. So I think clarifying all of these pieces is very important. The defense authorization last year gave much broader authority to DOD to define commercial services in a performance based environment and so forth. But we still have this need, I think, both for internal and external consumption and understanding, to clarify exactly what we're talking about.

Mr. DIPENTIMA. On your competition question, I actually see it opposite to that. We do a lot of work on the GWACS and IIQs and the rest. The fact of the matter is, the pressure is on me constantly to perform, not only because of the past performance provisions, but when you take a contract like CIOSP, with dozens of prime contractors and hundreds of subs, if I don't perform, there's no reason to come back to me on the next task order. They have such a large number of other companies and subs that they can select from.

So I think I feel I'm always in competition and always incentivized to do a good job. Because in fact, it is easy to replace me if in fact I'm not delivering what the Government needs.

Mr. SOLOWAY. And if you look at the statistics from the Federal procurement data system, in IT, 91 percent of all actions are competitively awarded. That's a pretty high percentage.

Mr. DAVIS. OK. Professor Tiefer, I think you suggested that one of the critical differences between the products and services market is the products market tends to be more competitive. And that one is more appropriate for the kinds of reforms we've made in recent years. Is that fair to say?

Professor TIEFER. That's correct.

Mr. DAVIS. Let me just ask some more of the reps, would they agree with that?

Mr. SOLOWAY. Statistically speaking, it's factually incorrect from a Government perspective. As I just said, if you look at the Federal procurement data system for fiscal year 2000, you find that the procurement of services is more competitive than the procurement of products by the Government. Something like 91 percent of information technology services are competitively procured, 80 some odd percent of total services are competitively procured. I believe, I don't have the figure with me, that something under 60 percent of products are competitive.

So I think in the Government market it actually is exactly the reverse.

Mr. WAGNER. And in our arena, with base operation support contracting, I can tell you, it's extremely competitive out there. There are a number of contractors out there that are making this marketplace very competitive and very tough to be in.

Mr. DIPENTIMA. Mr. Davis, I would say that there is one instance in which it might be interpreted as a lack of competition. But if I look at a competition coming out, let's say, on a GWAC, and I know that there's a particular company that has done excellent work, high customer satisfaction and has been doing a good job for that, that's not where I'm going to invest my B&P money. I'm not going to foolishly spend a lot of money to try to unseat someone who is in fact doing a very fine job for the Government.

Now, if other people feel like me and we don't particularly bid that task order, you could be perceived as being non-competitive, when in fact, it's the whole decision that was competitive and we decided not to compete on that.

Mr. DAVIS. That's not like the business that Mr. Turner and I were in, where if you're doing a fine job for the Government people still try to unseat you. [Laughter.]

But that's a different business altogether.

Osborn and Gaber, in their book, Reinventing Government, which is now a decade old, but was a good primer at the time, I know that Vice President Gore brought Osborn in to help him in the reinventing Government, make an observation about Government being mission driven versus regulation driven. In point of fact, you come to the point sometimes where you have so many regulations you can't get the job done.

One of the examples they used was Mayor Guiliani in New York, when he was first elected. He'd go into these neighborhoods. The one request he got uniformly as went across the city was for stop signs in neighborhoods, to stop the cut-through traffic, the kids were out there, the school buses, or playing ball.

So he'd go, oh, yeah, I'll take care of it. He'd go back to city hall, they'd put a memo out, they'd send it to their traffic people who would do the appropriate counts, they would weigh this against the international engineering standards for signage. He'd go back 6 months later and they'd say, Rudy, what happened to that stop sign? We never got the stop sign.

If you go through the regulations, you'd never get the stop sign. Anybody who's in local government knows, you'd just never get it. Because the purpose of the regulations is to move traffic.

So what Guiliani did is, he learned. He went out to these neighborhoods and he would always have a trunk full of stop signs with him in the back. And they'd go up and weigh it, and he'd just take it out and write the permit and give it to them. [Laughter.]

Now, I don't think we want to take Government so it's that mission driven, or you'd never be able to move traffic. There are reasons. But it's finding, as we said before, what's the right balance. And we have had a lot of acquisition reform over the last decade. It has been to some extent bipartisan. You had President Clinton and the administration working with, for the most part, Republicans in Congress, and some Democrats, working to get these in

there. We are trying to digest, I think they brought a lot of efficiencies.

I know for one thing they had fewer bid protests. Excuse me, but any time you keep the lawyers out of it, that's efficiency in my opinion.

So traditionally, you don't do procurement more than once a decade, at most. And here we are trying to followup. But the services side is an area in my opinion where we see more and more buying going in there. And as a result, I think sometimes more and more waste without the right oversight and without the right tools for our contracting officers to be able to get out there and get the best products, the best value if you can.

So I think we need to revisit this. I think we need to make some changes. We heard from the previous panel they're not sure how much should be legislative and how much should be directed from the inside, and we're going to work with the administration to do that.

But I also think we need to keep in mind what Professor Tiefer was saying, and that is, you can go overboard on some of this stuff. Without the appropriate oversight sometimes, the law of unintended consequences kicks in. We'll try to figure it out.

All your testimony has been very helpful, I think, in building the record for this, and we look forward to hearing further comments you want to make as we move through this process.

I'm going to now turn it over to Mr. Turner for any questions he has.

Mr. TURNER. Well, this has been an interesting panel. It does bring to mind a lot of issues that obviously we are going to have to deal with in trying to put together a reform package.

I think as the chairman mentioned, there are so many differences in contracting in the private sector versus Government contracting that we have to keep in mind that it makes it a very difficult area to work our way through. Inevitably, I think the standards of accountability that we are obligated to carry out in Government vary and differ from the private sector. We are concerned not only about cost and profit, but we are concerned with public safety and other issues that really represent the fulfillment of the public trust that those of us who serve in elected office and those who are appointed and service as acquisition officers have to carry out, which is a somewhat higher standard than perhaps is required of a business executive in trying to structure a deal or make a profit.

Also I guess it's true that a lot of public policy considerations enter into the contracting process, things that collectively we agree should be considerations that may have absolutely no relevance if you're in the private sector.

I was interested, Dr. Tiefer, you cited for us two articles that you commended us to take a look at. I wish you would maybe just give us a little sense of what those articles are all about. One of them I believe was an American University law review. It was one, I believe, entitled, "Fear of Oversight, the Fundamental Failure of Business-Like Government." And then the other one you mentioned was the Project on Government Oversight, "Defense Waste and Fraud Camouflaged as Reinventing Government" article.

