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THE SERVICES ACQUISITION REFORM ACT [SARA]

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

MARCH 7, 2002

Serial No. 107–151

Printed for the use of the Committee on Government Reform

Available via the World Wide Web: http://www.gpo.gov/congress/house
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U.S. GOVERNMENT PRINTING OFFICE

84–514 PDF WASHINGTON : 2003

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THE SERVICES ACQUISITION REFORM ACT [SARA]

THURSDAY, MARCH 7, 2002

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

The subcommittee met pursuant to call, at 2:25 p.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the subcommittee) presiding.

Present: Representatives Davis, Horn, and Turner.

Staff present: Melissa Wojciak, staff director; Victoria Proctor, professional staff member; Amy Heerink, chief counsel; Mark Stephenson, minority professional staff member; and Jean Gosa, minority assistant clerk.

Mr. DAVIS. I apologize for being late. I was summoned to the Speaker's office and I leave when he tells me I can leave. I think you know what that is like.

I want to just say good afternoon and welcome to today's legislative hearing on H.R. 3832, the Services Acquisition Reform Act. Today's hearing builds on others conducted over the past year on the continuing barriers government agencies face in acquiring the goods and services necessary to meet mission objectives. SARA is intended to assist agencies in overcoming those barriers by adopting better management approaches in purchasing tools governmentwide to facilitate the efforts of acquisition managers in meeting agencies' goals.

I am going to put the rest of my statement in the record so that we can move ahead, 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
Legislative Hearing on "H.R. 3832, the Services Acquisition Reform Act of 2002"
Subcommittee on Technology and Procurement Policy
March 7, 2002 at 2:00 pm
2154 Rayburn House Office Building

Good afternoon and welcome to today's legislative hearing on H.R. 3832, Services Acquisition Reform Act of 2002 (SARA). Today's hearing builds on others conducted over the past year on the continuing barriers government agencies face in acquiring the goods and services necessary to meet mission objectives. SARA is intended to assist agencies in overcoming those barriers by adopting better management approaches and purchasing tools governmentwide to facilitate the efforts of acquisition managers in meeting agency goals.

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. However, these reform initiatives did not address the dramatic growth we have seen in government purchasing of services. Now, we need to adopt legislation that allows government agencies to develop a more strategic approach to the purchasing services and authorizes the use of innovative contract vehicles for service contracting.

Over the past year, I have continued to find that federal agencies are failing to achieve contract management goals and efficiency in service contracting. In addition, the GAO along with several civilian oversight agencies have found that prevailing weaknesses exist in service contracting, including acquisitions that are not competed sufficiently, are poorly planned, or are not well managed. These continuing failures led the GAO to place contracting for both the Departments of Defense and Energy on its high-risk list.

In fiscal year 2000, the government contracted for approximately $87 billion worth of services ranging from complex services such as professional consulting, to information technology services, to relatively simple services such as temporary clerical

services and janitorial services. This is a growth of 24% in real dollars since fiscal year 1990. This trend mirrors a similar pattern in the private sector. According to the GAO, in 2000, about $2.1 trillion in services was sold in the United States marketplace. GAO also notes that the growth in service contracting has led to many private sector firms to significantly reengineer how they contract for services to achieve better results and cost-savings.

Unfortunately, federal purchasing for complex services such as large scale IT modernizations continues to result in high failure rates for federal agencies. Previously, our greatest concern with these high profile project failures was the waste of significant amounts of taxpayer dollars. Now, as we have seen in a hearing I held just a week ago on meeting homeland security goals, these project failures can result in delays in meeting information sharing goals or greater cross-agency collaboration that unwittingly assist our enemies in operating within our borders without fear of detection. It is imperative that we adopt a strategic approach to acquisition that includes the support of senior level federal managers working to implement goals both intra- and inter-agency.

SARA builds on many of the acquisition models adopted by leading private sector companies. It includes a comprehensive workforce training program. All too often, training is the first item cut in an agency budget, and federal employees are not provided with the opportunity to keep their professional skills up-to-date. Over the course of the past year, we have learned that investment in human capital is the top priority of private sector companies and training budgets are the last area where a company looks to achieve cost savings. This results in a more highly-skilled and loyal workforce. The training fund I propose in SARA will help us achieve the same goals for the federal acquisition workforce.

Additionally, Title II of the legislation will force agencies to adopt a business environment reform model used by commercial companies. First and foremost, the legislation creates a chief acquisition officer within every federal agency to better coordinate purchasing goals within an agency and to assist agencies in defining their overall purchasing strategy. According to one private sector company interviewed by the GAO, this management change resulted in as much as a 15% savings on contracts for services. SARA also enables agencies to better leverage purchasing power by identifying barriers to horizontal acquisitions.

The remaining titles of SARA provide federal acquisition professionals with the contracting tools necessary to better access the commercial marketplace. Specifically, we authorize the usage of additional contract types, greater usage of performance-based contracting, and eliminate existing barriers for improved contracting for information technology products and services. These new tools recognize that federal acquisition personnel need greater flexibility to make appropriate management decisions on a daily basis to meet agency mission goals.

Clearly, the events of September 11th have shown that agencies must change how they do business in order to meet homeland security goals. SARA is intended to

streamline procurement cycles and integrate agency mission goals with acquisition goals in order to help agencies meet the challenges presented by the war on terrorism. I look forward to the testimony from our two panels of expert witnesses. As the bill wends it way through the legislative process we look forward to mining the wealth of knowledge, ideas and innovation present in both the public and private sector communities, that is so well represented by today's witnesses. With your wisdom and assistance we will further refine the legislation and achieve true reform.

Mr. TURNER. Mr. Chairman, I will do the same in the interest of time.

Mr. DAVIS. Thank you. We may end up being ahead of where we were when you—[laughter]—Mr. Horn, you are welcome to make a statement.

Mr. HORN. I will bypass (off-mic).

We had a hearing on the problem of the interest cards, and I see in here that $2,500 is the mark at this point and it wants to go to $25,000. We have had a real situation with the Navy that is just irresponsibility, and so we need to somehow get accountability and responsibility.

Mr. DAVIS. Thank you. I think the question is, how do you find the right balance and not running for paperwork every time you need some little item, but at the same time making sure people are accountable for what they do.

I am going to call—yes, Mr. Turner.

Mr. TURNER. I had a statement handed to me by Representative Dennis Kucinich. I would like to offer it into the record.

Mr. DAVIS. Without objection, it will be put in the record.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Subcommittee on Technology and Procurement Policy
Hearing on the Services Acquisition Reform Act
Statement by Rep. Dennis Kucinich
March 7, 2002

I thank the Chairman and the members of the Subcommittee for indulging my request to deliver an opening statement during this hearing.

In late January I filed a motion seeking a Temporary Restraining Order that would prevent the Defense Finance and Accounting Service from outsourcing its Retired and Annuitant Pay function to ACS Government Solutions Group. I took this step because the A-76 competition conducted by DFAS unfairly advantaged the contractor, and because the final contract between DFAS and ACS would cost the taxpayer millions of dollars.

I was forced to file this motion because federal courts have interpreted U.S. code to bar employees and their representatives from challenging a government contracting decision in court. Employees, it has been determined, are not "interested parties" when it comes to federal contracting. By contrast, U.S. law explicitly recognizes the right of a contractor to mount a court challenge to the outcome of a government outsourcing competition.

This inequity must be addressed, both from the perspective of federal employees and from the perspective of the American taxpayer. Faced with the possibility of a contractor lawsuit if it *does not* decide to outsource, but subject to no legal action if the *contractor* wins the competition, a federal agency will plainly have incentive to favor contractor bids in its public-private competitions.

Particularly in light of the Office of Management and Budget's A-76 outsourcing quotas (which themselves hinder efforts at making federal agencies accountable), this incentive to outsource has enormous implications for government accountability. Agencies generally do not have in place concrete measures to track the performance of a contractor once it is awarded a contract to perform work for the government. Thus the primary check against fiscally irresponsible contracting occurs at the time of the outsourcing decision itself. If employees and contractors have equal opportunity to sue to reverse a competition decision, unwise outsourcing would be less likely, and any such contracting out that occurred would be subject to challenge before conversion took place.

I would like to see an amendment to the Chairman's Services Acquisition Reform Act that would grant federal employees (in the case of public/private competitions for existing government work), and potential federal employees (in the case of public/private competitions for new work), the same standing to pursue judicial relief that is available to contractors.

I would hope the distinguished Chairman would agree to include such an amendment in his bill. Granting federal employees standing to challenge outsourcing decisions in court is a matter of equity, of accountability, and of responsibility to the American taxpayer – particularly given the $87 billion spent annually on federal service procurement. In my capacity as Ranking Member of the Government Reform Subcommittee on National Security, I have become all too familiar with the Pentagon's inability to keep track of its spending, to account for its equipment, and to adequately seek from contractors the best value for the taxpayer dollar. Allowing employees the ability to sue will not be a panacea for

these ills, but it will promote accountability in our federal government. And it will level the playing field for employees and contractors involved in the outsourcing process.

Mr. Chairman, I know that you are committed to basic fairness and accountability, and I look forward to working with you on this crucial issue.

Mr. TURNER. And if I could also offer my statement as well, which also includes a request from the minority that three items be included in the record that I might mention, first, the comments of the Inspector General at the GSA dated March 5, 2002, which refers to several provisions of the bill; second, the minority would request inclusion of the Acquisition Reform Report prepared by the Project of Government Oversight; and finally it is my understanding that the Inspector General at the Department of Defense is preparing written comments on the bill which should be ready within a few days, and we would ask that they also be included in the record.

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

Statement of the Honorable Jim Turner
Legislative Hearing on the Services Acquisition Reform Act

Subcommittee on Technology and Procurement Policy

March 7, 2002

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 introduced on March 4, 2002. The issues addressed in the legislation are complex and this hearing affords the thorough and detailed examination they deserve.

I also want to thank you for your willingness to accommodate the minority's requests for witnesses both at this hearing and in the past. The acquisition reforms of the past decade were enacted for the most part with bipartisan support and input. I am confident we will 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 paper clips. Getting the acquisition process and procedures right, and ensuring that the 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. Acquisition policy must be cost effective to the government and user-friendly to the suppliers of goods and services.

The past decade has seen extensive changes in the federal procurement system. These changes have focused on simplifying the acquisition process and empowering the contracting-officer to assume the role of primary 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.

Fair competition must always be the guiding principle in federal procurement. 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. Any procurement reform we enact into law must ensure that this principle is not compromised.

Mr. Chairman, the minority would ask unanimous consent to place a number of items in the record. First, the comments of the Inspector General at the General Services Administration, dated March 5, 2002 on several provisions of this bill. Second, a prepared statement and report on acquisition reform prepared by the Project of Government Oversight. And finally, it is my understanding that the Inspector General at the Department of Defense is preparing written comments on this bill, which should be ready in the next day or so. I would ask the hearing record be left open so that those comments could be included.

Thank you Mr. Chairman.

Mr. DAVIS. Thank you.

I am going to call our first panel of witnesses. As you know, it is the policy of the committee that all witnesses be sworn before you testify. If you would rise with me and raise your right hands.

[Witnesses sworn.]

Mr. DAVIS. Thank you. Be seated.

To afford sufficient time for questions, if you would try to limit yourselves to no more than 5 minutes for your opening statement. All written statements will be made part of the permanent record, and without objection, Mr. Turner, the items that you have just presented will be put in the record.

We will begin with Mr. Woods, followed by Mr. Perry, Mr. Styles and Ms. Lee. Thank you.

STATEMENTS OF WILLIAM WOODS, DIRECTOR FOR ACQUISITION AND SOURCING MANAGEMENT, U.S. GENERAL ACCOUNTING OFFICE; ANGELA STYLES, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY; STEPHEN PERRY, ADMINISTRATOR, U.S. GENERAL SERVICES ADMINISTRATION; AND DEIDRE LEE, DIRECTOR OF PROCUREMENT, U.S. DEPARTMENT OF DEFENSE

Mr. WOODS. Thank you, Mr. Chairman.

We appreciate the opportunity to be here today to participate in the hearing on the Services Acquisition Reform Act of 2002. The bill's proposals focus on strengthening the acquisition work force, moving toward a performance-based contracting environment, and improving the management of service acquisitions. Each of these areas is in need of improvement and we support the efforts of the subcommittee in addressing them.

In my statement today, I would like to cover three areas. First, I would like to discuss our recent findings on how leading companies tackle the same kinds of problems the bill is seeking to remedy. Second, I would like to cover a number of provisions of the bill that emulate the best practices we found at those leading companies. And third, I would like to cover a number of provisions of the bill about which we have some concerns.

In a recent report January 2002, we covered our review about how six leading commercial companies changed their approach to acquiring services. The companies we studied found themselves in a situation several years ago similar to the one that Federal agencies are in today. They were spending a substantial amount of money on services, but did not have a good grasp of where those dollars were being spent. They were not effectively coordinating purchases and they lacked the tools to make sure that they were getting the best overall value for the taxpayer.

The companies we studied were able to turn the situation around by adopting a more strategic perspective to service spending. By that I mean each company focused more on what was good for the company as a whole, rather than just individual business units.

On the chart we have here to my right, your left, we tried to identify some common elements among each of the six leading companies that we reviewed. While each company took a number of different approaches in the area of service acquisition, we were able to distill some common elements. The first is knowledge. We found

that the companies we visited analyzed their spending on services to answer the basic question about how much was being spent and where the dollars were going. In doing so, they realized that they were buying similar services from numerous providers, often at greatly varying prices.

The companies we studied used this knowledge to change how they were acquiring services in very significant ways. Again, they took a variety of approaches. For example, some elevated or expanded the role of the company's procurement organization. Others designated what they called commodity managers to oversee key services. And others made extensive use of cross-functional teams to help identify their service needs, conduct market research, evaluate and select providers, and manage performance.

The third common element that we found was support. By that, we really identified two things. One was they used communication throughout the organization to make sure that everyone understood what the common goals were. Then second, each one used a variety of performance measures to keep track of how well they were doing in terms of, for example, financial performance or customer satisfaction.

The key, though, that we found was commitment. We found that in order to overcome these challenges, the companies found that they needed to have sustained commitment from their senior leadership, first to provide the initial impetus to change, and second to maintain the momentum. The significance and the importance of commitment is why we chose to put that in the middle of our chart.

Now, why should all these particular practices matter in looking at how to reform the service acquisition approach in the Federal Government? Well, in a word, the answer is results. Each of these companies was able to achieve significant dollar savings and each was able to achieve improved delivery of services. In one case, we found a company that saved over $210 million from adopting some of these approaches.

Let me turn next to some provisions in the bill that track some of the practices that we found in reviewing these leading service companies. One is section 401 of the bill, which would promote greater use of performance-based contracting. Performance-based contracting is simply a process where the contracting agency specifies the outcome or the result that it desires to achieve, and leaves it to the vendor to decide how best to achieve those outcomes. We have work under way for this subcommittee to look at how Federal agencies are implementing performance-based contracting. Very briefly, we found that although they are meeting the goals established by the Office of Management and Budget—the OMB established a 20 percent goal for the use of performance-based contracting—and the agencies are somewhat exceeding that goal. We found that there was widespread inconsistency in the application of the definition of performance-based contracting.

The second provision, and this is an example of performance-based contracting, is share and savings, which under the bill section 301 would be promoted in a variety of ways. We have also a job under way for the subcommittee looking at how the leading companies are implementing this share and savings concept. What we are finding is that the real key to it is establishing the baseline.

That is a very difficult issue and that will be the focus of our review as to how companies establish the baseline in order to be able to measure the savings.

The third provision in the bill that we found common among the companies we looked at was the chief acquisition officer. Section 201 of the bill would create a chief acquisition officer in each agency, a practice that we found common among the companies. But one of the differences that we found is that at the leading companies the chief acquisition officer, and it was not always designated as such, but that position, whatever it was called, had the authority to influence decisions on acquisition to implement needed structural, process or role changes, and most importantly to provide the necessary clout within the organization to obtain initial buy-in and acceptance of whatever changes were required. Under the Services Acquisition Reform Act, section 201, it is not clear that the chief acquisition officer would have comparable responsibility and authority.

Finally, I would like to mention three provisions in the bill that we have some concerns about. The first is section 211 of the proposed bill which would permit service contractors to invoice the government on a bi-weekly rather than monthly basis. We have two concerns about that. One is that there would be an obvious effect on the Treasury in terms of the time value of money. But equally important, we have issued a series of reports over the years that have focused on erroneous payments. Our concern in this area is that if you increase the frequency of payments, that might also increase the possibility for erroneous payments.