Share with us a little bit about what we would learn if we were to have the time to review those two articles.

Professor TIEFER. I'm holding up a copy of Professor Schooner's article on "Fear of Oversight, the Fundamental Failure of Business-Like Government." Professor Schooner, this is something of a magnum opus for him. He did numerical studies showing a number of areas, one of which is the decline in the number of protests.

He has seen that the result of FASA and FARA and reinventing Government, things which he believes show a decline in competition and by the decline in protest disputes and things like that, a decline in the oversight, in the enforcement of public policy goals that are achieved through procurement law. It's a strong thesis. He's the co-director of the Government law program at George Washington Law School, which is in some ways the most distinguished Government contracting law program in the country.

So there's a great deal of attention being given to his thesis. And it calls for caution in going a lot further a lot faster in the same acquisition reform direction. He's not totally against going anywhere, he just says caution.

The other study, which I wont' talk about at length, the project on Government oversight pointed out a number of, actually it mostly picked up a number of General Accounting Office studies, inspector general studies which has shown that there's been in certain areas less competition. Some of the other abuses that we fear in Government contracting. I think the project on Government oversight actually submitted written testimony for today's hearing.

Mr. DAVIS. It's in the record.

Mr. SOLOWAY. Mr. Turner, if it would be all right with you and then the chairman, what I would like to offer is to take Professor Schooner's article and the POGO report and submit some comments for the record. And I've read Professor Schooner's article and engaged in extensive discussion with him about it, and frankly find the thesis less tenable perhaps than my colleague, Dr. Tiefer.

But what I'd like to do, if it's OK with you, for the record, is submit some comments on both Professor Schooner's article and the POGO report, which unfortunately also had some errors of fact and so forth and perhaps some misconceptions as to what's really going on, from my time at the Department of Defense.

Mr. DAVIS. Certainly. That would be fine.

Do you have the article with you? I can read it on the plane tomorrow. I'd be happy to read it.

Professor TIEFER. I will submit it for the chairman's reading.

Mr. DAVIS. That would be great. I will read it. Thank you very much.

Do you have any more questions?

Mr. TURNER. That's all. Thank you.

Mr. DAVIS. Well, we have a vote on, so this is a good time to conclude. Let me thank all of you for your input into the process. We look forward to working with you. We're going to keep the record open for 2 weeks, if you want to do anything to supplement what you said, any other ideas. We have other testimony that groups have submitted that will be made part of the record and that we will address as we move through.

I want to thank everybody for attending the subcommittee's important oversight hearing today. I want to thank the witnesses, I want to thank Representative Turner and the staff for helping to put this together. I think it's been a productive hearing and the proceedings are closed. Thank you.

[Whereupon, at 5:35 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

COMMONWEALTH of VIRGINIA

Office of the Governor

James S. Gilmore, III
Governor

Donald W. Upson
Secretary of Technology

December 7, 2001

The Honorable Thomas M. Davis
Chairman
Subcommittee on Technology and Procurement Policy
Committee on Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Congressman Davis:

In reply to your request of November 7, I am providing below responses to the seven questions you posed regarding compensation for Virginia state government's IT workforce. Each of your questions is indicated in italics, followed by our response.

(1) Please elaborate on the reclassification of Virginia's 1650 old job classifications into 300 new categories. How and why was this done?

In 1998, the Commission on the Reform of the State Compensation Plan was formed to recommend changes to the classification and compensation system in use at that time. With the assistance of a Technical Advisory Committee and an Employee Advisory Committee, compensation plans from other states were studied. The Commission's findings and recommendations were presented to the Governor and General Assembly in the 2000 session. The recommendation to develop a new compensation management system for employees covered under the Virginia Personnel Act was approved and the first phase of the new system was implemented September 25, 2000. Numerous committees were established to assist with implementation, including subcommittees who worked to develop the new career groups and role titles. A pay band system was selected, in part, because of the increased flexibility it allowed. The pay bands also provide some career growth that was important since a significant number of classified employees were at the top of the old pay grades. The new system also includes new pay practices that provide more options for compensation.

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(2) *What are value-added actions that you have taken in Virginia to ensure a better equipped IT workforce that perhaps could be applied to the federal government?*

The Compensation Reform initiative outlined above has done much to make state IT positions more competitive with regard to both starting salaries and opportunities for continuing additional compensation. Just as important in recruiting and maintaining the state's IT workforce are other monetary and non-monetary benefits now available for use at individual agencies' discretion. In addition to the state's excellent fringe benefit package (personal leave, hospitalization, life insurance, flexible spending accounts, and retirement and 457b deferred compensation plans) monetary benefits can now include individual, project, and team bonuses, and employee recognition awards under a variety of categories. Non-monetary benefits include flextime, alternate work schedules, telecommuting, and bonus vacation days. Such non-monetary benefits, to the extent that they help employees accommodate their own individual family and lifestyle situations, have proven effective in many cases in recruiting and retaining IT professionals who might otherwise be attracted to higher paying positions in the private sector.

(3) *Has the state of Virginia moved more towards IT outsourcing in recent years?*

Since the mid-1990's, Virginia has made increasing use of IT contractors as supplements to classified IT positions. This trend began in significant part as a result of efforts initiated by then-Governor George Allen to reduce the overall size of the state workforce.

We would make a distinction, however, between such use of contractors in supplemental positions and true outsourcing, where an entire function is turned over to a contractor for ongoing operations. Such IT outsourcing has not occurred frequently within Virginia state government. A significant exception is desktop management, where the Virginia Department of Transportation and several other smaller agencies have contracted for the provision of personal computers, related software, and support on a turnkey basis.

Has this been a partial response to your own difficulties in hiring and retaining state IT workers?

In large part, use of contractors as supplemental IT staff is the result of ceilings on classified positions. However, there are certain types of specific skill sets, more prevalent in some agencies based on their technology infrastructure, for which the state has particular difficulty in hiring qualified individuals within even the

expanded pay ranges provided under the Compensation Reform initiative noted above. An example of such a position is Oracle Database Administrator.