Second, there is a provision in the bill, section 223, that would strengthen the process under which agencies decide challenges to their procurement decisions. That is a provision that we support. We support agencies deciding protest at the lowest level and the most expeditious way. Our concern here is that the bill would require decisions by agencies within 10 working days. Frankly, we think that is probably too brief a period to provide for meaningful consideration and decision of the protest.

The last provision I wanted to mention is section 404 of the bill. That provision would designate as a commercial item any product or service sold by a commercial entity. Our concern is that this provision would allow for products or services that had never been sold, or in fact even offered for sale in the commercial marketplace, to be considered as a commercial item. In such cases, the government may not be able to rely on the assurances of the marketplace in terms of quality and pricing of the product or service.

Mr. Chairman, this concludes my prepared statement. I would be happy to take your questions.

[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
House of Representatives

For Release on Delivery
Expected at 2:00 p.m.,
Thursday, March 7, 2002

CONTRACT MANAGEMENT

Taking a Strategic Approach to Improving Service Acquisitions

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

GAO-02-499T

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to participate in today's hearing on H.R. 3832, the Services Acquisition Reform Act of 2002 (SARA). The bill's proposals focus on strengthening the acquisition workforce, moving toward a performance-based contracting environment, and improving the management of service acquisitions. As we testified[1] before you last November, our work shows that all these areas need attention, particularly in light of the government's increasing dependence on services.

Today, I would like to discuss our recent findings on how leading companies tackled the same kinds of problems the bill is seeking to remedy. The practices that these companies followed clearly paid off in terms of dollar savings and service enhancements. We believe that the federal government has an opportunity to achieve similar outcomes with support and commitment from the Congress. I would also like to discuss our ongoing work related to specific proposals in the bill as well as concerns we have about other sections of the bill.

BEST PRACTICES FOR SERVICE ACQUISITIONS

A main goal of the bill is improving the management of service acquisitions. There is good reason for this. Over the past decade, federal agencies have substantially increased their purchases of services, particularly for information technology and professional, administrative, and management support. In fiscal year 2001 alone, the federal government acquired about $109 billion[2] in services. This money, however, is not always well-spent. Our work, as well as the work of other oversight agencies, continues to find that millions of service contract dollars are at risk at defense and civilian agencies because acquisitions are poorly planned, not adequately competed, or poorly managed.[3]

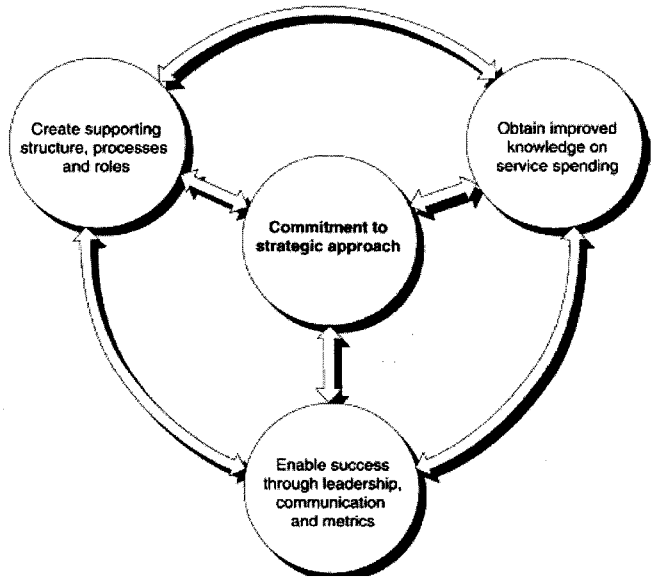
In view of these problems, we examined how leading companies changed their approach to acquiring services. The companies we studied found themselves in a situation several years ago similar to the one that federal agencies are in today. They were spending a substantial amount of money on services—ranging from routine maintenance, to advertising, to information management–but did not have a good grasp of how much was being spent and where these dollars were going. Moreover, they were not effectively coordinating purchases, and they lacked tools to make sure that they were getting the best overall value.

The companies we studied were able to turn this situation around by adopting a more strategic perspective to service spending; that is, each company focused

[1]U.S. General Accounting Office, *Contract Management: Improving Service Acquisitions,* GAO-02-179T (Washington, D.C.: Nov. 1, 2001).
[2] Excludes Research and Development. Data developed for actions exceeding $25,000.
[3]U.S. General Accounting Office, *Contract Management: Trends and Challenges in Acquiring Services,* GAO-01-753T (Washington, D.C.: May 22, 2001).

more on what was good for the company as a whole rather than just individual business units, and each began making decisions based on enhanced knowledge about service spending. The specific activities they undertook ranged from developing a better picture of what they were spending on services, to taking an enterprisewide approach to acquiring services, to developing new ways of doing business. Figure 1 highlights key elements of the strategic approach.

Figure 1: Key Elements of Strategic Approach Taken by Leading Companies



Source: GAO analysis.

Specifically, the companies we visited analyzed their spending on services to answer basic questions about how much was being spent and where the dollars were going. In doing so, they realized that they were buying similar services from numerous providers, often at greatly varying prices. The companies used this data to rationalize their supplier base, or in other words, to determine the right number of suppliers that met their needs. Hasbro's spend analysis, for example, revealed that it had 17 providers of temporary administrative, clerical, and light industrial personnel for 7 locations. The company also found that it had inconsistent policies and processes, multiple contact points, and limited performance measures. Information was not being shared across locations.

The companies we studied changed how they acquired services in significant ways. Each elevated or expanded the role of the company's procurement organization; designated "commodity" managers to oversee key services; and/or made extensive use of cross-functional teams to help identify their service needs, conduct market research, evaluate and select providers, and manage performance. These changes transformed the role of purchasing units from one focused on mission support to one that was strategically important to the company's bottom line. For example, Dun & Bradstreet officials told us that, with the support of senior corporate management, their procurement function now exercises far more control and responsibility over their services and that it acts more in an advisory capacity to business units rather than just being relied on for negotiating expertise.

Bringing about these new ways of doing business was challenging. For example, some companies spent months piecing together data from various financial management information systems and examining individual purchase orders just to get a rough idea of what they were spending on services. Other companies found that establishing new procurement processes met with resistance from individual business units reluctant to share decision-making responsibility and involved staff that traditionally did not communicate with each other.

To overcome these particular challenges, the companies found they needed to have sustained commitment from their senior leadership—first, to provide the initial impetus to change and second, to keep up the momentum. Since service acquisitions were largely viewed as a mission support activity and peripheral to the bottom line, such commitment needed to be intense and accompanied by clear communication on the rationale, goals, and expected results from the reengineering efforts.

Moreover, to help sustain management attention, the companies implemented performance measures to help them gauge whether reengineering efforts were really working. For example, ExxonMobil employed an extensive system to measure performance of its procurement function, which included metrics on the procurement organization's progress in meeting financial, customer satisfaction, and business operation objectives; compliance with best practices; and more detailed metrics to assess the performance of local purchasing units.

Why should these particular practices matter in looking how to reform service acquisition in the federal government? Taking a strategic approach clearly paid off. Companies were able to negotiate lower rates and better match their business managers' needs with potential providers of services. One official estimated that his company saved more than $210 million over the past 5 years pursuing more strategic avenues to purchasing information technology services, while another estimates his company typically achieved savings of 15 percent or more on efforts that were undertaken using the new processes.

Best Practices and the Services Acquisition Reform Act

The SARA bill touches on some aspects important to the approach followed by the leading companies. First, the proposed bill also encourages greater use of performance-based contracting. Performance-based service contracting is a process where the contracting 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 to doing business with the government, gain greater access to technological innovations, and better ensure contractor performance.

Second, the bill would create a chief acquisition officer within each agency. We support the concept of a chief acquisition officer. Our discussions with a number of officials from 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. The bill, however, differs from the approach taken by leading companies in terms of the scope and the decision-making authority of this position. Specifically, at the leading companies, these officials were corporate executives who had authority to influence decisions on acquisitions; implement needed structural, process, or role changes; and provide the necessary clout to obtain initial buy-in and acceptance of reengineering efforts. Under SARA, it is not clear that the chief acquisition officer would have comparable responsibility and authority.

ADDITIONAL ONGOING WORK RELATED
TO THE PROPOSED SERVICES ACQUISITION REFORM ACT

In addition to our work on best service acquisition practices, we are performing a number of evaluations related to specific proposals in the Services Acquisition Reform Act, including those on (1) acquisition workforce, (2) performance-based contracting, and (3) share-in-savings contracting. I would like to highlight what this work entails and how it can be of use to the subcommittee as it moves forward on the bill.

Acquisition Workforce

The proposed bill contains several provisions to address the challenges being faced in the acquisition workforce. Procurement reforms and technological changes have placed unprecedented demands on the acquisition workforce. Contracting personnel are now expected to have a much greater knowledge of market conditions, industry trends, and technical details of the commodities and services they procure.

We believe it is essential for agencies to define the future capabilities needed by the workforce and to contrast these needs with where the workforce is today. Doing so will provide a solid basis for evaluating whether different management

tools are needed to meet the needs of the future workforce. Specifically, agencies could improve the capacity of the acquisition workforce by focusing on four key areas:

- **Requirements**—assessing the knowledge and skills needed to effectively perform operations to support agency mission and goals.
- **Inventory**—determining the knowledge and skills of current staff so that gaps in needed capabilities can be identified.
- **Workforce strategies and plans**—developing strategies and implementing plans for hiring, training, and professional development to fill the gap between requirements and current staffing.
- **Progress evaluation**—evaluating progress made in improving human capital capability and using the results of these evaluations to continuously improve the organization's human capital strategies.

In our current work for this and other committees, we are examining efforts to assess and address the needs of the future acquisition workforce. Specifically, we are looking at (1) the adequacy of agency training requirements for the acquisition workforce and agency practices for determining the level of funding needed for training, (2) selected federal agencies' strategic planning efforts to manage and improve the capacity of the acquisition workforce, and (3) strategies being used to ensure that the acquisition workforce is prepared to meet the new challenges for acquiring services.

Performance-Based Contracting

As noted earlier, the proposed bill is promoting greater use of performance-based contracting. The work we are conducting now for this subcommittee should be particularly useful in determining the extent to which performance-based contracting is taking hold and whether there are governmentwide mechanisms that can be used to encourage greater use of it.

Our work to date shows that for fiscal year 2001, about 23 percent of eligible service contracts were reported to be performance-based. This number is in line with a 20-percent goal set by the Office of Management and Budget. However, our work shows that there are inconsistencies in the interpretation of the definition of a performance-based contract. Moreover, demonstrating either monetary savings or efficiency gains will be challenging. We look forward to sharing the results of our review with the subcommittee by August of this year.

Share-in-Savings Contracting

The proposed bill focuses specifically on promoting greater use of one particular form of performance-based contract: share-in-savings. Basically, in share-in-savings contracting, a contractor funds a project up front in return for a percentage of the savings that are actually realized by an agency. 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 innovative 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.

The work we are conducting in this area will identify examples of best practices using the share-in-savings contracting method found in the commercial sector and assess how these practices can be effectively applied in the federal government. We are specifically asking commercial companies why they chose this tool as a means to help achieve their business goals and what their experiences have been. One particular form of share-in-savings that has emerged in our discussions is gain sharing. Under this approach, a contractor does not assume all of the risk, rather it will reduce its normal fees in return for a percentage of increased earnings or savings that result from the contractor's work. The idea is to develop a "win-win" arrangement, which jointly encourages the contractor and the client to achieve sustainable business results.

SPECIFIC CONCERNS ABOUT SARA PROPOSALS

I would like to share initial concerns we have with some particular provisions of SARA based on our previous work and experiences.

First, section 221 of SARA would amend the Office of Federal Procurement Policy Act to increase the micropurchase threshold from $2,500 to $25,000. The governmentwide commercial purchase card is the preferred method for making micropurchases and is widely used. We have not comprehensively examined the use of purchase cards across the federal government. However, our reviews at selected agencies, including two Navy units, have found weak internal controls, which have left agencies vulnerable to a variety of improper purchases. We are concerned, therefore, that raising the micropurchase threshold may not be advisable until problems with controls and abuses are addressed and resolved.

Second, section 223 of SARA would strengthen the process under which agencies decide challenges to their procurement decisions by imposing a statutory stay of contract award or performance pending resolution of any bid protest. The bill would require an agency to issue a decision on a bid protest within 10 business days. We support prompt resolution of protests and believe the proposed bill may help accomplish this. We are concerned, however, that the 10-day time limit would be too brief in many cases to permit meaningful consideration of a protester's complaints, especially when the protest involves any degree of complexity.

Third, section 211 of the proposed bill would authorize service contractors to submit invoices for payment more frequently—biweekly instead of monthly. Although this change would have a positive effect on service contractors' cash

flow, it could increase the cost of doing business for the government. Additionally, this change may increase the risk of erroneous payments—a significant problem across the government–as it could increase the volume of invoices and would provide agencies with less time to process and review them. As such, we believe further study is warranted on this provision.

Lastly, the bill also makes a number of significant changes to commercial items, including one, section 404, that would designate as a commercial item any product or service sold by a commercial entity. Although we have not fully assessed the possible impact of the proposed change, we are concerned that the provision would allow for products or services that had never been sold or offered for sale in the commercial marketplace to be considered a commercial item. In such cases, the government may not be able to rely on the assurances of the marketplace in terms of the quality and pricing of the product or service.

In conclusion, long-standing problems and the increasing significance of contracting for services point to a need for reforms in how services are procured, managed, and overseen. Strengthening leadership over service acquisitions and using performance-based contracting are good steps in this direction. However, agencies need to take additional measures in order to achieve the types of outcomes obtained by leading companies. These include developing a reliable and accurate picture of service spending; developing new structures, mechanisms, and metrics to foster a strategic approach; and providing strong leadership to carry out these changes. Such actions would help agencies to begin learning more about where their service dollars are going and to find ways to leverage those dollars.

Mr. Chairman, this concludes my statement. We look forward to sharing the results of our reviews and continuing to assist the subcommittee in its development of the Services Acquisition Reform Act. I will be happy to answer any questions you may have.

CONTACT AND ACKNOWLEDGEMENT

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(120141)

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

SARA challenges the procurement community to take a fresh look at several key aspects of our acquisition processes and policies, from the way we manage contracts and incentivize our contractors to the approaches we employ for capitalizing on the ingenuity of the commercial marketplace. As responsible stewards of the $220 billion in goods and services the Federal Government buys each year, I share your desire to ensure these subjects receive priority attention.

Since I appeared before you in November, the President has unveiled a budget that reiterates this administration's commitment to results. The fiscal year 2003 budget places a new-found emphasis on how well programs and the initiatives we have designed to manage them serve the needs of our citizenry. In describing the budget, Mitch Daniels has emphasized that the days when programs float along year after year, spending taxpayers' dollars with never a showing of reasonable results or returns, must give way to an era of accountable government.

SARA gives us the opportunity to more carefully study the subcommittee's vision for positioning the procurement work force to meet the many challenges that face our country in the 21st century. Since results are what count in the end, our review must consider whether processes as SARA would change them will help agencies to better execute the programs that you have entrusted them to carry out.

In this regard, I am pleased by several features of SARA which offer the promise of greater return on our investment of Federal resources. These aspects of SARA include for instance a pilot to simulate performance-based service contracting and the concept of statutorily reinforcing more integrated decisionmaking among the various disciplines that are responsible for the acquisition process.

I believe the path to improved performance begins with ensuring that the processes are shaped to effectively balance all the acquisition basics. Balance is achieved by appropriate attention to acquisition planning, competition, contract structure and contract management. We also must be sensitive to operational efficiency, but in doing so recognize that it is not an end in and of itself.

Unfortunately, lax application of acquisition basics continues to be a major contributor to shortfalls in program performance, insufficient attention to requirements development, weak cost and price analysis, inconsistent use of competition, ineffective negotiations, poorly structured contracts, and inadequate contract management plague even the most streamlined and protest-proof of our acquisition tools. To improve performance, agencies must recognize that acquisitions are the shared responsibility of a variety of disciplines, including program, technical, contracting, budget, financial, logistics and legal personnel. These disciplines must work together so the respective expertise that each offers is better integrated in agency decisionmaking.

In particular, program offices must be willing to commit sufficient attention to the acquisition planning and contract manage-

ment. They must understand that no amount of training on the part of procurement personnel and no degree of operational efficiency afforded by contracting tools can serve as a substitute for these activities. For their part, agency procurement officials must not allow pressures for expediency to divert attention away from the application of fundamental contracting principles that lie at the heart of any successful acquisition process, no matter the agency or the requirement.

Far from the mechanical or administrative-laden label that some might assign to the contracting function, procurement personnel are the key component of our acquisition work force and are looked upon to ensure sound application of the very contracting tools now available to them. To use the President's own words, "We are here not to mark time, but to make progress to achieve results, and to leave a record of excellence." The message is clear. We must remain firm in our resolve to improve the performance of government and the culture that drives our investment decisions.

The importance of agency procurement offices in this transformation cannot be emphasized enough. Program offices across government, from those that serve the needs of our war fighters to those that support the government's efforts to promote educational excellence for our students, must ultimately depend on our procurement personnel to draft and negotiate the sound contracts that form the underpinning for successful performance.

I thank the subcommittee for recognizing the critical role played by procurement officials throughout the government, and also for challenging us to revisit the principles that lie at the heart of our procurement processes. On behalf of the administration, I accept this challenge. In doing so, I intend to ensure that our procurement processes are results-oriented and to work with this subcommittee and the other Members of Congress to change them where they are not.

This concludes my prepared remarks, but I am happy to answer questions.

[The prepared statement of Ms. Styles follows:]

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

MARCH 7, 2002

Chairman Davis, Congressman Turner, and Members of the Subcommittee, I appreciate the opportunity to appear before you again today to continue our discussion on the "Services Acquisition Reform Act" (SARA). SARA challenges the procurement community to take a fresh and focused look at several key aspects of our acquisition processes and policies -- from the way we manage contracts and incentivize our contractors, to the approaches we employ for capitalizing on the ingenuity of the commercial marketplace. I thank the Subcommittee for reaching out to engage the Administration in this important dialogue. As responsible stewards of the $220 billion in goods and services the federal government buys each year, I share your desire to ensure these subjects receive the priority attention of our federal procurement officials.

Since I last appeared before you in November, the President has unveiled a budget that reiterates the Administration's commitment to results. The FY 2003 budget places a newfound emphasis on how well programs -- and the initiatives we have designed to manage them -- serve the needs of our citizenry. In describing the budget, the Director of the Office of Management and Budget (OMB) emphasized that "[t]he days when programs float along year after year, spending taxpayer dollars with never a showing of reasonable results or return, must give way to an era of accountable government."

I'm confident you will agree that our procurement personnel are going to be major players in the transformation to accountable government. They are the creators and guardians of the vehicles that most directly influence how effective our contractors are in helping carry out the business of government. The Administration and Congress must therefore work together to ensure the procurement workforce is well equipped to shoulder this critical responsibility.

SARA gives us the opportunity to more carefully study the Subcommittee's vision for positioning the procurement workforce to meet the many challenges that face our country in the 21st century. Since results are what count in the end, our review must consider whether processes, as SARA would change them, will help agencies to better execute the programs that you have entrusted them to carry out.

In this regard, I am pleased by several features of SARA, which offer the promise of greater return on our investment of federal resources. These aspects of SARA include, for instance, a pilot to stimulate performance-based service contracting (PBSC) and the concept of statutorily reinforcing more integrated decision making among the various

disciplines that are responsible for the acquisition process. However, I cannot express similar enthusiasm for some other aspects of SARA, at least not in their current formulation. In those cases, the tie-in between the change that SARA would bring about and the potential for improved performance is too tenuous.

Given the evolving nature of the bill's provisions during the drafting process (to which most agencies have not been privy), and the fact that it was formally introduced just this week, the Administration is not prepared at this time to provide a comprehensive assessment of SARA. However, I would like to speak conceptually about some of SARA's more prominent themes, namely: (1) strengthening the management of the procurement process and skills of the workforce, (2) improving use of contract incentives, and (3) taking greater advantage of the commercial marketplace. My comments (which are generally based on the February 27th draft of the bill) assume familiarity with, and elaborate on, my statement from your November hearing. Since that statement addressed most of the questions posed in your letter of invitation for this hearing, I will not generally repeat those responses in my discussion with you today.

Managing the Procurement Process

SARA includes a variety of provisions that seek to address shortcomings in current management practices and human capital needs. Among other things, SARA would require each executive agency to appoint a "chief acquisition officer" to achieve better integration of its acquisition activities. SARA also would establish a central fund

to cover acquisition workforce training needs, and authorize a government-industry exchange program.

Achieving Better Integration of Acquisition Activities

As you know from my last appearance before the Subcommittee in November, I believe the path to improved performance begins with ensuring that processes are shaped to effectively balance all "acquisition basics." Balance is achieved by giving appropriate attention to acquisition planning, competition, contract structure, and contract management. We also must be sensitive to operational efficiency, but, in doing so, recognize it is not an end in itself.

Unfortunately, lax application of acquisition basics continues to be a major contributor to shortfalls in program performance. Insufficient attention to requirements development, weak cost and price analyses, inconsistent use of competition, ineffective negotiations, poorly structured contracts, and inadequate contract management plague even the most streamlined and protest proof of our acquisition tools.

To improve performance, agencies must recognize that acquisitions are the shared responsibility of a variety of disciplines, including program, technical, contracting, budget, financial, logistics and legal personnel. These disciplines must work together so the respective expertise that each offer is better integrated in agency decision making. In particular, program offices must be willing to commit sufficient attention to acquisition planning and contract management. They must understand that no amount of training on

the part of procurement personnel and no degree of operational expediency afforded by contracting tools can serve as a substitute for these activities.

For their part, agency procurement officials must not allow pressures for expediency to divert attention away from the application of fundamental contracting principles that lie at the heart of any successful acquisition process, no matter the agency or the requirement. Far from the mechanical or administrative-laden label that some might like to assign to the contracting function, procurement personnel are the *key* component of our acquisition workforce and are looked upon to ensure sound application of the varied contracting tools now available to them.

SARA's solution for better integration: the chief acquisition officer (CAO). section 201 of SARA would require an agency to appoint a CAO. Under SARA, a CAO would assume the responsibilities currently assigned to agency senior procurement executives (SPE). These responsibilities include, among others, providing management direction of the agency procurement process, increasing use of full and open competition, and maintaining clear lines of authority, accountability, and responsibility for procurement decision making. In addition, the CAO would become primarily responsible for "acquisition management." In particular, SARA would make the CAO responsible for evaluating performance of agency acquisition programs on the basis of applicable performance measurements and develop appropriate business strategies. The CAO would also assess knowledge and skill in acquisition resources management and develop plans for addressing deficiencies.

A modified management construct. As noted, I agree that agencies need to foster better integration between traditional contracting functions, such as contract negotiation, and other related functions that are integral to the acquisition process, but not directly within the responsibility of the contracting officer. These other functions include activities such as requirements development and financing. I further agree that there may be benefits from reinforcing the principle of integration in statute. However, two important modifications to SARA's current construct need to be carefully considered.

First, we need to retain the SPE position. There remains a very real ongoing need for committed management attention focused on traditional procurement activities. We cannot allow this attention to be diluted. Thus, the Subcommittee should consider clarifying that, in addition to their current responsibilities, senior procurement executives, shall provide contract management advice to agency senior program officials who, in turn, shall confer with the senior procurement executive as is necessary to enable the respective officials to effectively monitor and evaluate a program's acquisition performance activities.

Second, I would authorize -- but not require -- the appointment of a CAO. As one industry witness observed during your November hearing, it is difficult to legislate agency cultures. The establishment of a CAO within a given agency should be the product of a well-deliberated business decision by senior management driven by the need, and the likely ability of a CAO, to improve operational and management shortcomings. The agency head, who is familiar with, and ultimately accountable for,

mission performance, will be best able to assess the need for a CAO based on the nature of the agency's mission and prominence of acquisition in carrying out this mission. Perhaps, the Subcommittee could offer guideposts to help agencies in deciding when the function is likely to be of greatest benefit -- e.g., when an agency has a large procurement budget, routinely undertakes a significant number of complex major acquisitions, and is especially reliant on contractors to help carry out its mission.

Overall, I support the Subcommittee's desire to ensure agency procurement personnel are meaningful and real partners in agency decision making on acquisition matters. At the same time, senior agency management must have the flexibility to determine how this attention is most effectively applied and integrated with other acquisition-related functions. Indeed, a CAO mandate might be especially constraining in small agencies with minimal procurement budgets and personnel. At the other end of the scale, I would note that the Department of Defense (DOD), with one of the largest procurement budgets and personnel workforces, already has, by statute (10 U.S.C. 133), a CAO -- i.e., the Under Secretary of Defense for Acquisition, Technology, and Logistics -- and we would not want CAO legislation to interfere with that statute.

I much appreciate the modifications the Subcommittee has already made in response to my prior comments, by dispensing with a construct that would have defined where the function is placed within the agency. This is a step in the right direction, but even more management flexibility must be vested in the agency head. Otherwise, a good concept could become a force-fit restraint on good management.

Tending to the Needs of our Acquisition Workforce

The Subcommittee's interest in improving the management of human capital is certainly understandable. Agencies can ill afford imbalances in the experience, skills, or knowledge base of their acquisition workforce. A well equipped workforce is tantamount to successful mission performance.

Funding. Section 102 of SARA would establish a central acquisition workforce training fund. Funding would be generated through fees paid by federal agencies making purchases from government-wide acquisition contracts (GWACs), multi-agency contracts for information technology (IT) and the Multiple Award Schedules (MAS) program operated by the General Services Administration.

I appreciate well the need for adequate funding. At the same time, I continue to believe acquisition training programs should be funded through the normal budget and appropriations process. Among other things, funding training through fees generated from purchases made from GWACs, multi-agency contracts, and MAS could create a hardship on small agencies that may rely more heavily on these vehicles to meet their needs.

Developing management expertise. SARA would create an executive exchange program between the federal government and the private sector to foster the development of management expertise. If it can be properly structured, this concept may offer an opportunity to improve understanding between, and broaden the perspectives of, the respective sectors' acquisition workforces. As the Director of the Office of Personnel Management (OPM) stated to the Subcommittee last Summer on an industry-exchange

program for IT, improved communication and cooperation between the government and the private sector can help identify more effective ways for the two sectors to work together and can spur the flow of new approaches to technical problem-solving. At the same time, I am sensitive to possible ethics implications. For this reason, I have asked the Office of Government Ethics and the Department of Justice to carefully review these SARA provisions. (Of course, OPM will also be reviewing the provisions as well.)

Eliminating Unnecessary Reporting Requirements

Before leaving the topic of procurement management, I would like to note briefly that my office is reviewing some of the current Congressional reporting requirements related to government-wide acquisition activities to determine if they should be eliminated or otherwise modified. Unnecessary reporting can be a costly drain on resources and divert attention away from our priority initiatives.

We are generally looking to assess the continued utility of various reporting requirements, in light of the burden that such requirements create and steps that may have been taken since the requirements were originally imposed to provide visibility and accountability through other means. We are also taking into account the benefit that might be achieved if the resources currently dedicated to Congressional reporting were redirected to other efforts that may offer a greater long-term payoff. Such alternative efforts might include some of those identified in SARA, such as participation on a government-industry panel to help agencies gain a better and broader understanding of

how performance-based service contracting (PBSC) can be used most effectively, or examination of opportunities to foster greater collaboration as agencies address common acquisition activities. I hope you will work with us to eliminate unnecessary reporting requirements that may remain on the books.

Using Contract Incentives

Several of SARA's provisions address the use of incentives. This interest is understandable. For any effort involving contractors to ultimately succeed, contracts must be well structured to produce cost-effective quality performance. Although SARA does not specifically identify PBSC as an incentive, per se, I would like to address it at this point in my discussion, since it is designed to foster the creativity and initiative of our contractors to help agencies achieve better solutions to meet their needs. Let me now briefly elaborate on my November comments on PBSC and reiterate our views regarding share-in-savings.

Refocusing our PBSC efforts. As your letter of invitation notes, PBSC is underutilized. To help energize and refocus our PBSC efforts, I am taking the following steps.

First, I am forming an inter-agency group to resolve disagreements among the agencies regarding the requirements to qualify a contract as performance-based. I anticipate, as one output of this effort, improved guidance regarding the scope and nature of PBSC. There must be a common understanding of the definition upon which to build experience and track progress.

Second, I am supporting pilot efforts that can help agencies gain experience with the PBSC concept. In this regard, I support government-wide expansion of the pilot that Congress established for DOD in the Defense Authorization Act for FY 01. (I am assuming that this is the sole intent of sections 401(a) and (b) of the bill.) Under that pilot, DOD may treat acquisitions for services of $5 million or less as commercial items if the purchases are performance-based and made on a firm-fixed-priced basis, and certain other conditions are met. Expansion of this pilot to civilian agencies should help to incentivize greater use of PBSC.

Third, in response to section 204 of SARA, I am carefully considering the merits of a government-industry advisory panel to review PBSC. Such a panel might help agencies to gain a better and broader understanding of how PBSC can be used most effectively. However, if such an initiative is undertaken, I would urge the Subcommittee to keep it focused on PBSC (as opposed to the broader scope currently reflected in section 204) and to make the Federal Advisory Committee Act inapplicable, so as to eliminate unnecessary and work-inhibiting burdens on the advisory effort. In this way, the attention and energies of the participants will provide concentrated effort to support this results-oriented initiative.

As a footnote to our discussion on PBSC, I feel compelled to comment briefly on language in Title III of SARA that would encourage contracting offices to expend efforts to incentivize contractors performing under level-of-effort type contracts. This provision is puzzling. Level-of-effort contracts are the antithesis of PBSC. Payment is based upon

reimbursement for time and effort expended (i.e., best efforts) rather than being tied to a completed and delivered product or service for which there is a contract specified firm-fixed price (i.e., tangible results). Although the SARA provision is designed to encourage efficient performance under these contracts, it is unclear how successful such efforts would ultimately be. Since profit is built into the price of each hour, there would appear to be little incentive to work fewer hours than are authorized under the contract. Rather than seeking to improve a contract type that is inherently weak, we should, in my opinion, motivate greater use of those contractual arrangements that can better protect the government's interest.

Expanding use of "share-in-savings" contracts. SARA would significantly expand and make permanent the share-in-savings pilot authority created in the Clinger-Cohen Act. We recognize that agency interest in the pilot authority has been weak and agree that consideration should be given to adding incentives. However, expansion must be tempered by the following considerations.

First, even as expanded, the authority should remain as a pilot for IT until there are demonstrable benefits. To date, we have not seen results. In fact, our sense is that agencies will need to gain greater experience in developing baselines. Proper baselines, in combination with guaranteed savings clauses, are critical to ensuring savings can be validated and realized. As one procurement official recently told me: "We are struggling to do PBSC well. Share-in-savings is like graduate level PBSC. You gotta walk before you can run."

Understanding results achieved under the pilot, including cost reductions, will help Congress decide whether or not a provision of general authority would be beneficial for the government. We should also consider the impact of these contracts on other activities in light of the extended contract duration that may be required to recoup savings and the generally high termination costs.

Second, added incentives need to be consistent with established fiscal policy (i.e., where agencies, at a minimum, are required to fund the first year of the contract plus termination costs). Moreover, provisions allowing agencies to use retained savings (after paying the contractor) should limit the allocation of such funds to the acquisition of additional IT to ensure responsible program development.

Third, section 301(e)(2) of the bill, which purports to require the Director of OMB to submit legislative recommendations to Congress, shall be construed consistently with the President's constitutional authority to supervise the unitary executive branch and to recommend to Congress such measures as he judges necessary and expedient.

Contracting in the Commercial Marketplace

As you know well, this Administration is actively striving to create a market-based government that is unafraid of competition, innovation, and choice. From our competitive source initiative, which is already beginning to give the private sector a greater opportunity to compete for work, to our planned efforts to reinvigorate the acquisition of commercial-off-the-shelf items, we are committed to ensuring that

agencies are effectively positioned to take better advantage of the commercial marketplace.

In this regard, Mr. Chairman, I was pleased to see that the bill you introduced at the end of last year to address federal emergency procurement flexibilities (H.R. 3426) included a provision to reinforce the importance of conducting effective market research – including consideration of small businesses and new entrants into federal contracting. Such a provision will serve as a useful reminder of the importance of considering the full range of marketplace capabilities.

With respect to SARA, it contains several provisions addressing commercial item acquisitions. My attention is especially drawn to sections 402, 403, and 404, which would expand application of Part 12 of the Federal Acquisition Regulation (FAR). For context, let me take just a moment to review the nature of FAR Part 12.