(4) *Does Virginia allow for highly skilled IT workers to continue to receive higher levels of compensation for their performance without forcing these individual performers to take on IT management functions? If so, how is this accomplished and does it affect workplace morale in any way?*

One of the shortcomings of the old classification system was that individuals with competent technical skills would at some point have to move to higher paying supervisory positions if they desired to see their compensation continue to increase. This forced some good technicians to take on management roles that they were either not interested in or did not have the capabilities to handle. One of the rationales behind establishing the current broader pay bands was to allow capable IT professionals to continue to be rewarded for their technical competence without having to move to a supervisory track. Such opportunities have had an overall positive effect on employee morale.

(5) *It has taken Virginia some time to implement reforms in the compensation and benefit structure for IT employees. What do you think are reasonable timeframes for federal departments and agencies to implement reforms such as those recommended by the National Academy of Public Administration (NAPA) in its report?*

It took Virginia about two years to research other state compensation plans and recommend the framework for a new compensation plan. That timeframe seemed to be appropriate. Implementation should probably take between one to two years using a phased in approach.

(6) *When Virginia was implementing its reforms, what legislation, if any, was necessary to achieve the results you have obtained so far?*

The Commission's recommendations were presented to the Governor and General Assembly and implemented via the 2000 Appropriation Act.

(7) *What are the priority IT skills for which you are currently hiring and training people? Have you found the need to bolster your acquisition and contractor management staff with more people or different skills or both?*

Specific skills needs vary greatly from one state agency to another. While human resources policymaking is for the most part centralized, recruitment and hiring is very decentralized, so specific data on statewide IT hiring needs is not available.

Generally, however, the types of skills most in demand appear to be those needed to develop on-line processes, including Web site development, Web front ends for mainframe applications, networking expertise, and security in a network environment.

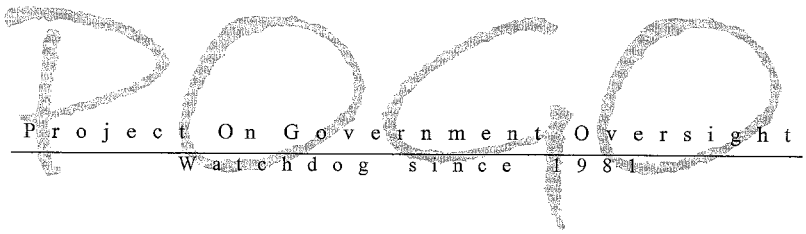
We have recently added several procurement staff members with specific backgrounds in IT but will continue to rely heavily on procurement selection panels made up of IT specialists from the agencies that will be using the contracts resulting from such procurements. Effective overall management of projects, including contractors that may be working on them, is an area where we see much room for improvement. We currently have initiatives underway to promote the spread of best practices in project management throughout state agencies and expect to implement formal project management training and certification in the near future.

If I can be of any further assistance in your investigation into this topic, please let me know.

Sincerely,

Donald W. Upson

Donald W. Upson



Written Testimony of Danielle Brian
Executive Director
Project On Government Oversight
before the
House Government Reform Subcommittee on Technology and Procurement Policy
Hearing on
"Moving Forward with Services Acquisition Reform: A Legislative Approach to Utilizing Commercial Best Practices"
November 1, 2001

The Project On Government Oversight (POGO) investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. Founded in 1981, POGO is a politically-independent, nonprofit watchdog that strives to promote a government that is accountable to the citizenry.

Thank you for allowing me the opportunity to challenge the misconceptions held by those Members of the Subcommittee who believe that Acquisition Reform benefits more than just the private sector. The outline of the legislation before the Subcommittee, replete with notations from industry lobbyists, would allow industry to repeatedly reach into the taxpayer's pocket for treats for themselves while the rest of the country is focused on defending our homeland.

In 1999, the Project On Government Oversight released a report containing the results of a lengthy study of the impact of Acquisition Reform during the Clinton Administration. The study found that acquisition reforms actually caused prices to **balloon by up to fifteen times** (or 1,532%) on spare parts for weapons produced by contractors like Boeing and Allied Signal, who were taking advantage of lax accounting and oversight. The full report can be found on our website at http://www.pogo.org/mici/money/camrpt.htm.

The General Accounting Office (GAO) reported last November that the much-touted "commercial" pricing system promoted in this legislation **caused spare parts prices to increase by 1,000% or more in just one year.** The GAO also found that among commercial parts ordered with "frequent demand," one out of seven spare parts (14%) experienced significant annual price increases of 50% or more in 1998. By comparison, only one out of twelve spare parts (8%) had such price increases in 1995.

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Our fears about the use of commercial best practices were again validated when we began to receive streams of documents relating to the Air Force's pretense that Boeing's C-17 airlifter was in fact "commercial." By thus categorizing the airlifter, the Air Force would be allowed to bypass important pricing oversight which is only intended to be lifted for items which are truly commercial and are therefore regulated by free market forces. A $232 million outsize cargo carrier with 173,300 lbs. capacity is clearly not a mass-market item which is sufficiently affected by the free market.

In the draft Memorandum of Agreement between the government and Boeing was Appendix "H-XXX", which was entitled "Reduced Government Oversight Role." This Appendix states, "This clause is intended to summarize the government's reduced oversight role on Lots 13-15 and the transition to greater reliance on contractor self-assessment and third party process certification. . . . The government shall be granted access to contractor generated data required for the performance of this contract in a format selected by the contractor, unless specifically stipulated otherwise in the contract. The government shall have the ability to review the contractor's accounting system solely for purposes of assessing contractor initiated Cost Accounting Disclosure Statement changes." This language would severely restrict the ability of relevant agencies to audit the records of a contractor.

In the "For Official Use Only" Program Overview, the intent of industry is even more specific: "The mandatory clauses of FAR Parts 12 and 15, the Cost Accounting Standards of FAR Part 31(sic). . . necessitate costs and procedures that commercial entities will find objectionable, overbearing, and unreasonable." The government should not waive regulations that require truth in negotiations, competition in contracting, and cost accounting standards simply because a contractor doesn't like them. If the contractor can't meet these basic requirements, the government should – and can – go elsewhere with its business. These regulations are the front line defense for taxpayers, and they must not be tossed aside. Claims that potential government contractors have chosen not to sell to the government due to these basic transparency rules are unsubstantiated.