Part 12 establishes a preference for the acquisition of commercial items and lays a foundation for taking advantage of customary commercial practices. It creates an environment that is largely free from government-unique standards, specifications and accounting requirements. Among other things, Part 12 provides standard provisions and clauses that are intended to address commercial market practices for a wide range of potential government acquisitions.

Consistent with the Federal Acquisition Streamlining Act (FASA) and the Clinger-Cohen Act, Part 12 is rather broad in its scope. Its applicability even extends to purchases where there may not be adequate price competition. In fact, the commercial

item provisions of FASA, and especially the Clinger-Cohen Act, were designed, in part, to prove the government could forego its traditional safeguards in a non-competitive environment. To appreciate this point, one need not look further than the Truth In Negotiations Act (TINA). Long before Clinger-Cohen barred application of this law to commercial item contracts, TINA provided an exception for any commercial or non-commercial purchase where there was adequate price competition.

Notwithstanding its already broad scope, SARA would expand application of Part 12 even further. One apparent goal is to create greater uniformity in our treatment of commercial contractors. To this end, section 403 would eliminate caveats in law that currently result in more limited application of Part 12 policies to services than are authorized for products. Use of Part 12 would no longer be predicated on services being sold competitively in substantial quantities and based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. section 402 would endorse the acquisition of services through time-and material or labor-hour contracts using the same terms, conditions, and safeguards that Part 12 provides for the acquisition of commercial services through firm-fixed-price contracts. Finally, section 404 would require an agency to purchase the *non-commercial items* of a "commercial entity" using the clauses and policies prescribed by Part 12 if at least 85 percent (in dollars) of the sales of the enterprise over the past three business years have been made to nongovernment entities or under FAR Part 12.

I am concerned about the potential impact of these provisions, which would eliminate certain safeguards from Part 12. As we have come to learn (or relearn) in

recent years, protecting the public fisc is not easy in environments where the government's market leverage has been marginalized. To be more specific, Part 12 (in conjunction with the definition of "commercial item" set forth in FAR Part 2) requires that: (1) the risk of performance be placed on the contractor through the use of firm-fixed-price contracts or fixed-price contracts with economic price adjustments, (2) a contractor offer products that, at a minimum, are "of a type" sold or offered for sale in the commercial marketplace, and (3) offered services are sold competitively in substantial quantities in the commercial marketplace. SARA's effective elimination of these safeguards would leave the government unnecessarily vulnerable. Consider the following:

Use of flexibly-priced contracts. Since the enactment of FASA, agencies have been precluded from acquiring commercial items under FAR Part 12 using cost-type contracts. This limitation makes sense. There should be no need for the government to assume performance risk to purchase goods and services that have been market tested, either directly or through a commercial analog.

Putting aside whether time-and-material and labor-hour contracts should be considered cost-type contracts, they certainly share many of the risk characteristics of a cost-type contract. In particular, the government assumes the performance risk. A contractor has no obligation to deliver a finished product; it must only make best efforts. Some may point out that the government is protected by the establishment of a "ceiling price" while others will argue that the government's interest can be protected if a labor rate is fully loaded (i.e., it includes overhead, general and administrative expense, and

profit, in addition to direct costs). However, as I noted in my comment on level-of-effort contracting, profit is included in the price of each hour. As a result, both of these so-called safeguards will offer little positive incentive for cost control, labor efficiency, or delivery of a completed product or service. The FAR recognizes this problem and restricts use of time-and-material and labor-hour contracts to circumstances where no other contract type is appropriate.

Part 12 in its current structure appropriately avoids these potential problems by requiring use of firm-fixed-price contracts or fixed-price contracts with economic price adjustments for the acquisition of commercial items. Agencies may award contracts that identify fixed labor rates, provided that orders reflect a firm-fixed-price for a specific task. Given the problems inherent in time-and-material and labor-hour contracts, and the fact that they are the antithesis of PBSC, I am hard-pressed to see how their use will produce beneficial results if applied to Part 12 in its current form, as sections 402 and 403 envision.

Acquisition of non-commercial items from commercial entities. As I noted a moment ago, section 404 would require an agency to purchase the non-commercial items of a "commercial entity" using the clauses and policies prescribed by Part 12 if certain conditions are met. This would mark the first time non-commercial items could be acquired under FAR Part 12 on other than a performance-based, firm-fixed-price, and pilot basis. The rationale underlying section 404 ostensibly is that the government will be protected when it buys non-commercial items (i.e., items that are not sold or even of a type offered or sold in the marketplace) as long as the company has a demonstrated track

record in selling commercial items at fair and reasonable prices. In the absence of marketplace competition or another appropriate safeguard, I am opposed to relying upon the results of a track record unrelated to the offered product or service as protection that the prices for non-commercial items are fair and reasonable.

The bottom line: one size does not fit all. My point in raising these concerns is not to signal a retreat in the federal government's commercial item policies. To the contrary, we must remain steadfast in our effort to take advantage of the marketplace. And, in doing so, we must recognize that Part 12 can effectively address many of the relationships with our contractors. At the same time, we must accept that Part 12 has boundaries. It assumes that prices are determined by the interplay of competitive market forces. Not every relationship with a contractor can be satisfied with its terms, conditions and safeguards.

The boundaries of Part 12 are best viewed in the context of the differences between the government and the private sector. Fundamentally, we can never escape the fact that the government is not a private entity, does not report to shareholders, and does not have a profit incentive.

Taxpayers demand that our program and contracting officials use competition as a matter of course and operate in a manner that is citizen-centric and fair. These demands are well founded and not to be ignored. While effective investment of resources is critical, the varied needs of our citizenry preclude profit motive from operating as an incentive. In this context, competition, where applicable, and transparency (especially

where competition is absent) have proven themselves to be the most reliable prescriptions for yielding results and ensuring our government remains accountable to those we serve.

By contrast, shareholders of a private entity are focused on profit. As a result, they will be more quick to allow their companies to forego competition or transparent source selections when doing so will increase the profitability or price of the companies' stock. While this behavior is certainly understandable, it cannot appropriately serve as a public policy to meet the many needs of our Nation.

Part 12's current limitations reflect tradeoffs that have been made between the desire to eliminate barriers to the marketplace and the need to protect the interests of the government in an environment which demands that competition and transparency be used -- not withheld -- to ensure effective contracting. In particular, Part 12 ties our use of commercial items and practices to those situations where there is a "yardstick" in the commercial marketplace (e.g., competition, substantial sales of services, a firm-fixed-price for a completed task) to serve as a surrogate for the imposition of government-specific requirements in determining price and product quality. While the loss of this yardstick may be of little consequence to a private entity that can easily employ other leveraging tools to protect its shareholders, this yardstick is critical to the government's ability to effectively meet its varied needs.

I therefore urge the Subcommittee to reconsider the impact of sections 402, 403 and 404. I welcome the opportunity to discuss these concerns further, as well as to explore with the Subcommittee improvements that might make Part 12 policies more

effective where alternatives exist to enable the government to protect its interests and maintain the public's confidence.

Conclusion

As this year's budget illustrates, the Administration takes seriously the assessment of government performance. To use the President's own words: "We are not here to mark time, but to make progress to achieve results, and to leave a record of excellence."

The message is clear: we must remain firm in our resolve to improve the performance of government and the culture that drives our investment decisions. The importance of agency procurement offices in this transformation cannot be emphasized enough. Program offices across government, from those that serve the needs of our war fighters to those that support the government's efforts to promote educational excellence for our students, must ultimately depend on our procurement personnel to draft and negotiate the sound contracts that form the underpinning for successful performance.

I thank the Subcommittee for recognizing the critical role played by procurement officials throughout government and also for challenging us to revisit the principles that lie at the heart of our procurement processes. On behalf of the Administration, I accept this challenge. In doing so, I intend both to ensure that our procurement processes are results oriented and to work with this Subcommittee and the other members of Congress to change them where they are not.

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

Mr. DAVIS. Thank you very much.

Commissioner Perry.

Mr. PERRY. Thank you Congressman Davis and Congressman Turner and members of the subcommittee. Thank you for inviting me to appear before you to discuss ideas on how to improve the Federal Government's acquisition process.

Chairman Davis, I too would like to take this opportunity to thank you in particular for your leadership in this area over the years, and for your current initiative to bring the need for additional acquisition reform to the attention of the Congress.

As you know, each year the Federal Government spends over $200 billion goods and services in order to meet the agency requirements to provide government programs and services to the American public. That is why it is so important for the government's acquisition process and regulations to focus on efficiency, effectiveness and accountability. Additionally, the acquisition process and regulations should be easily understood by all the parties who are involved in the process and should be based upon a common sense approach. Finally, when appropriate, the Federal Government's acquisition process and regulations should resemble the best commercial sector buying procedures.

As you know, at GSA we have been actively implementing a number of initiatives to improve the Federal acquisition process and work force. This includes items such as the integrated acquisition system, which is a part of the administration's e-government strategy. Several of the initiatives that we are working on are detailed in the written testimony that I have submitted for the record.

At GSA, we are developing our acquisition work force as a part of our overall human capital management initiative. For example, to develop the skilled acquisition work force we need at GSA, we are developing competency-based assessments to determine the specific areas where our training of the GSA acquisition work force to date has achieved the needed results. We are also looking at areas where we still have deficiencies. We are using this information regarding the skill mix of the GSA acquisition work force to develop and implement a specific action plan tailored to the identified training needs at our agency. We believe that all Federal agencies should be doing the same kind of self-assessment and correction of deficiencies as a part of their human capital management initiatives.

The Services Acquisition Reform Act proposal to require GSA to establish a work force fund for interagency training purposes shows a strong commitment to improving the knowledge and skills of the acquisition work force in particular, and that of the total Federal work force in general. While we fully support your concept of developing a well-trained acquisition work force, the administration would support adequate funding to agencies through normal budget and appropriations processes.

We believe that several of the other provisions of the Services Acquisition Reform Act will help agencies improve their acquisition work force, for example, section 102 of the bill, which calls for a government-industry exchange program; additionally, section 105 of the bill which calls for an acquisition work force recruitment and

retention pilot program; and third, section 107 of the bill which encourages contractors to allow their employees to telecommute. These sections and others in the bill that I have cited are examples of the provisions in this legislation which would in fact help agencies improve their acquisition work force.

On another matter having to do with the chief acquisition officer, as reflected in your legislation it is important to keep in mind that without management leadership, initiatives to streamline the current acquisition process could end up becoming just another layer of regulations. That is why we support the concept of each agency having a chief acquisition officer. We have such a position at GSA and we believe that the ability of that person to aid GSA in developing a strong acquisition strategy is critically important to our success.

For that reason, we believe that section 201 of the legislation requiring agency heads to establish a chief acquisition officer position is an interesting proposal and would signal the importance of maintaining a well-managed, integrated, agency-wide acquisition plan.

In summary, Mr. Chairman, we believe that the Service Acquisition Reform Act is a very sweeping proposal offering several beneficial programs and ideas. We appreciate your leadership in bringing these matters before this subcommittee and before the Congress and before the administration. As you can see from our comments and from the various initiatives that we are working on at GSA, we share your commitment to making the needed improvements to the Federal acquisition process and to the Federal acquisition work force. With that in mind, we are anxious to continue to work with the subcommittee to find ways to make significant improvements in the current Federal acquisition process.

Once again, thank you for inviting me to discuss these items and this very important issue with you today. I will be happy to answer questions.

[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

MARCH 7, 2002

INTRODUCTION

CHAIRMAN DAVIS, MR. TURNER AND MEMBERS OF THE SUBCOMMITTEE, THANK YOU FOR INVITING ME TO APPEAR BEFORE YOU TODAY TO DISCUSS IDEAS ON HOW TO IMPROVE THE CURRENT FEDERAL ACQUISITION PROCESS.

CHAIRMAN DAVIS, I WOULD LIKE TO TAKE THIS OPPORTUNITY TO THANK YOU IN PARTICULAR FOR YOUR LEADERSHIP IN THIS AREA OVER THE YEARS, AND FOR BRINGING THE NEED FOR ADDITIONAL ACQUISITION REFORM TO THE ATTENTION OF CONGRESS.

AS YOU KNOW, EACH YEAR, THE FEDERAL GOVERNMENT SPENDS APPROXIMATELY $200 BILLION ON GOODS AND SERVICES IN ORDER TO MEET AGENCY REQUIREMENTS TO PROVIDE GOVERNMENT PROGRAMS AND SERVICES TO THE AMERICAN PUBLIC. THAT IS WHY IT IS SO IMPORTANT FOR THE GOVERNMENT'S ACQUISITION PROCESS AND REGULATIONS TO FOCUS ON EFFICIENCY, EFFECTIVENESS AND ACCOUNTABILITY. ADDITIONALLY, THE ACQUISITION PROCESS AND

REGULATIONS SHOULD BE EASILY UNDERSTOOD BY ALL THE PARTIES INVOLVED IN THE PROCESS AND BE BASED ON COMMON SENSE. FINALLY, WHEN APPROPRIATE, THE ACQUISITION PROCESS AND REGULATIONS SHOULD RESEMBLE COMMERCIAL SECTOR BUYING PROCEDURES.

GENERAL SERVICES ADMINISTRATIONS (GSA'S) ROLE IN IMPROVING THE OVERALL FEDERAL GOVERNMENT'S ACQUISITION PROCESS

AS YOU KNOW, GSA MANAGES A SIGNIFICANT PORTION OF THE OVERALL FEDERAL GOVERNMENT'S ACQUISITION PROCESS TO OFFER GOODS AND SERVICES, SUCH AS WORKSPACE, OFFICE EQUIPMENT, COMPUTERS, TELECOMMUNICATIONS, INFORMATION TECHNOLOGY, VEHICLES AND FURNITURE TO OUR CUSTOMER AGENCIES. THROUGH THE EFFICIENCY AND EFFECTIVENESS OF GSA'S PROCUREMENT AND PROPERTY MANAGEMENT SERVICES, WE HELP FEDERAL AGENCIES TO BETTER SERVE THE PUBLIC. AS ONE OF THE FEDERAL GOVERNMENT'S LEAD ACQUISITION AGENCIES WE RECOGNIZE THE NEED TO CONSTANTLY LOOK FOR WAYS TO IMPROVE THE FEDERAL GOVERNMENT-WIDE ACQUISITION PROCESS AND USE GSA'S EXPERTISE TO HELP PROVIDE BEST VALUE FOR ALL AGENCIES AND THE TAXPAYERS.

AT GSA WE RECOGNIZE THE NEED TO PURSUE THIS MORE AGGRESSIVELY BY INITIATIVES AT BOTH THE FEDERAL GOVERNMENT-WIDE LEVEL AND AT THE INDIVIDUAL AGENCY-LEVEL.

GSA'S CURRENT INITIATIVES FOR IMPROVING THE FEDERAL ACQUISITION PROCESS:

1. GSA ADVANTAGE!

ONE EXAMPLE OF GSA'S EFFORT TO IMPROVE THE FEDERAL ACQUISITION PROCESS IS THE DEVELOPMENT OF AN ON-LINE ACQUISITION SYSTEM CALLED GSA ADVANTAGE. THIS SYSTEM USES INTERNET TECHNOLOGY TO GIVE AGENCIES ELECTRONIC ON-LINE ACCESS TO THE GOODS AND SERVICES OF OVER 7,000 VENDORS. THE SYSTEM ALSO ALLOWS AGENCIES TO ISSUE ELECTRONIC REQUESTS FOR QUOTATIONS FOR PRODUCTS AND SERVICES. ADDITIONALLY, THE GSA ADVANTAGE SYSTEM HAS THE ENHANCED SEARCH AND INQUIRY FUNCTIONALITY NECESSARY TO MAKE IT A VALUABLE RESEARCH TOOL FOR CONTRACTING OFFICERS LOOKING FOR COMPARATIVE INFORMATION REGARDING THE ITEMS THEY NEED TO BUY. THIS YEAR WE INTEND TO IMPROVE THIS ON-LINE ACQUISITION SYSTEM BY INTEGRATING OUR GSA ADVANTAGE SYSTEM WITH OTHER AGENCIES'

PROCUREMENT AND FINANCE SYSTEMS. THIS WILL MORE FULLY AUTOMATE THE PROCESS OF TRANSFERRING AGENCY PURCHASE ORDERS AND OTHER PROCUREMENT INFORMATION. IT WILL ALSO PROVIDE THE INFORMATION NEEDED FOR EACH AGENCY'S ACCOUNTING CONTROL PURPOSES.

2. INTEGRATED ACQUISITION SYSTEM:

TO GO WELL BEYOND THE CURRENT GSA ADVANTAGE ON-LINE ACQUISITION SYSTEM, WE ARE WORKING ON THE ADMINISTRATION'S E-GOVERNMENT INITIATIVE TO INTEGRATE ACQUISITION TOOLS. THIS WILL ELIMINATE REDUNDANT SYSTEMS AND DATA COLLECTION.

WE CAN ACHIEVE THE ADMINISTRATION'S GOAL TO EXPAND THE USE OF ELECTRONIC GOVERNMENT AND INTERNET TECHNOLOGY WHILE AT THE SAME TIME ACHIEVE THIS COMMITTEE'S GOAL TO IMPROVE THE FEDERAL GOVERNMENT'S ACQUISITION PROCESS.

THIS E-GOVERNMENT INITIATIVE WILL TRANSFORM THE FEDERAL ACQUISITION PROCESS AND SIGNIFICANTLY IMPROVE SERVICE AND OUR ABILITY TO PROVIDE BEST VALUE IN SUPPORT OF AGENCY MISSIONS.

SECTION 203 OF YOUR DRAFT BILL CALLS FOR A STUDY ON HORIZONTAL ACQUISITION THAT COULD RESULT IN RECOMMENDATIONS THAT WILL HELP US ACHIEVE THE INTENDED GOAL OF THE E-GOVERNMENT INITIATIVE FOR INTEGRATED ACQUISITION. AMONG OTHER THINGS, THIS EFFORT WILL FACILITATE THE INTEGRATION OF CURRENT CONTRACTING VEHICLES AND CATALOGS INTO A COMMON ON-LINE SYSTEM THEREBY MAKING CURRENT GWACS (government wide acquisition contracts), AND CATALOGS FOR GOODS AND SERVICES MORE ACCESSIBLE TO ALL FEDERAL CUSTOMERS.

3. FEDBIZOPPS:

ANOTHER EFFORT TO IMPROVE THE FEDERAL ACQUISITION PROCESS THROUGH THE INCREASED USE OF E-GOVERNMENT AND INTERNET TECHNOLOGY IS THE RECENT DEVELOPMENT OF A WEB SITE, WWW.FEDBIZOPPS.GOV, FOR THE GOVERNMENT'S FEDERAL BUSINESS OPPORTUNITIES. THE WEB SITE, WHICH GSA MANAGES, IS THE GOVERNMENT-WIDE ONLINE ENTRY POINT FOR AGENCIES TO POST THEIR ACQUISITION NEEDS AND FOR VENDORS TO LOCATE OPPORTUNITIES TO DO BUSINESS WITH THE GOVERNMENT.

4. INTEGRATED VENDOR PROFILE NETWORK:

FINALLY, GSA ***IS*** A MANAGING PARTNER IN THE INTEGRATED ACQUISITION INITIATIVE. A COMPONENT OF THIS IS TO DEVELOP AN INTEGRATED VENDOR PROFILE NETWORK. THIS SYSTEM WILL PROVIDE A GOVERNMENT-WIDE POINT OF VENDOR REGISTRATION AND VALIDATION. THAT IS, VENDORS WILL BE ABLE TO PROVIDE THEIR BUSINESS INFORMATION IN ONE PLACE FOR ALL GOVERNMENT SOURCES TO USE. GOVERNMENT OFFICIALS WILL HAVE ACCESS TO THIS DATA TO SUPPORT THEIR ACQUISITION PROCESSES. THIS WILL REPLACE MULTIPLE MANUAL, REDUNDANT, AND OFTEN INCONSISTENT VENDOR COLLECTION SYSTEMS WITHIN THE GOVERNMENT, AND PROVIDE A UNIFIED DATABASE OF VENDOR INFORMATION.

TRAINING

WE CERTAINLY AGREE WITH YOU THAT TRAINING THE FEDERAL ACQUISITION WORKFORCE ON A CONTINUAL BASIS IS AN ESSENTIAL PART OF IMPROVING THE FEDERAL ACQUISITION PROCESS AND CRITICAL TO EACH AGENCY'S PERFORMANCE SUCCESS. AT GSA WE RECOGNIZE THE NEED TO PURSUE THIS MORE AGGRESSIVELY.

THE UNIVERSITY OF MULTIPLE AWARD SCHEDULES (OR U-MAS)

ONE EXAMPLE OF OUR EFFORT TO DEVELOP THE SKILLED ACQUISITION WORKFORCE WE NEED IS GSA'S ON-LINE TRAINING PROGRAM FOR THE

FEDERAL ACQUISITION WORKFORCE. THIS VIRTUAL CAMPUS, KNOWN AS THE UNIVERSITY OF MULTIPLE AWARD SCHEDULES (OR U-MAS) IS A SELF-PACED INTERNET TOOL TO TRAIN THE FEDERAL ACQUISITION WORKFORCE ON HOW TO USE THE GSA SCHEDULES PROGRAM. IT IS AVAILABLE ON-LINE, 7 DAYS A WEEK, 24 HOURS A DAY.

GSA HUMAN CAPITAL MANAGEMENT INITIATIVE:

AS PART OF OUR EFFORT TO DEVELOP THE SKILLED ACQUISITION WORKFORCE WE NEED AT GSA, WE ARE DEVELOPING COMPETENCY-BASED ASSESSMENTS TO DETERMINE THE SPECIFIC AREAS WHERE OUR TRAINING OF THE GSA ACQUISITION WORKFORCE TO-DATE HAS ACHIEVED THE NEEDED RESULTS AS WELL AS AREAS WHERE WE STILL HAVE DEFICIENCIES. WE ARE USING THIS INFORMATION REGARDING THE SKILL MIX OF THE GSA ACQUISITION WORKFORCE TO DEVELOP AND IMPLEMENT A SPECIFIC ACTION PLAN TAILORED TO THE IDENTIFIED THE TRAINING NEEDS OF OUR AGENCY.

WE BELIEVE ALL AGENCIES SHOULD BE DOING THIS KIND OF SELF-ASSESSMENT AND CORRECTION OF DEFICIENCIES AS PART OF THEIR HUMAN CAPITAL MANAGEMENT INITIATIVES.

THE SERVICES ACQUISITION REFORM ACT PROPOSAL TO REQUIRE GSA TO ESTABLISH A WORKFORCE FUND FOR INTERAGENCY TRAINING PURPOSES SHOWS A STRONG COMMITMENT TO IMPROVING THE KNOWLEDGE AND SKILLS OF THE ACQUISITION WORKFORCE IN PARTICULAR AND THE TOTAL FEDERAL WORKFORCE IN GENERAL. WHILE WE FULLY SUPPORT YOUR CONCEPT OF DEVELOPING A WELL-TRAINED ACQUISITION WORKFORCE, THE ADMINISTRATION WOULD SUPPORT ADEQUATE FUNDING THROUGH THE NORMAL BUDGET AND APPROPRIATIONS PROCESS.

SERVICES ACQUISITION REFORM ACT PROVISIONS WILL HELP AGENCIES IMPROVE THEIR ACQUISITION WORKFORCE:

ONE EXAMPLE OF HOW CONGRESS CAN HELP AGENCIES IMPROVE THEIR FEDERAL WORKFORCE IS IN SECTION 102 OF YOUR PROPOSED BILL WHICH CALLS FOR A GOVERNMENT-INDUSTRY EXCHANGE PROGRAM TO PERMIT AGENCIES TO ARRANGE FOR THE DETAIL OF AN ELIGIBLE EMPLOYEE OF AN AGENCY TO WORK FOR A PRIVATE SECTOR ORGANIZATION OR AN ELIGIBLE EMPLOYEE *OF* A PRIVATE SECTOR ORGANIZATION TO WORK FOR AN AGENCY. THIS TYPE OF PROGRAM COULD PROVIDE AGENCIES SUCH AS GSA WITH THE ABILITY TO OFFER INCREASED TRAINING OPPORTUNITIES TO ITS ACQUISITION WORKFORCE AND ENABLE THEM TO BECOME FAMILIAR WITH INDUSTRY

BEST PRACTICES. LIKEWISE, THE PRIVATE SECTOR PARTICIPANTS COULD BENEFIT BY BEING INVOLVED IN THE IMPORTANT PROJECTS THE GOVERNMENT IS UNDERTAKING, SEEING FIRST HAND HOW THE GOVERNMENT WORKS AND TAKING A BETTER UNDERSTANDING OF FEDERAL GOVERNMENT BACK TO THEIR COMPANIES.

SECTION 105 OF THE BILL CALLS FOR AN ACQUISITION WORKFORCE RECRUITMENT AND RETENTION PILOT PROGRAM WHICH WOULD ALLOW THE HEADS OF AGENCIES TO DETERMINE THAT CERTAIN FEDERAL ACQUISITION POSITIONS ARE "SHORTAGE CATEGORY" POSITIONS AND THEREFORE ALLOW AGENCIES TO SHORTEN THE TIME NEEDED TO HIRE HIGHLY QUALIFIED ACQUISITION PERSONNEL. I WOULD NOTE THAT SECTION 151 OF THE MANAGERIAL FLEXIBILITY ACT OF 2001 (S. 1612) WOULD EXTEND SIMILAR HIRING FLEXIBILITY TO ANY POSITION LACKING SUFFICIENT CANDIDATES OR THERE IS A CRITICAL HIRING NEED. I'M SURE YOU ARE FAMILIAR WITH THE FINDING THAT MORE THAN 50% OF THE FEDERAL WORKFORCE IS ELIGIBLE FOR RETIREMENT DURING THE NEXT 5 YEARS. WITH THIS IN MIND WE ARE CONCERNED ABOUT OUR ABILITY TO FILL POSITIONS, ESPECIALLY THOSE HELD BY SKILLED ACQUISITION PERSONNEL. I'M SURE YOU ARE FAMILIAR WITH THE FINDING THAT MORE THAN 50% OF THE FEDERAL WORKFORCE IS ELIGIBLE FOR RETIREMENT DURING THE NEXT 5 YEARS. WITH THIS IN MIND WE ARE CONCERNED ABOUT OUR ABILITY TO FILL POSITIONS,

ESPECIALLY THOSE HELD BY SKILLED ACQUISITION PERSONNEL. *THE SECTIONS OF THE BILL I JUST CITED COULD HELP AGENCIES IMPROVE THEIR STRATEGIC HUMAN CAPITAL MANAGEMENT INITIATIVES.*

TELECOMMUTING:

ANOTHER INITIATIVE WE BELIEVE ADDS TO OUR ABILITY TO RECRUIT AND RETAIN ASSOCIATES IS OUR TELECOMMUTING POLICY. WITH MOUNTING EVIDENCE THAT TELEWORK BENEFITS GOVERNMENT OPERATIONS, BENEFITS THE QUALITY OF WORKLIFE FOR PEOPLE AND BENEFITS THE ENVIRONMENT, GSA, ALONG WITH THE OFFICE OF PERSONNEL MANAGEMENT LAUNCHED AN INTERNET TELEWORK INFORMATION CLEARINGHOUSE FOR FEDERAL EMPLOYEES SO THEY CAN FIND OUT WHAT THE GOVERNMENT OFFERS. I WOULD LIKE TO COMMEND YOU MR. CHAIRMAN FOR YOUR LEADERSHIP IN THIS AREA AND SUPPORT YOUR EFFORTS TO PROVIDE INCENTIVES TO ENCOURAGE CONTRACTORS TO ALLOW THEIR EMPLOYEES TO TELECOMMUTE.

CHIEF ACQUISITION OFFICER:

IT IS IMPORTANT TO KEEP IN MIND THAT WITHOUT MANAGEMENT LEADERSHIP, INITIATIVES TO STREAMLINE THE CURRENT ACQUISITION PROCESS COULD END UP BECOMING JUST ANOTHER LAYER OF REGULATIONS. THAT IS WHY WE SUPPORT THE CONCEPT OF EACH

AGENCY HAVING A CHIEF ACQUISITION OFFICER. WE HAVE SUCH A POSITION AT GSA AND WE BELIEVE THAT THE ABILITY OF THAT PERSON TO AID US IN DEVELOPING A STRONG ACQUISITION STRATEGY IS CRITICALLY IMPORTANT TO OUR SUCCESS. FOR THAT REASON, WE BELIEVE THAT SECTION 201 OF THE PROPOSED LEGISLATION REQUIRING AGENCY HEADS TO ESTABLISH A CHIEF ACQUISITION OFFICER POSITION IS AN INTERESTING PROPOSAL AND WOULD SIGNAL THE IMPORTANCE OF MAINTAINING A WELL-MANAGED, INTEGRATED, AGENCY-WIDE ACQUISITION PLAN.

SUMMARY COMMENTS

THE SERVICE ACQUISITION REFORM ACT IS A VERY SWEEPING PROPOSAL OFFERING SEVERAL BENEFICIAL PROGRAMS AND IDEAS. WE APPRECIATE YOUR LEADERSHIP ROLE, MR. CHAIRMAN, IN BRINGING THESE MATTERS BEFORE THIS SUBCOMMITTEE, THE CONGRESS AND THE ADMINISTRATION. AS YOU CAN SEE FROM OUR COMMENTS AND THE VARIOUS INITIATIVES WE'RE WORKING ON AT GSA, WE SHARE YOUR COMMITMENT TO MAKING NEEDED IMPROVEMENT TO THE FEDERAL ACQUISITION PROCESS AND THE FEDERAL ACQUISITION WORKFORCE. WITH THAT IN MIND WE ARE ANXIOUS TO CONTINUE TO WORK WITH THE SUBCOMMITTEE TO FIND WAYS TO MAKE SIGNIFICANT IMPROVEMENT IN THE CURRENT FEDERAL ACQUISITION PROCESS.

ONCE AGAIN, THANK YOU FOR INVITING ME TO DISCUSS THIS IMPORTANT ISSUE WITH YOU TODAY. I AM HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Mr. DAVIS. Thank you very much.

Ms. Lee.

Ms. LEE. Chairman Davis, Mr. Turner, I appreciate the opportunity to appear before you today and discuss the proposed Services Acquisition Reform Act.

As I testified before you last November, the business environment within the Department of Defense remains very complex, particularly in the acquisition services. The amount of money the Department spends on service 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.

We must ensure that all acquisitions, whether for products or services, are well-planned, executed and managed. We fully support the efforts of the subcommittee in a number of areas related to how the Department of Defense acquires goods and services. We have reviewed the draft package of proposals which comprise SARA, and since the introduction of the bill last week, are more thoroughly studying these proposals.

I would like to offer my perspective on several of them. First, people or work force—this is also my No. 1 priority. We must have talented, well-trained people in the acquisition field, particularly as we move to more and more challenging business arrangements. As you know, the Department of Defense has a very robust and continually evolving training program. By centralizing the funding for training within the Department through the Defense Acquisition University, we have demonstrated a commitment and provided stability to training our acquisition work force. To keep our acquisition work force trained and highly qualified to meet challenging missions, we are transforming DAU by moving from purely classroom training to more Web-based learning modules and by emphasizing critical thinking skills and business case reasoning.

The DAU provides a strong foundation and we appreciate the subcommittee's recognition of this contribution and our exemption from the training fund. We look forward to working with the civilian agencies in the Federal Acquisition Institute in developing a training program that ensures the work force acquires the right skills and capabilities to be able to contribute effectively in this changing acquisition environment.

We also support a government-industry exchange program. We believe that by tapping into the knowledge base of the private sector, we not only maximize the business relationships with our industry partners, but we can also improve the Department's acquisition process and procedures. For years now, the Department has found it very valuable to have programs where we send our military members and our civilians to work with industry counterparts.

However, we do not have a program to bring industry into the Department. Currently, an industry person would have to sever ties with his company in order to accept a government assignment, which we believe is probably an unrealistic expectation, particularly as people are planning and managing their own retirement portfolios and those by necessity involve a broad range of other relationships. We applaud the subcommittee's efforts to establish a government-industry exchange program, and we believe that issues

related to conflict of interest and compensation need to be clarified in the proposed legislation.

The Department is sensitive to retraining and attracting people, especially since we are faced with 50 percent of our work force being eligible to retire by the year 2005. We do have a new plan which was submitted last week about the work force of 2005 that has some ideas and issues on how the Department plans to deal with these challenges, and we certainly support the idea of work force and retention pilot programs as a way to attract a new talent pool to meet the challenges of our increasingly complex procurement. We note that there are many things going on in this arena, and we support those activities.

We also support revisions to share-in-savings initiatives. The share-in-savings authority as defined by the Clinger-Cohen Act has not been fully implemented by the Department for a number of reasons. A primary concern within DOD has been to ensure that funds spent for payment of savings are the right type of funds. Additionally, there may have been some reluctance by contractors to providing all of the non-recurring funds for the investment, even with a long-term payback.