The greatest concerns created by the proposed legislation as described in the "Section by Section Analysis" are:

Section 301. Revisions to "Shared Savings" Initiatives:

This section allows a contractor to share in the potential savings realized by its proposed cost-cutting initiatives. Projected contractor profits from this program are far more concrete than projected savings. Modifications to the Share-in-Savings provisions addressing for the GAO concerns will be critically important. Of particular concern will be how benchmarks will be established to prove that "savings" have in fact been realized.

Section 302. Authorize Longer Contract Terms:

This section would provide agencies the authority to grant long-term contracts, even up to 10 years. This anti-competitive provision seems particularly short-sighted in the field of IT, where companies and technologies are rapidly changing.

Section 303. Encourage Award Term Contracts:

This section would allow an existing contract to be extended without going through the normal competitive bidding process. This anti-competitive provision would allow favored vendors to have an unfair advantage over new capable contractors.

Section 401. Preference for Performance Based Acquisition:

While the concept of performance-based acquisition could be a great idea, in practice it primarily serves to allow for the removal of government oversight of contractors. In a case such as airport security, it is crucial that the top standards are adhered to at all times, for reasons of national security, regardless of the cost. By making a contract such as this performance-based, a contractor could decide that it is more cost efficient to cut corners on security and forego the performance bonus. Such substandard performance on highly important and complex functions could lead to disastrous outcomes. The highest standards need to be followed at all times, regardless of the outcome of a cost-benefit analysis by a contractor. It is unlikely that any performance/cost trade-off would ever be acceptable to the American public.

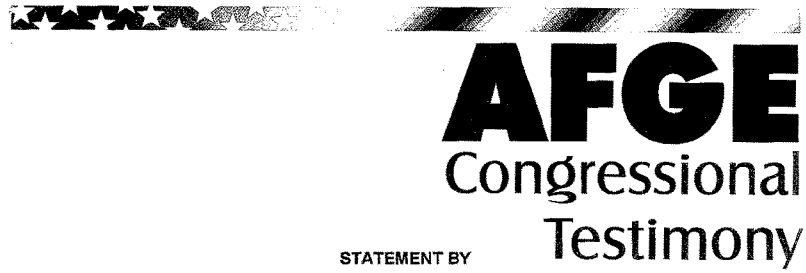
Section 404. Designation of Commercial Business Segments:

Perhaps the most troublesome provision in this act is the broadening of the already ridiculous definition of "commercial." The original legislation was intended to allow the government to bypass oversight for the acquisition of truly commercial items such as computers, office equipment or automobiles, where the forces of a free market are sufficient to ensure a fair price. However, even the current law does not require *actual,* but merely potential, sales of items to the public, nor does it require sales in a large free market. Section 404 would go so far as to make the products or services themselves irrelevant to their "commercial" status, but would simply *** whether the contractor has largely sold *any* product or service to non-U.S. government entities or has done business with the U.S. government under contorted definitions of "commercial" status. The bottom line? Little to no government oversight over pricing.

Section 602. Revisions to the Service Contract Act; part (c):

We agree with this provision if it means that other civil statutes would be strengthened to conform with the penalties and debarment clauses of the Service Contract Act. Alas, it is clearly more likely that the reverse is the intent. In fact, industry would like to make it even harder to be penalized or debarred for poor performance.

We are currently updating our 1999 report on the assault of Acquisition Reform on taxpayers, and will gladly provide it to the Subcommittee when it is completed.



STATEMENT BY

BOBBY L. HARNAGE, SR.
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

HOUSE GOVERNMENT REFORM COMMITTEE

ON

THE SERVICE ACQUISITION REFORM ACT

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Introduction
My name is Bobby L. Harnage, Sr., and I am the National President of the American Federation of Government Employees. On behalf of the American Federation of Government Employees, AFL-CIO, which represents more than 600,000 federal employees serving the American people across the nation and around the world, I appreciate this opportunity to offer the views of federal employees on the Service Acquisition Reform Act (SARA), legislation to be introduced by House Government Reform Subcommittee on Technology and Procurement Policy Chairman Tom Davis (R-VA) that would, among other things, simultaneously promote more contracting out of federal employee jobs without public-private competition and reduce the accountability of contractors to taxpayers. At the outset, I must point out that any comments I offer about SARA are inspired by the October 3 working draft, rather than any actual legislative language.

Whether to Wait for the Panel Apparently Depends On Which Side One Supports
Naturally, I was surprised to hear that SARA was being introduced. This legislation would obviously have a significant impact on federal employees and service contracting, both directly and indirectly. Contractors and their Congressional champions have consistently demanded that there be no changes to the public-private competition and service contracting processes until the contractor-dominated Commercial Activities Panel reports to the Congress next May.

In fact, an effort to make the Department of Defense's (DoD) service contracting more equitable to taxpayers and more accountable to taxpayers was opposed, at least in part, because it would have reformed the competition and contracting processes before the panel had reported. (Representative Neil Abercrombie (D-HI), was forced to gut his bipartisan measure when the House Republican leadership threatened to keep the defense authorization bill from going to the floor in exchange for a commitment to strengthen the "compromise" in conference.)

Indeed, an earlier effort by Representative Al Wynn (D-MD) to end the pork-barrel politics of taking work away from reliable and experienced federal employees and giving it to well-connected contractors was opposed, at least in part, for the same reason.

As Chairman Davis said on the floor, on July 25, during consideration of Representative Wynn's amendment to the Treasury-Postal Appropriations Bill:

> "Last year Congress mandated that GAO create the Commercial Activities Panel to study the policies and procedures governing the transfer of the Federal Government's commercial activities from its employees to contractors. This panel is going to report back to Congress in May, next year, with recommendations for

improvements. I believe that Congress should await the results of this review before we start to legislate on that issue."

Everything for Contractors, But Nothing for Federal Employees
SARA completely fails to address any of the service contracting-related concerns of federal employees. In fact, SARA profoundly undermines the principles of equity and accountability that constitute the foundation of AFGE's service contracting reform effort.

1. The TRAC Act and the Abercrombie amendment would correct the myriad problems in service contract administration. SARA, on the other hand, would eliminate federal oversight over a significant amount of service contracting by arbitrarily designating it as "commercial."

2. The TRAC Act would help the Congress to understand and eventually eliminate the human toll from contracting out caused by undercutting workers on their wages and benefits. SARA, on the other hand, would undermine protection for contractor workers by further restricting the application of the Davis-Bacon Act and the Service Contract Act.

3. The TRAC Act would ensure the use of public-private competition before work is given to contractors. SARA, on the other hand, would encourage agencies to use share-in-savings contracts to take work from federal employees and give it to contractors without public-private competition.

4. The TRAC Act would ensure that work performed by contractors would be subject to the same public-private competition that federal employees experience. The primary objective of SARA, on the other hand, apparently, is to shield contractors from competition, period, whether public or private.

I will now specifically address some areas of concern.

What Really Needs to be Done to Help the Acquisition Workforce
It is fashionable to blame the acquisition workforce for the serious problems in service contract administration. Of course, blame for those problems is more properly attributed to the Congress and the Pentagon as well as the acquisition reform effort.

Although the number of procurements has actually risen, Congress and the Pentagon have slashed the acquisition workforce in half over the last several years. The House defense authorization bill, in Section 901, would slash the acquisition workforce by an additional 13,000. Even DoD has belatedly come to the realization that it has cut far too deeply into its acquisition workforce. If the Subcommittee wishes to help the DoD acquisition workforce accomplish its

important work, I would urge the Chairman to lobby his House defense authorization conferee colleagues in support of the flexible moratorium on further such downsizing, as was called for in Section 812 of the Senate bill.

The flexible moratorium would also reduce contract administration costs to the taxpayers. The DoD Inspector General (IG) reported that seven different acquisition organizations report "increased program costs resulting from contracting for technical support versus using in-house technical support." Such wasteful contracting was made necessary because of the downsizing of the civilian acquisition workforce.

The acquisition reform effort has too often handcuffed DoD service contract administration with its "trust-but-don't-verify" mentality. With respect to service contracting, acquisition reform frequently means little more than get as much work out to contractors as soon as possible (i.e., don't worry about contract administration, retention of in-house capability, public-private competition, or private-private competition, as long as the work is being contracted out). The results are predictable: the worst IG audits in years, a "human capital crisis," a profound absence of public-private competition, and even a serious dearth of private-private competition (which has now caught the attention of the Bush Administration and the Senate Armed Services Committee).

It is possible to encourage innovative business practices in procurement without opening up the Treasury to private sector raiders. Indeed, some acquisition reform efforts have been successful. However, as former IG Donald Mancuso noted, "no major acquisition cost reduction goals have yet been achieved" by acquisition reform and some acquisition reform proposals "are really nothing more than, `Integrity of the marketplace,' and `Competition will somehow eventually result in the best product at the best price.'" In other words, service contract administration is unlikely to improve absent a properly-resourced commitment to hold contractors accountable to the taxpayers, even if that commitment is "contrary to acquisition reform" or an obstacle to "the revolution in business affairs." Unfortunately, SARA, which is as much a contractor wish-list as a piece of legislation, would emphasize the worst aspects of acquisition reform.

SARA would provide increased training for acquisition personnel. This is commendable. The DoD IG, in his Senate testimony last year, noted that *none* of the contracting personnel interviewed had received training related specifically to contracts for services, let alone for professional, administrative, and management support services.

At the same time, the legislation includes a government-contractor exchange program that is unnecessary, rife with potential conflict of interest issues, and ultimately a way for covetous contractors to "case the joint" for future outsourcing possibilities when they're supposedly doing the people's business. We need to

avoid quick-fix solutions, like bringing contractor personnel into federal acquisition jobs for brief periods of time. Although daunting, we must start rebuilding a trained, dedicated, and *committed* in-house acquisition workforce.

Finally, I note that a serious issue of concern for the acquisition workforce has been arbitrary and unnecessary credentialism. Chairman Davis led the effort against arbitrary and unnecessary credentialism as it applied to information technology contractor workers. We hope that the Subcommittee will begin to devote attention to arbitrary and unnecessary credentialism as it affects federal acquisition personnel.

Does the World Really Need Another Contractor-Dominated Panel?
Very serious questions were raised about the independence of the Cost Accounting Standards Board Review Panel, a contractor-dominated entity that several Republican and Democratic Senate lawmakers insisted was rife with conflicts of interest. The Commercial Activities Panel is another contractor-dominated entity that was established to reduce the momentum for legislative efforts to ensure full and fair public-private competition. Trying to settle arcane and difficult regulatory issues behind-closed-doors with yet another contractor-dominated panel is clearly not in the interests of taxpayers.

What About Standing for Federal Employees?
The House Government Reform Committee's Republican leadership has opposed efforts to ensure that federal employees have fair and full opportunities to compete in defense of their jobs on the grounds that such pro-taxpayer safeguards would not promote expeditious outsourcing. If that is the case, one might well ask why it is desirable "to stay a contract award if a contractor has filed an agency level protest." Perhaps this is a matter of whose ox is getting gored. When a contractor's interest is at stake, a valuable procedural safeguard is needed. When it's only a federal employee's interest, that procedural safeguard becomes a worthless delay.

Nevertheless, this is another issue where a little equity on the part of the Subcommittee would be appreciated. While the SARA legislation would expand contractors' bid protest rights, I urge the Subcommittee to remember that federal employees have no bid protest rights. Is it fair for only one side of the federal government's workforce to have standing to contest agency award decisions before the Court of Federal Claims and the General Accounting Office? Given the interest in using SARA to build upon the already-existing legal rights of contractors, I strongly urge the Subcommittee to ensure that federal employees also possess standing to contest agencies' award decisions.

Share-in-Savings: More Contracting Out Without Public-Private Competition
Instead of addressing the worst problem in contemporary service contracting—contracting out the work of reliable and experienced federal employees to politically well-connected contractors without public-private competition—SARA would actually make it worse, using a method almost completely untried outside

of the energy-savings context and one that a leading procurement law authority has called "excessively risky."

Worse, share-in-savings contracting, which essentially encourages agencies to borrow capital from the private sector at high interest rates, are unnecessary. There's no need to forfeit any savings to contractors. Some outsourcing initiatives like refurbishing military housing, rebuilding utilities, and share-in-savings contracts generally have been justified on the basis that the federal government can not pay for the significant associated costs without leveraging private sector capital. Such endeavors often require large amounts of resources up front but can generate long-term efficiencies and savings.