We need a policy for using share-in-savings contracts that not only encourages our contractors to undertake aggressive cost reduction programs, but one that also stimulates agency interest by allowing them to retain a portion of the savings after contract payment.

I look forward to working with the subcommittee on additional provisions of SARA. In closing, I would really like to thank the subcommittee for your continued interest in procurement and acquisition issues and focusing all of us on the need to continue to improve. I would like to also make my commitment to work on those issues in the Department.

Thank you very much for the opportunity to talk about these things today.

[The prepared statement of Ms. Lee follows:]

STATEMENT OF

DEIDRE A. LEE

DIRECTOR, DEFENSE PROCUREMENT

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BEFORE THE SUBCOMMITTEE ON

TECHNOLOGY AND PROCUREMENT POLICY

COMMITTEE ON GOVERNMENT REFORM

March 7, 2002

STATEMENT OF THE DIRECTOR, DEFENSE PROCUREMENT

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Mr. Chairman and Members of the Committee:

I appreciate the opportunity to come before you and discuss the proposed Services Acquisition Reform Act (SARA) and your ideas for improving the acquisition of services within DoD.

As I testified before you in November, Mr. Chairman, our business environment within the Department of Defense remains 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 and we are developing a strategic approach to acquiring them.

We fully support the efforts of the Subcommittee in a number of areas related to how the Department acquires goods and services. We have reviewed the draft package of

proposals which comprise SARA and would like to offer our perspective on several of them.

The Department appreciates the subcommittee exempting our participation from a proposed Acquisition Workforce Training Fund. By centralizing the funding for training within the Department, we have demonstrated a commitment and provided stability to training our acquisition workforce. Defense Acquisition University (DAU) has a very robust training program. To ensure that we have a trained and highly qualified acquisition workforce to meet our changing missions, we are transforming DAU by moving from purely classroom training to more web-based learning modules and by emphasizing critical thinking skills and business case reasoning. We look forward to working with the civilian agencies and Federal Acquisition Institute in developing a training program that ensures the workforce acquires the right skills and capabilities to be able to contribute effectively in the changing acquisition environment.

We support a Government-industry exchange program as the Department has been working on implementing such a program. We believe that by tapping into the knowledge base of the private sector, we not only maximize the business relationships with our industry partners but we can also improve the Department's acquisition processes and procedures. For years now, the Department has found it very valuable to have programs where we send our military members and civilians to work with their industry counterparts. However, we do not have a program to bring industry into the department. Currently, an industry person would have to sever ties with its company in

order to accept a Government assignment, which is an unrealistic expectation. We applaud the Subcommittee's efforts to establish a Government-Industry Exchange program, however, we believe that issues related to conflict of interest and compensation need to be clarified in the proposed legislation.

The Department is sensitive to retaining and attracting people especially since we are faced with 50 percent of our workforce being eligible to retire by 2005. We support the idea of a workforce and retention pilot program as a way to attract a new talent pool to meet the challenges of our increasingly complex procurement needs. We note that the Human Resources Hiring Flexibility Provisions of the Managerial Flexibility Act of 2001 (S 1612) would assist us in recruiting the right people with the right skills to manage larger and more complex acquisitions and to ensure that the taxpayer receives the best value possible.

Lastly, we support certain revisions to share-in-savings initiatives. The share-in-savings authority, as defined by the Clinger-Cohen Act, has not been fully implemented by the Department for a number of reasons. A primary concern within the DoD has been to ensure that funds spent for payment of savings are the right type of funds. Additionally, there may have been some reluctance by contractors to providing all of the non-recurring funds for the investment even with the long-term payback. We need a policy for using share-in-savings contracts that not only encourages our contractors to undertake aggressive cost reduction programs but one that also stimulates agency interest by allowing them to retain a portion of the savings after contractor payment.

We would like to note that Section 301(e)(2) of the bill, which purports to require the Director of the Office of Management and Budget to submit legislative recommendations to Congress, shall be construed consistently with the President's constitutional authority to supervise the unitary executive branch and to recommend to Congress such measures as he judges necessary and expedient.

In closing, I would like to affirm my commitment to achieving excellence in the acquisition of services within DoD. The Department is frequently hampered by a demanding set of statutory requirements, which restricts our flexibility, and thus our ability to adapt to changing circumstances. I ask the committee to support the President's "Freedom to Manage" initiative, so that we would be better able to efficiently and effectively execute the programs you entrust us with. I look forward to working with you on your proposals to improve the acquisition of services within the Department.

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.

Ms. Lee, let me ask you on these purchasing cards—moving the threshold from $2,500 to $25,000. In the SPAWAR situation, I think it was in San Diego——

Ms. LEE. Yes, sir.

Mr. DAVIS. One of the concerns I always have about government is we spend so much time and energy making sure that nobody steals any money who is involved in government, whether it is politicians or officials, that we strap them that they cannot do much of anything else either. The question is to try to find, if you have confidence in your employees and you train them correctly, that this ought to be more efficient. Can you talk about that situation a little bit and some of the safeguards we can put in to make sure these are not abused, but at the same time not be running papers around for every procurement over $2,500, because you lose time, you lose money, you lose efficiency with the thresholds that low. I do not know what the right balance is, but you might reflect on the situation there in San Diego. Mr. Horn had raised it, and I just wanted to ask you to start with that, and then I will yield to Mr. Horn for questions.

Ms. LEE. Certainly.

Mr. HORN. I thank the chairman, and that is exactly the question I was going to ask. What can the Defense Department and General Services and the GAO advise us on how you can look at the fraud, and they were absolutely irresponsible. A Marine major allegedly conspired with cardholders under his supervision to make more than $400,000 in fraudulent purchases from five companies, two of which he owned, two of which were owned by acquaintances, and one of which was owned by his sister. The charges included purchases such as DVD players, palm pilots, desktop and laptop computers.

Another example—a cardholder made more than $17,000 in fraudulent transactions covering personal items from Wal-Mart, Home Depot, shoe stores, pet stores, boutiques, eye care centers and restaurants over a 7-month period.

Now, obviously when we go to hold a hearing outside of Washington we use our government card for the hotel and the per diem that you are paid for restaurants. And people like our administrative people would catch something if there was about the whole suite or the whole end of the hotel for your buddies for a reunion, that would be caught on Capitol Hill, and inspectors general are all over the place. In the Defense Department, they ought to be looking very carefully at this.

Why should we take the taxpayers' money—good, hard-earned money? They would sure like to have $17,000, but they do not. But when we use their $17,000, we have got to figure out a way to get the controls. There were no controls with the Navy, and one captain is not going to make admiral, given that. So I do not know if that is the punishment or what, but I do not want to see it happen in the first place.

So could you tell us how you do it, Ms. Lee? What kind of program—I know the game. Two subcommittees differ, and the subcommittee that has the Defense Department—fine. But you have

got to do something on your side to act like leaders, and not just let this fraud go out.

Ms. LEE. Yes, sir. It is absolutely unacceptable.

Mr. HORN. OK. Now, how do you do it? How do you organize it?

Ms. LEE. This particular instance, which happens to be SPAWAR, cards and the entire command have been suspended as of last Friday. There is new leadership in there. First, they are going through and making sure everyone has their currency training, and reminding them of what those obligation are. They are reviewing all cards, the thresholds that the cards are authorized, the number of holders, and the number of cardholders per reviewer, and the relationship between those reviewers. In addition to that, we have put in place an electronic system that kind of lets us do the trend analysis to see what purchases are bought.

Additionally, I have asked our Department of Defense IG to come with me, and they have done so, and formed a consolidation where they look across the Department of Defense at all IG audits regarding purchase cards, and they consolidate those. They are also looking for trends and going to give us specific recommendations.

The rest of the Department watched that shot across the bow and it is very clear to them how important it is.

Mr. HORN. You might have been right the first time. [Laughter.]

OK. I do not care how you do it, just so you do it.

Ms. LEE. It is unacceptable to us.

Mr. HORN. Yes.

Mr. Administrator Perry, for whom I have fond affection and a fine agency you preside over. What can we do with GSA so they do not run away with it? Do you have a system right now?

Mr. PERRY. We do. I would just reiterate what my colleague has said. It is an unacceptable position or situation. We do need to have the right controls in place and we have to look after it vigorously.

At the same time, I would like to believe that most of our Federal workers are in fact trustworthy and conscientious, and this is something that would only be done by a few. The remedy that we take in the case of those few who have been discovered I think will send a very strong message.

In the case of GSA, we also use the controls, the trend analysis. On a monthly basis, each manager receives reports from our CFO's office indicating if there have been any purchases from vendors which would appear to be not appropriate or if there have been purchases of items which would appear to be not appropriate. And then it is the responsibility for the manager of the person using the card to oversee that to make sure that inappropriate use is not undetected.

I think we just have to stay with it, but not dispense with the program entirely because of the actions of a few.

Mr. HORN. Mr. Woods, has GAO gone back to some of these situations now to see if anything has changed? I mean, that is what I wanted to have done maybe 2 months from now, whatever. Has it happened in between?

Mr. WOODS. Yes, sir, it has. As you know, the findings that you talked about earlier were based on a report that we did last year at two Navy installations in the San Diego area.

Mr. HORN. That was the one with Senator Grassley.

Mr. WOODS. That is correct. And we have gone back and you will be hearing more next week about the results of that review. But if I could just talk a little bit about the problems or the source of the problems, it all gets back to internal controls. In order to be able to properly exercise the flexibilities that the Congress has provided below the micro-purchase threshold and therefore in the use of purchase cards, there needs to be effective internal controls. What we have found by and large in the course of that review is that the controls were there. They were not being exercised properly. It is not a lack of controls, it is just they were not adhering to those controls.

Another issue was training. Many of the examples that you listed are obvious. You do not use a government purchase card for personal items. You do not need training on that. But other areas are not so obvious. For example, meals—my understanding is food is not a permissible item for the use of the government purchase card. That may or may not be so obvious. It requires additional training.

Another issue, frankly, is just too many cards. We found that there was a proliferation of cards in both of those facilities, and that is an issue as well.

Mr. HORN. Thank you, Mr. Chairman.

Mr. DAVIS. Let me just ask a question before I yield to Mr. Turner. The number of issued cards at civilian agencies is proportionally much smaller, is it not? Or are you not familiar with that?

Mr. WOODS. I am not familiar with that, sir.

Mr. DAVIS. Can anybody help me on that?

Ms. STYLES. We did supply data I believe on the exact number of cards. It is also available on a publicly available Web site.

Mr. DAVIS. I will put that in the record and figure it out.

I think one of the ways you control this is by controlling the people that have access to the cards, making sure they were trained and you are not supervising everybody. One of the difficulties in procurement is anytime you move more of the authority out to your line officials, you have more chances for somebody to make a mistake. On the other hand, we found out that when it is too centralized, it is a very, very inefficient process. So it is a question of finding the right balance.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

I wanted to address the issue of share-in-savings contracts. I know, Ms. Styles, you had some concerns that you expressed. Ms. Lee, you had some concerns specifically. I notice, Ms. Styles, in your testimony you express the concern that the expanded share-in-savings contract authority should remain as a pilot project. And you said that we need to see more results, agencies need to gain greater experience in developing baselines, obviously, as you say, proper baselines in combination with guaranteed savings clauses are critical to ensuring savings can be validated and realized.

I have had a concern about where we get the expertise within our agencies to actually negotiate share-in-savings contracts. Obviously for them to work, there has got to be a fair deal for both the government and for the supplier of the service. Both sides need to

have competent people negotiating it. Otherwise, it is going to turn out to be a very unhappy experience for one side or the other.

So your caution that you have expressed, and I think you went on also in that same statement to say, "We should also consider the impact of these contracts on other activities in light of the extended contract duration that may be required to recoup savings and the generally high termination costs." If you will, just expand a little bit on your concerns there, and particularly what you mean by that statement that I just read there about the problems you see. And then address for me how we can get the kind of expertise that we really need to make share-in-savings work effectively.

Ms. STYLES. Certainly. I think we need to take share-in-savings in some appropriate steps. What we are seeing, we have had some experience with share-in-savings in the Federal Government. We have got some contracts with the Department of Education that are share-in-savings contracts, and we have some contracts with the Department of Energy that are share-in-savings contracts, energy savings performance contracts.

The Department of Education ones are short-term contracts, 3-year contracts dealing with a lot of IT infrastructure complex problems. It took them a long time to develop the baselines and even then the baselines were not accurate baselines. They had to go back after an IG report and change the baselines on those contracts. That is not to say that it is wrong for them to be innovative. I think it is good for them to be innovative, but they also recognize that they are not going to get the appropriate return on their money in a longer period than 3 years, particularly when you are dealing with something like an IT project.

The other concern we have is we have seen no savings yet in those contracts. Obviously, we are at the very beginning of those contracts. They had to restructure the baselines, but we still have not seen any savings with those.

Energy savings performance contracts are 25-year contracts. That limits the flexibility of the agency if it needs to restructure or if it needs to be a little bit more nimble in delivering services to the citizens. Those have been in place for a longer period of time. We have still not seen savings on those contracts.

So it is not to say that the concept of share-in-savings is not right. It is that we need to take this in steps. The first step in many respects is performance-based service contracting. We are still having some difficulties with performance-based service contracting, with understanding how it works, with negotiating that with the contractors. So we have to take it in appropriate steps as we move forward. If we jump to a broad share-in-savings-type proposal, you are learning to run before you actually learn to walk, I think is the way I put it in my testimony. And you really have to take appropriate steps to, in many respects, protect the taxpayer dollars in exactly the way you said, is that we need to know how to negotiate these contracts and to create appropriate metrics and baselines.

Mr. TURNER. It seems that you do have to have some experience to negotiate these kind of contracts. I do not know where you go in some agencies to find that expertise. Obviously, establishing the baseline is the critical first step to making sure it works. Do you

think it would be helpful if there was some other entity or individual that helps in that process? It has been suggested to me perhaps the inspector general in the agency should take a second look at the development of the baseline, be sure it is fair? Is there some way in there that we can look forward to the point where we could know that we have got people in the Federal Government who can actually negotiate these deals and that they are going to be sound?

Ms. STYLES. And a lot of it is training. A lot of it is going forward with training with performance-based service contracts and training in this area. And I think all of the help they can get as they negotiate the baselines is appropriate because second looks at these are good. Even at the Department of Education, they realized in student financial aid that the second look of the IG at their baseline was appropriate and identified things that they did not see. I believe they have changed the baselines as a result.

Mr. TURNER. Ms. Lee, you shared some other concerns with share-in-savings initiatives. One point you made, I am not sure I understood, but you suggested that, "A primary concern within DOD has been to ensure that funds spent for payment of savings are the right type of funds." What did you mean by that?

Ms. LEE. Particularly on some of the O&M-type work where we have funds that are for operation and maintenance to make sure that we have got the contract structured appropriately so in fact it is an appropriate expenditure of operation and maintenance funds. Or if, for example, we had R&D funds, so that when the contract is structured and the payments are made on an annual basis, that they are backed from the funding as appropriated by the Congress.

Mr. TURNER. You also shared an interest in an idea to ensure that there is some incentive in the agency to enter into share-in-savings, not just an incentive on the part of the service provider. How would you envision that working?

Ms. LEE. Sir, as you know, and I am not sure that it should be this way, but it is, in that in an organization, the current way our funding often works is that if you save money, you get less the next year. And so to recognize from an incentive standpoint that these people have done a good thing and the fact that they have less money does not necessarily mean that their appropriations should be, or that their amount should be decreased the next year, that it should be recognized that they are doing good things more efficiently and that in fact they should be budgeted accordingly.

Mr. TURNER. Has the Defense Acquisition University entered into any kind of training program to help people be able to be well-versed in how to negotiate share-in-savings contracts?

Ms. LEE. Not specifically. We are, however, looking at this more modularized work force and incorporating industry more as well. So we would have modules that are available both to DOD, industry people, civilian agencies, and are working with agency and academia to say what are the right topics, what are the right formats, and what is the easiest and most efficient delivery method for our entire acquisition community—government, industry, academia—and not just limit it to the Department of Defense.

Mr. TURNER. Is your acquisition education program available to non-DOD Federal employees?

Ms. LEE. Mr. Turner, technically it is, but the reality is that we can hardly get all the DOD people through it, so the slots are rare and difficult to come by.

Mr. TURNER. Thank you.

Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much.

Ms. Styles, let me just say on the Department of Education contract, my understanding is that the Department of Education came back to the IG and said they had some difficulties measuring baseline; that there were savings and the IG concurred with that. We can look at it further, and as we draw this, we want to work with you to try to make sure that this is a vehicle that can achieve maybe at the Federal level some of the savings we have seen in the private sector.