However, to maintain control over expenditures, the Congress generally requires that the agency in question have budget authority for the full cost at the time the endeavor is undertaken—regardless of when the benefits or outlays occur. Because that agency generally must absorb the entire cost of these relatively expensive acquisitions in a single year's budget, such endeavors may seem prohibitively expensive despite their long-term benefits. The adoption of a separate capital budget would allow the federal government to avoid undertaking outsourcing merely in order to overcome short-term funding shortfalls.

Capital budgeting would allow agencies to outsource for purposes of efficiency, rather than merely to gain access—often expensive, especially in the case of share-in-savings contracts—to private capital. At the same time, the adoption of a separate capital budget is not intrinsically anti-contractor because the expanded spending authority can be used for outsourcing as well as for in-house performance.

Can What's Wrong for Federal Employees Be Right for Contractors?
Shortly before this year's defense authorization conference began, Representative Abercrombie met with a Republican leader on the House Government Reform Committee about the commitment that had been made to strengthen the "compromise" over his amendment in conference. According to Representative Abercrombie, that lawmaker insisted on watering down further an already watered-down "compromise," specifically by striking a provision that, borrowing from OMB Circular A-76's minimum cost differential, would require contractors to show a 10% cost savings through a public-private competition process before taking work from federal employees. One can imagine my surprise when I learned that SARA included a provision that would allow contractors that same 10% advantage when their contracts come up for renewal. Why do incumbent contractors deserve an advantage but incumbent federal employees do not?

Reducing the Accountability of Contractors to Taxpayers
A series of recent reports and audits demonstrate that service contractor waste, fraud, and abuse is, after several years of acquisition reform, worse than ever. Fear not, taxpayers! Contractors have the solution: more acquisition reform. If at first a policy does not succeed, fail, fail again. SARA would seriously compromise the ability of the federal government to uncover and prevent such waste, fraud, and abuse by categorizing contracts, services, and even entire business segments as "commercial," thus precluding the use of audits, the Truth in Negotiations Act, and Cost Accounting Standards.

The Bush Administration is committed to transforming the civil service into a spoils system for politically well-connected contractors by competing, converting, or privatizing at least 425,000 federal employee jobs over the next four years. At a time when we need to be imposing comprehensive, government-wide systems to track service contractor costs, SARA would weaken even further the federal government's capacity to track such costs.

Exacerbating the Human Toll From Service Contracting
SARA would raise the thresholds for application of the Service Contract Act and the Davis-Bacon Act and prohibit their flow-down to commercial subcontractors.

The federal government should be a model employer, not a sweatshop employer. The Economic Policy Institute (EPI) recently reported that "The federal government saves money by contracting work to employers who pay less than a living wage. Even the federal government jobs at the low end of the pay scale have historically paid better and have had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers...Further research, such as a survey of contracting firms, is needed in order to know more about these workers and their economic circumstances."

Also according to EPI, "In 1999, only 32% of federal contract workers were covered by some sort of law requiring that they be paid at least a prevailing wage, which is usually defined as the median wage for each occupation and industry. But even this minority of covered workers are not guaranteed a living wage under current laws. For example, the Department of Labor has set its minimum pay rate at a level below $8.20 an hour for the workers covered by the Service Contract Act in 201 job classifications."

Clearly, the problem is not that prevailing wage laws are applied too often; rather, the problem is that they are not applied often enough. Mr. Chairman, shouldn't we instead eliminate savings from contracting out that are generated by undercutting workers on their wages and benefits by removing wages and benefits from the competition process?

Such efforts are already underway at lower levels of government. For example, state agencies in Colorado, when comparing costs between public employees and the contractor, "shall not include any savings to the state attributable to lower health insurance benefits provided by the contractor." The removal of wages and benefits from the competition process ensures that any remaining contracting out undertaken will truly make government more efficient.

Conclusion

Considering the interests at stake for both federal employees as well as contractors, it is as highly regrettable as it is extremely disappointing that SARA takes a wholly and indisputably one-sided pro-contractor approach to dealing with federal service contracting. I strongly urge the Subcommittee to emphatically reject SARA.

WORKING DRAFT

SERVICES ACQUISITION REFORM ACT

Section by Section Analysis

TITLE I
WORKFORCE INITIATIVES

101. Acquisition Workforce Training Fund

The government still has not devoted adequate resources to the most critical element of successful reform: the training and education of the acquisition workforce. Training clearly has not kept up with the rapidly expanding technology and services capabilities that the contracting officers have to buy. In the past, little attention has been focused on training of the workforce in service contracting, which now represents at least 43 percent of federal contracting expenses.

Section 101 would establish an acquisition workforce training fund to be utilized by the Federal Acquisition Institute (FAI). A percentage (5-10 percent) of the fees collected by federal agencies for government-wide multiple award contracts and/or purchases from the GSA schedules would be used for this workforce training fund.

102. Government-Industry Exchange Program

Section 102 would establish a government-wide program for the acquisition workforce. This program would be closely modeled on the H.R. 2678, the Digital Tech Corps Act of 2001, which creates an information technology exchange program for federal employees.

103. Acquisition Workforce Recruitment and Retention Pilot Program

The government is currently facing potentially high retirement numbers within its acquisition workforce within the next five years. In addition, the nature of contracting has changed significantly. The government must attract a new talent pool to right-size the acquisition workforce in order to meet its increasingly complex procurement needs.

Section 103 would build on recommendations put forth in the recent Information Technology workforce study conducted by the National Academy of Public Administration.

104. Authorization of Telecommuting for Federal Contractors

TITLE II
BUSINESS ENVIRONMENT REFORM

SUBTITLE A – BUSINESS MANAGEMENT REFORM

201. Establish a Chief Acquisition Officer

Section 201 would establish a Chief Acquisition Officer position within civilian agencies that would report directly to the Head of Agency; the Department of Defense already has such a position – created under the Goldwater-Nichols Act. The CAO position would be held by a career employee, who is a member of the Procurement Executives Council.

202. Increased Role for Defense Contract Management Agency

Historically, the military departments have retained contract administration responsibility for contract services performed on military installations. The size, complexity and dollar value of service contracts is growing as a result of base operating support service contracts. The Defense Contract Management Agency (DCMA) was created in 1990 to provide a single government "face" to industry for contract administration. General service contractors, however, currently are confronted with a situation where there is no uniformity with regard to contract management, as each Service, and in most cases, each buying activity, provides such oversight (under FAR Part 42) in its own manner.