Ms. STYLES. If I can clarify, we have not yet seen the savings because it is so early in the contracts, but they do anticipate having savings. I have to say I want to commend them for doing a very good job working under the current structure to come up with a share-in-savings contract and to take hard looks at their baselines. I think they did a very good job.

Mr. DAVIS. Maybe if we had some tools we would give them under this, they could have done better, but I think we will continue to dialog on that.

Let me also ask, Ms. Styles, you talked about adequate funding is needed for training, but that the funding stream ought to be the result of the normal budget and appropriation process. I think in a perfect world, I would agree with you, but let me tell you what happens in the real world. When an agency budget gets cut, the first two things to go are your travel and your training. That is just the way it works because agencies like to keep their people. You can do that maybe with one cycle or another, but I have been in government at the county level and at the Federal level now for over 20 years. That is just the nature of government. It does not work as ideally as we might like.

It is for that reason that I feel if you do not have a specified fund earmarked to go there, we will continue to see in tough budget years agencies cut their training budget. It clearly has taken a toll. I think you can take a look at the situation you had with the Navy in San Diego and say this is a result of training, of not having appropriate oversight. If you do these things appropriately, you can cut down on the fraud.

So I think that is where the disagreement is, and I will give you a chance to respond to that. But I think the current process of relying on normal budget and appropriations has resulted in not funding the work force training the way it should have been.

Ms. STYLES. You know, there may be an opportunity for an interagency fund that is appropriated by Congress. My concerns relate to the fact that we have to be willing to step up to the plate and recognize that we need training money, and Congress should recognize that money should be appropriated in a specific fund.

My concern about the structure of the current legislation is that we may affect a very effective contracting vehicles by taking percentages and money out of that to train people. I am particularly concerned that, as I look at training, I am trying to integrate civil-

ian and defense people in training. The way it is currently set up, it would actually take money from the Department of Defense to train the civilian agencies, because the Department of Defense is such a high volume user of these contracts, but then they would not have access to this fund to be able to train their people.

I think we need to recognize the commitment to training to be able to fund it appropriately. Otherwise, I think we are going to have trouble holding agencies to a training commitment, or to actually training their people appropriately.

Mr. DAVIS. I just say good luck in being able to get the non-Defense agencies and the Defense agencies together on training. You have the tiger by the tail there. There is a lot of turf and a lot of history on that, but ideally that would be——

Ms. STYLES. I think as we face this retirement crisis and the human capital crisis, it is more important than ever to be able to have one acquisition community working together, and to have access to the skills of the Department of Defense and for the Department of Defense to have access to the civilian agencies.

Mr. DAVIS. If we were business, that would be easy to do.

SARA, as you know, would place commercial services on the same level as commercial products by amending the definition of commercial items currently in the OFPP Act. You express some concern about this proposal, but it is not clear to me why commercial services should not be on the same plane as products. Could you try to explain?

Ms. STYLES. Which portion specifically are you talking about?

Mr. DAVIS. SARA puts commercial services on the same level as commercial products. Are you with me?

Ms. STYLES. Yes.

Mr. DAVIS. OK. It does it by amending the definition of commercial items that are currently in the OFPP Act. You have expressed concern about the proposal. I am just not sure why the commercial services should not be on the same plane as products.

Ms. STYLES. If you can tell me which provisions specifically—are we talking about time, material, labor, hour contracts? Are we talking about the commercial business entity?

Mr. DAVIS. It comes from the FAR part 12 amendments.

Ms. STYLES. I mean, there are distinctions between——

Mr. DAVIS. OK. I will give you this written and again have you get it back, if that would be all right to clarify that.

Ms. STYLES. OK.

Mr. DAVIS. Melissa tells me it is section 403, but you can get back to us in writing on that.

Let me ask Mr. Perry, how do you coordinate GSA's acquisition strategy over the agency's diverse business units?

Mr. PERRY. That strategy coordination over our diverse activities within GSA is in part coordinated through the fact that we have an acquisition officer in the organization who helps us to make that happen. He also obviously provides services beyond GSA. That is a big part of it. Your proposal suggests that other agencies might use that same model, and we support that idea. But we also at the same time would leave open the fact that there may be some agencies where it is more crucially important than in others. That may

be something for agencies to deal with, but we feel that having that centralized approach is useful.

Mr. DAVIS. Ms. Lee, let me ask you. SARA provides in section 223 for a statutory agency-level protest process. Now, in that process, we call for 10 working days for resolution of protests. Is that adequate, do you think?

Ms. LEE. Congressman Davis, I do think that we are trying to teach our people to be responsive and make sure that when there is an issue, they solve it. I would actually ideally like to see it solved before it gets to a protest level-type of discussion. That would be my No. 1 goal.

However, if it does get to be a formal protest, particularly in an agency as large as the Department of Defense, there is a lot of review that is necessary. So I do think the 10 days would put us in a very tight timeframe and might not get as good and thorough a review as it should have.

Mr. DAVIS. OK. Is DOD satisfied with the access it currently has to the commercial services market?

Ms. LEE. We believe there are quite a few other vendors that we would like to encourage to do business with the Department. We have seen a particular interest after September 11th. Some of it I think may be perhaps patriotism; others realizing all the diverse activities that the government does participate in. As a result of our broad agency announcement, we got over 12,500 responses from people, and we see a lot of people wanting to do business with the government.

We have also found that creative and aggressive contracting officers can accomplish that. There are some additional flexibilities that we would like to attain and we would like to work with you through SARA and other methods to ensure we can get those.

Mr. DAVIS. Thank you.

Mr. Woods, let me just ask you, you note in your testimony that the chief acquisition officer that we include in SARA ought to be structured differently. Do you have any recommendations for the placement and operation of a chief acquisition officer within the civilian agencies?

Mr. WOODS. I do not have specific recommendations along those lines, but I do note that when you compare that to the chief financial officer, for example, the CFO is a direct report to the head of the agency. Now, I am not suggesting that would need to be the case with the chief acquisition officer, because I think agencies need the flexibility to be able to determine where the position would best be placed. But the key is that wherever it is placed, it needs to have the necessary authority to have the clout to make sure that the changes can be made.

Mr. DAVIS. OK.

I have one more question for Ms. Styles. You express some concern about SARA's expansion of the scope of commercial item procedures. Why shouldn't the government just be able to buy products and services of a commercial firm without any further analysis of the actual nature of the item? That is what the private sector does.

Ms. STYLES. It has to be something that commercial firm actually sells commercially. As it is structured right now, if 80 percent of

the firm's business is coffee makers and the other 20 percent is smart bombs, the smart bombs can be considered commercial in nature, even though there is no adequate price competition in the commercial marketplace. As a result, there is no transparency into the cost for that smart bomb and there is no assurance that there is a commercial price for that.

Mr. DAVIS. Well, I hope that is not how we are buying our smart bombs. [Laughter.]

Ms. STYLES. This would allow that.

Mr. DAVIS. All right. So the language—just tighten it. You do not have any problem with the concept?

Ms. STYLES. With the concept, if it is commercial and it is sold commercially in substantial quantities, and we can assess the price and protect the government—no, I do not have a problem. Or in the alternative, if it is not sold commercially, that we have sufficient transparency into how they put that price together.

Mr. DAVIS. We could give example after example where the government goes out and buys items that are more expensive than you can get off the shelf. So what we are trying to do in a case like this is I think give them the flexibility to get things quickly when they are sold across the counter every day.

Ms. STYLES. If it is commercially available on the shelf, then they can buy it commercially.

Mr. DAVIS. I am just trying to get the concept. We can worry about the language later.

OK, Ms. Lee, smart bombs are not bought from coffee makers are they, at DOD? I just wanted to be reassured here.

All right. That is all the questions I have for this panel. Why don't we take about a 3-minute break and get our next panel up here.

Thank you very much.

We will welcome our second panel—Steve Kelman of Harvard University; Professor Steven Schooner of The George Washington University Law School; Scott Dever of Hasbro; Mr. Richard Roberts of KPMG Consulting, testifying on behalf of the Information Technology Association of America; Ms. Roberta StandsBlack-Carver of Four Winds Services, testifying on behalf of the Contracts Services Association; and Mr. Jerry Howe of Veridian, testifying on behalf of the Professional Services Council.

Will you please stand and raise your right hands?

[Witnesses sworn.]

Thank you very much.

Please be seated. Again, we have the statements, if we could start with Dr. Kelman and we will move straight down. Steve, welcome.

STATEMENTS OF STEVEN KELMAN, PROFESSOR OF PUBLIC MANAGEMENT, HARVARD UNIVERSITY; STEVEN SCHOONER, ASSOCIATE PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; SCOTT DEVER, VICE PRESIDENT OF GLOBAL PROCUREMENT, HASBRO, INC.; RICHARD ROBERTS, SENIOR VICE PRESIDENT AND MANAGING DIRECTOR, FEDERAL SERVICES, KPMG CONSULTING, INC.; ROBERTA STANDSBLACK-CARVER, PRESIDENT AND CEO, FOUR WINDS SERVICES, INC.; AND JERRY S. HOWE, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, VERIDIAN

Mr. KELMAN. Chairman Davis, thanks very much for asking me to come and testify. Congressman Turner, thank you for the opportunity to be here today. I am here to testify in support of the Services Acquisition Reform Act. This piece of legislation really is the next step in the continuation of the efforts we have undertaken over the last decade to create a business-like, modern procurement system in the Federal Government.

Really, it has two basic principles—the reform effort. The first is make government contracting, to the extent we can, as much as possible like the way a world-class commercial company would buy products or service for itself. That has been principle No. 1. Principle No. 2 has been, stop the obsessive focus with bureaucracy and process, and start focusing the system on achieving results for taxpayers.

The changes in the last decade have not been uncontroversial. It is never easy to change old, hide-bound processes. But there has really been an alliance of moderates in both parties, Democrats and Republicans, often sort of fighting against people further to our right and people further to our left, that have allowed these changes to take place. I think it is fair to say that the procurement system is better because of those changes, not just faster, but better.

The most recent addition of the history of government contracting, which comes out of The George Washington University Government Contracts Program, it came out in 1999, on the last page of the book—this is the new edition, the revised edition—says—this is as is described at the end of the 1990's—the situation is as healthy as any I can recall in the history of peacetime government contracting. That is not to say it is idyllic. Protests and lawsuits still abound. See, there are other people besides me who still think there is too much litigation in the system. Government contracts——

Mr. DAVIS. You would never expect a law professor to agree with that, though, right?

Mr. KELMAN. This comes out of George Washington Law School. [Laughter.]

Government contracts still dwarf their nongovernment counterparts in size, minutiae and risks. Contracting officers still trained in the old system—some refuse to change. But all in all, the 1990's have improved the process.

We have seen that in Afghanistan. There has been a lot of publicity around the JDAM, the smart bomb that is being used very successfully in Afghanistan. It not only works better than its predecessor, the laser-guided bombs, but also, as an article in my home-

town newspaper the Boston Globe pointed out, one of the reasons 70 percent of the bombs in Afghanistan are smart bombs compared to 3 percent in the Gulf War is that smart bombs used to cost $100,000 each. They now cost $20,000 each and they work better.

What has not been pointed out is that JDAM is a poster child for acquisition reform. They started procuring it before acquisition reform began in the early 1990's, and pulled it back and redesignated it an acquisition reform pilot program; introduced the various acquisition reform techniques. The price went down 50 percent compared to what it had been before.

If I can add a personal example. A few years ago, I was invited by the Defense Department to be a keynoter at an electronic commerce conference, and actually I had to get to an academic conference at Johns Hopkins about an hour after I was supposed to finish speaking, so I said, gee, I don't know if I can do it. So they said they would pay my transportation and they gave me a driver to drive me down to Baltimore. The driver happened to be a Marine who had just returned back to the Pentagon after being abroad for 21 years. He was not a contracting person. He was a Marine. And he was saying to me, "Sir, a few years ago I started noticing that just my every day life in the Marines as a Marine was getting better. The food was getting better; stuff that had not been there before that got out of stock was arriving faster. We could get things easier. And I never knew why it was. I just noticed my life was getting better." He was interested to learn when he now had a procurement detail that this was as a result of the acquisition reforms of the 1990's.

I have got to say, and I mentioned this to Deidre Lee, I think all of us, when I heard that, was really proud of what all of us had accomplished in terms of making this Marine's life better. Above all, the people who accomplished it are the frontline career contracting people in the Federal Government.

Mr. DAVIS. Steve, let me just say, you have accomplished then, and I will not take your time on this, but making Army chow edible. This is something that for generations we have tried to get at and procurement reform did it. [Laughter.]

Mr. KELMAN. Because what happened was we used to buy MilSpec food, and now we are buying commercial food from commercial vendors. That is the secret to it.

There has been a bipartisan effort, but just a word on why this was initiated by a Democratic administration and why I think Democrats should be supporting SARA, this piece of legislation. As a Democrat, I believe that government has the ability to serve people and to accomplish things for us as a society. But to do that, government has to work well. It has to work effectively. It has to have modern management principles associated with it. That is the basic message behind procurement reform.

So in my testimony, I support pretty much every provision in this legislation. There are a number of areas where I have made some suggestions for some changes. I hope we have a chance to talk about some areas like share-in-savings. The only way to get people to learn to walk is give them a chance. And the current pilot project—it was an unintended consequence I was involved in doing. We were trying to encourage agencies to do share-in-savings. It has

had the effect of discouraging them. Let's teach them to do it by giving them some of the authorities in this bill. The very last thing, because I have gone a little bit over my time, nobody has talked about the provision in the bill on cooperative purchasing. This has been an area where you, Chairman Davis, have led a lonely fight against special interests, trying to prevent—what this basically is saying, let State and local governments on a completely voluntary basis, if they would like access to the GSA schedules, use them if they want to. A coalition of special interests succeeded in repealing the provision in the Federal Acquisition Streamlining Act, allowing this. Congressman Davis played a lead trying to save it. Congressman Kucinich, I worked with Congressman Kucinich while I was in the administration, played a lead trying to save it. I am glad to see that this pro-taxpayer feature is coming back into legislation again.

I have a whole bunch of detailed comments in my testimony, but this is good government.

Thank you.

[The prepared statement of Mr. Kelman follows:]

TESTIMONY OF DR. STEVEN KELMAN, ALBERT J. WEATHERHEAD II AND RICHARD W. WEATHERHEAD PROFESSOR OF PUBLIC MANAGEMENT, HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, BEFORE THE SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY, HOUSE COMMITTEE ON GOVERNMENT REFORM, ON THE SERVICES ACQUISITION REFORM ACT, MARCH 7, 2002

Chairman Davis, Congressman Turner, and members of the Subcommittee, I very much appreciate the opportunity to appear before you today to express my support for the Services Acquisition Reform Act. I am a professor of public management at Harvard University and have devoted my professional career to improving government management in the interest of taxpayers and to training young people considering careers in public service. During the Clinton Administration, I served for four years as Administrator of the Office of Federal Procurement Policy.

This bill continues the effort to create a modern, businesslike procurement system that began a decade ago, in an exercise in bipartisanship and good government that is all-too-rare these days. Reform has not been uncontroversial – changing the hidebound practices of the past never is. But moderates, both Democrats and Republicans, have been able to work together and fend off opposition from further to the Left and further to the Right. I hope we will be able to continue down that constructive path.

The procurement system today is clearly in better shape than it was before reform began. Procurement is not only faster. It is, above all, better. As James Nagle writes regarding the overall state of the procurement system in the new edition of his History of Government Contracting, published by the George Washington University Government Contracts Program: "The situation is as healthy as any I can recall in the history of peacetime government contracting. That is not to say it is idyllic. Protests and lawsuits still abound. Government contracts still dwarf their non-government counterparts in size, minutia, and risks. Contracting officers trained in the old system still refuse to change and many contractors still try to cheat. But, all in all, the 1990s have improved the process."

We have seen this dramatically in the war against terrorism in Afghanistan. A dramatic military success story there is the role played by the Joint Direct Attack Munition (JDAM), the military's "smart" bomb kit. JDAM, according to an article in my hometown paper, The Boston Globe, "works the way it's supposed to work." Soldiers on the ground punch in the coordinates of the location where they want the bomb. Quickly, and with great accuracy, JDAM has allowed air power to respond. The new weapon is far faster and more accurate than the laser-guided bombs used in the Gulf War.