Section 202 would require the Defense Contract Management Agency to be the contract administration office for service contracts performed on military installations valued in excess of $1 million. This legislation is aimed solely at large base operating service contracts.

203. Study on Horizontal Acquisition

The concept of horizontal acquisition has not been totally fleshed out. Yet, such integration promotes vital cross-functional involvement in acquisition where all relevant offices and disciplines work together in a team or partnering format.

Section 203 would direct and authorize funding for the Office of Federal Procurement Policy (OFPP) to complete a study utilizing any necessary contracting authority for assistance in completing the work within 9 months. If necessary, the OFPP may use independent consultants to assist in the review. This study would look at the laws, executive orders and regulations that hinder the performance of acquisition functions across department/agency lines.

204. Establish a Regulatory Review Process

Despite several years of acquisition reform – the 1994 Federal Acquisition Streamlining Act, the 1996 Clinger-Cohen Act and the FAR Part 15 rewrite – many regulations still exist that inhibit greater use of commercial practices.

Section 204 would set up an Acquisition Regulatory Review Committee to review all federal acquisition regulations. The intent of the committee would be to determine the necessity of a regulation, the interoperability between regulations, and the proper implementation of regulations that are essential to the conduct of government contracting.

The Committee, established by Section 204, would include representatives from the government and the private sector. Within a year after date of enactment of this Act, the

Committee would report to the Committees on Government Reform and Armed Services in the House and the Committees on Governmental Affairs and Armed Services in the Senate.

205. Bid Protests

Section 205 would allow for a stay of contract award if a contractor has filed an agency level protest.

SUBTITLE B – PAYMENT TERMS

206. Revise Payment Terms

The main expense for a contractor providing services, as opposed to "products," is labor costs (*e.g.,* salary, benefits, and taxes). These expenses are incurred every week, or biweekly, when contractor personnel are paid. The government often waits the full allowable 30 days (or longer) after receipt of a contractor's invoice to pay or reimburse the contractor. As a result, contractors must "carry" this investment in working capital that ultimately costs the government in higher profit margins charged by the contractor. These higher margins are charged because contractors need to earn an acceptable rate of return on this increased investment.

However, if invoices were paid faster the contractors could lower their profit margins and still earn an acceptable return on investment. Lower margins charged by contractors would result in lower costs to the government for services.

Section 206 would apply to all electronic invoicing of service contracts. Contractors may submit invoices biweekly or monthly. The date of the invoice shall be the day it is electronically delivered to the government. The government shall accept or reject the invoice within 5 working days of the date of the invoice. All invoices not rejected within 5 days shall be paid as soon as possible. Under no circumstances shall an accepted invoice be paid later than 30 days from the date of delivery. Payment of an invoice does not prohibit either the government or the contractor from making corrections or adjustments to the invoice at a later date. There is no reason to delay payment for minor errors or clarifications. These can be accomplished at a later date. Only when a contractor becomes non-responsive should payments be withheld or delayed.

SUBTITLE III – ACQUISITIONS GENERALLY

207. Increase in Authorization Levels of Federal Purchase Cards

208. Reauthorization of Franchise Funds

TITLE III – CONTRACT INCENTIVES

301. Revisions to "Shared Savings" Initiatives

In order to achieve the goal of acquiring services through "best value," it is important that

contractors be provided additional incentives to invest in cost reduction initiatives. One way of reducing such expenditures is to provide for an equitable sharing in the near-term savings that result from contractor investments in cost savings initiatives. One approach would be to institute a "value engineering" type of treatment for the investment costs. But the projected savings from such initiatives should then be shared with the contractor on a negotiated basis.

Section 301 would direct the FAR Council to amend the Federal Acquisition Regulations (FAR) to allow a "Savings Incentive" that would permit contractors to benefit from the savings initiatives they originate.

302. Authorize Longer Contract Terms

Real innovation – in some areas – does not occur until about the 2-3 year point, as the contractor becomes totally familiar with all aspects of the operation. Longer contracts (up to ten years with appropriate options) provide sufficient time to recover the cost of investing in technology, automation and equipment. These investments often are not possible under shorter contracts. In addition, partnerships have a real chance to flourish over the long term.

Section 302 would provide agencies the authority to utilize more multi-year contracts (7-10 years.

303. Encourage Award Term Contracts

This is based on the concept that, if the contractor performs well, it should be "awarded" with additional option years on the existing contract; the criteria for determining quality performance would be established at the onset of the contract. And, this method could be reversed to penalize non-performing contractors by shortening contract terms. This innovative concept guarantees the needs of the government are met, while giving the contractor an incentive to achieve or exceed the agreed-upon performance criteria.

Section 303 would provide agencies with the authority to award a 10 percentage advantage to an incumbent (that has performed exceptionally) when a contract is recompeted. This would be used as an evaluation factor and would be clearly detailed in the source selection criteria in the "request for proposal" (RFP).

304. Encourage Contract Efficiency

An excellent incentive for enhanced contractor performance is to identify ways to "invest" recognized cost savings back into the contractor and the contract. This can be achieved through allowing for specific contract schedule provisions that reserve residual funding for reinvestment of savings back into a contract. Contracts for services should include provisions that encourage contractors to find more efficient and cost effective ways to accomplish the scope of work without penalizing them for delivering reduced man-hours. The contract should have a Contract Line Item Number (CLIN) specifically set aside to retain cost savings on the contract. This is especially important in labor hour contracts and other forms of level of effort (LOE)

contracts. In such contract types, the fee earned by the contractor should not be reduced due to delivery of fewer hours if the contractor was able to demonstrate satisfactory performance utilizing fewer hours. Contracts for repair and maintenance services should include provisions that allow a contractor to research a more cost effective means for replacing parts or components. If the level of quality can be maintained by repairing parts or components rather than purchasing new items the contractor should be rewarded for recognizing the savings on behalf of the government. The Air Force had such a program at one time known as the "Depot Level Repair" (DLR) program that allowed a contractor to share a stated percentage of savings resulting from repairing the damaged or worn item rather than replacing it with a new item. Such contracts provide incentives to achieve demonstrated efficiencies while still meeting mission requirements.

Section 304 would provide agencies with the authority to allow re-investment of recognized savings into existing contracts and prohibit reduction of fees on *"level of effort"* type contracts if the contractor demonstrates acceptable accomplishment of the required work utilizing fewer hours at a total cost savings to the government.

TITLE IV
COMMERCIAL SERVICES ACQUISITIONS

401. Preference for Performance Based Acquisition

When properly structured, performance-based service acquisition (PBSA) holds great promise to reduce costs while increasing service quality. PBSA capitalizes on private sector expertise and leverages technological innovations. Currently, the Department of Defense is allowed to use the FAR Part 12 streamlined commercial items procedures to purchase commercial, provided the acquisition is performance based.

Section 401 would extend this authority to all service contracts government-wide.

402. Authorize Additional Contract Types in FAR Part 12

Broadening the available contract types to include standard commercial-type contract vehicles, such as "time and material" or labor-hour contracts. In the commercial marketplace support is regularly acquired on a fixed rate per hour or day because the method is flexible and predictable. And, the competitive forces of the commercial marketplace ensure that quality services are provided in an efficient manner so that unnecessary days/hours are not spent. While the 1994 Federal Acquisition Streamlining Act (FASA) did not prohibit its use, the implementing regulations do not recognize this contract type – thus impeding the government's access to significant commercial capability.

Section 402 would revise Section 8002(d) of FASA to allow time and material, or similar contract types, for the acquisition of commercial items.

(NOTE: Are any additional clarification necessary to ensure that IT needs are met? Do we need to update definitions or add additional language to ensure we are eliminating regulations in conflict with FAR Part 12?)

403. Clarification of Commercial Services Definition

The trends of improvement in the acquisition of services are evident. Yet, innovation and acquisition reform in the manner in which services are acquired still lags behind the vast improvements we have achieved in the arena of commercial products acquisition. Significant barriers remain, for example, for the sale of commercial services that are sold independently of the sale of a commercial item.

Section 403 would amend the current commercial item definition to include commercial services.

404. Designation of Commercial Business Segments

The current commercial item definition used for FAR Part 12 procurements still restricts access to a wider ranger of capabilities available in commercial enterprises since its focuses on the salient characteristics of individual products and services on a contract by contract basis. The current commercial item definition should be expanded to enable the Government to gain access to the full range of products and services that can be obtained from commercial firms. This is particularly important for service contractors since FAR Part 12 is rarely used in service contracting because, while the company may believe the service is clearly commercial, the contracting officer often does not view it in that context. For many commercial service companies, this means a difficult choice – either forego the business opportunity or accept a contract under FAR Part 15 with its many Government-unique requirements (in these cases, often setting up separate divisions to handle the government work). Many of the companies that would benefit from this change operate in areas where there is strong small business subcontracting participation – for example in the areas of fleet management, fleet overhaul, and ambulance services.

Section 404 would establish a new statutory definition – one for a "commercial business segment," which would be separate from the current statutory definition of a "commercial item." This provision would allow the products and services of a "commercial business segment" to be acquired by the Government through FAR Part 12 procedures if at least 75% (in dollars) of the sales of the company over the past three business years were made to non-U.S. Government entities or under FAR Part 12. This definition is separate from the current statutory definition of a "commercial item" in order to clarify that this particular proposal is not intended to impact or modify the statutory definition at 41 U.S.C. 403(12).

405. Organizational Conflict of Interest

406. Commercial Liability

TITLE V
TECHNOLOGY ACCESS IN A COMMERCIAL ENVIRONMENT

501. Trade Agreements Act Exemption for Information Technology Commercial Items.

The Trade Agreements Act (19 U.S.C. 2512(a)) and its implementing regulations (FAR 52.225-5) require that all products being delivered to the Government be U.S. made, or designated country, Caribbean Basin country or NAFTA country end products. While it allows the contractor to identify products being proposed that do not meet that requirement, the Government, however, may only purchase such products if no competing contractor is bidding those same products from compliant countries. Even when the contractor certifies that all products being delivered are compliant products, the contractor still must monitor the subject contract for the entire period of that contract to assure that any manufacturing source changes made do not invalidate the certification made at the time of award.

Section 401 would provide for a class waiver of the Trade Agreements Act for information technology products.

502. Intellectual Property Rights for Commercial Contracts

503. Cooperative program with State and Local Governments

Section 503 would establish a Cooperative Program with State and Local Governments to include purchases using Schedules for information technology products. This is intended to enhance accessibility of Section 508 requirements.

TITLE VI
SOCIO-ECONOMIC LAWS

601. Simplified Acquisition Threshold Inflation Adjustment

Section 601 would allow an automatic inflation adjustment (on a 3-year basis) to the Simplified Acquisition Threshold, which was raised in 1994 to $100,000 (upon enactment of the 1994 Federal Acquisition Streamlining Act).

602. Revisions to the Service Contract Act

The Service Contract Act (SCA), enacted in 1965, is designed to provide basic protections to workers employed on Government service contracts. The objective was to protect those workers for whom the marketplace does not adequately guard against unfair wage and benefit practices (*e.g.,* unskilled and semi-skilled workers). The fundamental premise of the Service Contract Act (SCA) remains sound. However, the Act has not been updated since the mid-1970s and is now lagging behind the times. There are many aspects of the SCA and the implementing regulations that add unnecessary costs and burdens on both taxpayers and businesses. The budgetary and regulatory reform goals of the Congress will be better achieved through the enactment of key reforms to the Service Contract Act. At the same time, the Act would continue to provide stability and appropriate protections to those who need it most.

Section 602 would amend the Service Contract Act in several ways:

a) Redefining the definition of "automated data processing" to reflect the definition found in the 1996 Clinger-Cohen Act;
b) Raising the SCA Threshold from its current level of $2500 to the Simplified Acquisition

Threshold ($100,000);

c) Conforming the penalties and debarment clauses of the SCA to other civil statutes
d) Prohibiting flow-down of SCA requirements to commercial subcontractors on commercial contracts

603. Revisions to the Davis Bacon Act

Enacted in 1931, the Davis Bacon Act is intended to protect communities and workers from the economic disruption by competition arising from non-local contractors coming into an area and obtaining federal construction contracts by underbidding local wage levels. Like the Service Contract Act, however, DBA has not been updated since enactment.

Section 603 would amend the Davis Bacon Act by:

a) Raising the DBA threshold from its current level ($2,000) to the Simplified Acquisition Threshold ($100,000)
b) Prohibiting flow-down of DBA requirements to commercial subcontractors on commercial contracts
c) Resolving conflict between SCA & DBA on new commercial products