It is also far cheaper. The Globe writes: "A laser-guided bomb in the Gulf War cost over $100,000. A JDAM costs $20,000. Because of the lower cost, the US military has a lot of them. In the Gulf War, out 3 percent of all the bombs dropped were smart bombs. ...In Afghanistan...it is 70 percent."

JDAM is a poster child for procurement reform. The program had already been bid out prior to procurement reform when got reclassified as a reform pilot. The 87

military specifications were replaced by five performance standards. Two contractors did a development competition before the winner was selected, and DoD personnel were assigned to each contractor team to give "their" team the best advice they could to help that team win. Past performance was central to the source selection decision. The unit price of the JDAM went down by 50% -- which is why the military can afford so many of them.

Procurement reform has been based on a simple principle – trying insofar as possible to make the government's procurement system resemble the way a world-class commercial firm would buy products and services from outside suppliers for itself. To accomplish this, Congress and the executive branch, working together, have sought to reduce bureaucracy and the fixation on process – and instead focus the system on achieving the best value for the government.

This has been a bipartisan effort. But, Mr. Chairman, if you will permit me, I'd like for a moment to speak as a Democrat and to explain why a Democratic administration initiated procurement reform and why Democrats should be supporting SARA.

As Democrats, we believe that important public purposes can be accomplished through government. For government to accomplish these purposes, it must be efficient and effective – it must deliver results. Procurement reform has been an effort to apply modern management principles to government, in the service of achieving better results.

SARA includes a number of measured and targeted steps in the continued march of procurement reform. I would like to concentrate my testimony on three of what I regard as the most important features of the bill – the efforts to encourage share-in-

savings contracting, the acquisition workforce training fund, and the government-industry exchange program.

I enthusiastically endorse the provisions in Section 301 to encourage share-in-savings contracting. "Share-in-savings" is a contract form whereby a contractor is paid, all or in part, based on the savings the contractor's effort generates for the government. In its most dramatic form – 100% share-in-savings – a contractor is paid nothing if its efforts fail to produce benefits for the government.

Share in savings contracting is the most exciting innovation in contracting I have seen in years. The fact is that too many government information technology services procurements fail. The government spends taxpayer dollars and gets little or no return. Share in savings provides the most powerful incentive imaginable for the contractor to deliver results to the government – the more you save the government, the more you get paid. While IRS has been laboring for over a decade with a tax modernization effort, the State of California, with a tax system larger than that of many nations, successfully modernized its tax system in a few years using share-in-savings contracting. The principle has also been applied in government to debt collection, energy conservation, and recovery auditing.

In federal IT, the Office of Student Financial Assistance in the Department of Education, which runs the college student loan program, has taken the lead in pioneering a share-in-savings approach for their systems modernization program. Four share-in-savings task orders have been signed, with two more under negotiation. The first two have already produced successful results. The two IT systems being changed have been successfully changed – in months, which is, as anyone with experience in government IT

systems changes knows, the government equivalent of the speed of light, because the contractor knows that the faster they get the new system up and running, the faster they will begin to get paid. Even using the most conservative possible assumptions, the taxpayer will save money from these two completed task orders – after the government's payment to the contractor, the government's net costs go down. This is a success story that deserves both praise and, hopefully, widespread imitation.

Congress made an effort to encourage share-in-savings contracting in 1996 through provisions of the Clinger-Cohen Act establishing a share-in-savings pilot program within OMB. This has turned out to be one of those examples of good intentions gone sour. Having been involved, while in government, in the development of these provisions, I know their intent was to introduce the idea of share-in-savings contracting to the federal IT community. However, the Clinger-Cohen provisions have turned out to be more of a hindrance to the spread of share-in-savings contracting than a help. The reason is that, although agencies have the statutory authority under the Federal Acquisition Streamlining Act to do share-in-savings contracts using the multiyear contracting authority that statute established governmentwide, many agencies have decided, given the Clinger-Cohen language, that they may only use share-in-savings contracts under the complex procedures outlined in that legislation. So the clarification that SARA provides of the government's authority in this area is helpful. The requirements to provide "best practices" guidance and to report to Congress on the spread of share-in-savings contracting also sends a good signal of Congress' view that the executive branch should seriously seek out opportunities for such contracting.

As a general matter, there is no greater disincentive to agency cost-saving efforts that the current practice of OMB and congressional appropriators to punish an agency for achieving savings by reducing the agency's appropriation in the area where savings were achieved on a dollar-for-dollar basis. Career government people constantly express frustration with this self-defeating policy. There is no general statutory fix, I don't believe, for the problem; fixes, if any, must occur on a situation-by-situation basis. But I am very pleased that Section 30l recognizes this as a problem and encourages efforts to come up with ways to deal with it. This is a problem for government beyond just share-in-savings contracting, but this is a good place to start.

I would like to address the provision in Section 30l that would allow share-in-savings contracts to be signed without full upfront funding of any cancellation charges for the contract, as current multiyear contracting authority requires. This provision does raise some question marks from an appropriations policy perspective. At the same time, I fear that until federal agencies have obtained sufficient experience using share-in-savings, they will be hesitant to undertake them if they are required to fund all potential cancellation charges upfront. And statutory precedent exists in the Energy Policy Act for waiving the requirement to fund cancellation charges upfront for energy savings contracts. I suggest the following compromise: that the statute authorize that some limited number and dollar value of share-in-savings projects be allowed to proceed without a requirement for full upfront funding of cancellation charges, with the projects to be selected by OMB. This will allow the government to gain experience with this new form of contracting that then will give agencies greater comfort with the technique, so that they become willing to proceed with further share-in-savings projects following the

normal requirement for upfront funding of cancellation charges required for multiyear contracts.

Second, I endorse the provisions in Section 102 to establish an acquisition workforce training fund. The reforms of the past decade place new demands on our contracting workforce, to be, in the words of Deidre Lee, Director of Defense Procurement, business advisors and not just regulation-box checkers. And, in the IT arena, the government has an enormous need to increase its skills in program management, performance management of contractors, and contract administration. For many agencies, acquisition needs to become an agency core competency, and we're far from being at a place where it is. The proposed fund could make a big difference in this regard.

I do not agree with the view that this is somehow "poor budgeting policy." The funds currently being paid for GWAC/GSA schedule administrative fees are appropriated funds that are being used to pay administrative costs of operating the procurement process. Part of these administrative costs, in my view, should be seen as being the proper training of our acquisition workforce. In fact, many budgeting experts would argue that it is over-specification of micro-categories in budgets, of the kind some critics of this training fund appear to advocate, that is bad budgeting policy.

My concern with Section 102 as written is a somewhat different one. I fear that, absent special provisions, the monies made available through this training fund will substitute for existing agency efforts, rather than adding to them as is needed and as is, I believe, the intention of the drafters of SARA. I believe that Section 102 should specify that these funds may not be used to meet existing statutory training or education

requirements for the acquisition workforce. Instead, I would suggest that every several years, the Procurement Executives Council (or a newly named Chief Acquisition Officers Council) be directed to select some small number of high-priority training areas for which these funds may be used.

Third, I strongly endorse the government-industry exchange program, presented for the acquisition workforce in Section 103 of SARA, and for the IT workforce in the companion Digital TechCorps legislation that has been introduced. The government needs to get away from exclusive reliance on a model where employees come in at entry levels and stay for an entire career. Young people more and more expect to have several jobs during their careers, and, if government can't find ways to make better use of people who come in at middle levels and stay only a relatively short period of time, we will lose access to a talent pool of people who wish to have an opportunity to perform public service, but don't wish to do so for an entire career. The government-industry exchanges envisioned here are, from the industry into government end, a way to begin to break the rigid paradigm of people coming into government only at the entry level and to provide the government access to some talented people wishing to do public service but not willing to work for government for 20 years. From the government into industry end, they are a way to mix the virtues of a core career workforce with the virtues of the new perspectives and ideas one gets by being exposed to something different for a while.

The workforce has changed. Workplaces are changing. These exchanges represent one part of a strategy for government to adapt its traditional human resources practices, and hence part of a broader effort to address the government's human capital crisis. They are only part of a larger effort, but let us embrace the idea of adaptation to

the new workforce and the new workplace, not stay trapped in our traditional ways of doing things.

I would, finally, like to say a word in support of Section 502 of the bill, which provides access for state and local governments to the information technology GSA schedules. Chairman Davis, you have led a sometimes lonely and difficult fight over the years on behalf of the taxpayer and the public interest by championing the common-sense suggestion that states and localities, on a fully voluntary basis, be provided access to federal GSA schedules if they decide that this would provide them a better deal than they are currently able to obtain. This was originally adopted in the Federal Acquisition Streamlining Act but then repealed after a special-interest lobbying effort. This provision has been subject to disinformation campaigns suggesting, totally without foundation, that it would put the federal government into competition with private businesses – when in fact it is private businesses that hold GSA schedule contracts – or that it would force the federal government on unwilling local jurisdictions – when in fact this provides an alternative, not a requirement. I commend you for your devotion to state and local taxpayers by continuing to champion this common-sense idea and urge the Subcommittee to side with taxpayers on this issue.

Before proceeding to comments on other provisions of SARA, I would like to urge that provisions be added to the contract incentive section of the bill regarding time and materials contracts. This form of contract has grown significantly over recent years. Compared to cost-reimbursement contracting, it has a number of advantages, mainly involving the ability (in my view, only in cases where the contract is awarded competitively) to avoid recource to certified cost and pricing data, cost accounting

standards, and the cost principles, which provides greater potential access to commercial companies. However, a traditionally recognized problem with T&M contracts is that they provide even less incentive for cost-control – in terms of the number of hours worked to do a job – than do cost-reimbursement contracts, since contractor profit is included in T&M rates and therefore the profit is higher, the larger the number of hours billed. And, of course, T&M contracts typically are not performance-based, which, as the bill notes in other provisions, is the preferred form of services contracting where possible.

To provide incentives for cost control, I would urge the addition of language directing the Federal Acquisition Regulation to note that fixed-price incentive fee contracts may be used for T&M/labor hour work and stating a preference for such incentive arrangements when T&M/labor hour contracting is used. I do not believe that it would now be unlawful to use a fixed-price incentive fee contract in these circumstances, but, unfortunately, some contracting officials still believe, despite language in Part One of the FAR, that contract types not specifically authorized are illegal. I also believe that, when (although only when) paired with fixed-price incentive fee contracts, we should also authorize in statute T&M award fee contracts as well, to incentivize good performance.

Before commenting on other individual provisions of the bill I wish to note, in the interests of full disclosure, that I have done consulting work with Accenture, the information technology firm, on share-in-savings contracting and more generally on their strategy in the government marketplace.

Section 106: Recruitment and Retention Pilot Program

I endorse this provision, which is another part of a strategy for dealing with the government's human capital crisis in acquisition. We can't afford to let outmoded bureaucratic personnel rules hinder the government's ability to compete for highly qualified potential employees.

I believe that the language regarding "preference eligibles" in this section is more restrictive than existing language in other "shortage category" fields and that, if this is correct, should be conformed to other hiring authorities for shortage areas.

Section 201: Chief Acquisition Officer

I endorse this provision, which is consistent with the view that acquisition is increasingly becoming a core competency for government. I would make two suggestions. The first is that SARA establish a Chief Acquisition Officers Council, corresponding to the current Procurement Executives Council and similar to other governmentwide councils for CIO's and CFO's. One of the most promising changes in the acquisition arena over the past few years has been the growing importance of the Procurement Executives Council, a development in which OFPP Administrator Deidre Lee played a crucial role for which she deserves great credit. "Knowledge management" is a hot topic in management practice today, reflecting the need for developing ways for knowledge to get transmitted across individuals and organizations. These interagency councils provide an important piece of social capital that can be used on an ongoing basis to promote knowledge dissemination and collaborative ability across government boundaries. Every student of this topic would say that such organizations are a precious resource that should be promoted.

Second, I would suggest that the language describing the role of the Chief Acquisition Officer in this section needs to be carefully examined and revised. The current language strongly emphasizes a process and compliance-oriented role for the Chief Acquisition Officer, in phrases that remind one of the old bureaucratic procurement system from which we have moved. There is only one passing reference in this list of duties to the fundamental role of acquisition in promoting the agency mission, but this phrase is lost amidst a sea of procedurally oriented verbiage. I would urge the Subcommittee to ask that the Procurement Executive Council, which represents the government's accumulated career contracting expertise, submit suggested language about the duties of a Chief Acquisition Officer.

Section 205: Acquisition Protests

Tremendous progress has been made over the last decade in reducing the prevalence of destructive procurement litigation, which promotes excessive risk-aversion on the part of government officials and creates a lose-lose adversarial environment between government customers and suppliers. One element of this welcome development has been the increased ability to use agency protests as an alternative to more formalized protests in front of GAO or the Court of Federal Claims.

The point has been made over the years that contractors would be more likely to use informal agency protests if they could be assured of a stay of contract performance during the pendancy of an agency protest (which would be a maximum of 10 days). This is a sensible provision. Agency protests balance the interest in a procurement system that functions with integrity with a minimization of disruption and excessive litigiousness.

Section 302: Incentives for Contract Efficiency

This provision provides specific statutory authorization for "award term" contracting. This is an innovative incentive mechanism, developed (independently) by contracting professionals in the Air Force and NASA, that has begun to be applied in federal contracting. It is a good example of the kind of pro-taxpayer innovation that career contracting professionals have developed in the environment of procurement reform.

With this technique already spreading and no questions about legality (to my knowledge) having been raised, perhaps no statutory authorization is required. But I like the idea of honoring the dedicated professionals who developed this idea by having it recognized in statute.

Section 401: Preference for Performance Based Contracting

I applaud the support for performance-based service contracting that this section provides. This was a procurement policy priority for the last two administrations, and it continues to be a priority for the current Administration.

I support the incentives the bill provides for using performance-based contracting. I would make only three suggestions. At (b) (B) (ii), the bill, after stating that a performance-based contract or task order must define tasks "in measurable, mission-related terms," states only that the contract or task order "identifies the specific end products or outputs to be achieved." There is no requirement that such end products or outputs themselves be specified in such measurable, mission-related terms – in principle, this language would allow definition of the end result sought in mission-oriented terms but require that the contractor produce only an output consisting of a level of effort or

some input-related deliverable. To remedy this problem, I would suggest that (B) (ii) be changed to read: "identifies the specific standards of performance required to meet the task as defined in (i)."

Second, I see no reason to exclude contracts awarded under these circumstances from special simplified procedures for awarding contracts for commercial items. I believe this exclusion should be eliminated.

Third, I support the idea of Centers of Excellence in Service Contracting. I would urge that language be included directing the Center in the Department of Defense to develop guidance and training material on developing performance measures in performance-based contracts, available for use in the entire government. I would hope that the Defense Department could play a role in this area similar to the one they played developing the discipline of project management in the 1950's. I would also add language making clear that the mission of these centers is to work on improvements in contract management for services.

Section 403: Clarification of Commercial Services Definition

It is, of course, factually correct to state that there are many widely available services sold in the commercial world that are sold on a time and materials basis. I myself have purchased legal, repair, gardening, and housecleaning services in this manner.

Second, the kind of pricing regime imposed in the context of the Truth in Negotiations Act, which is essentially a regulated utility model of cost plus some standard percentage profit, is inappropriate to the way that firms in the commercial marketplace compete among themselves for customers. In services, two firms may have

basically the same input costs, but one may put these input costs together in a way that creates more value for the customer, through creating a performance-oriented culture, through the quality of training and supervision, or through the way the firm manages knowledge dissemination and sharing. In the marketplace, these two firms, with the same costs, will charge different prices, based on their quality and reliability, and will earn different rates of profit. This is perfectly legitimate – indeed, this is how competition in the service sector works. This shouldn't be prohibited through a one-size-fits-all utility regulation pricing model.

Third, requirements for submission of certified cost and pricing data, CAS compliance, and compliance with government cost principles deters commercial services firms not currently selling to the government from entering the government marketplace, which may deprive the government of cutting-edge firms, particularly small businesses.

Fourth, over and above exemption from these cost-disclosure and audit-related requirements, there are other advantages of Part 12 acquisitions, such as freedom from a significant number of government-unique contract clauses that are a deterrent to the entry of commercial firms into the government marketplace, along with simplified procedures the government may use in acquiring commercial items.

For all these reasons, we should aim towards a situation where time and materials or labor-hour type contracts, for services widely available in the commercial marketplace, be classified as commercial items.

There is an important caveat, however: the time and materials contract (or task order) must be awarded competitively. As I indicated earlier, we should not expect that all service providers have the same prices, or the same profit rates, because they are

likely to be competing on their ability to take similar inputs and combine them into a higher-value service. But in a non-competitive situation, a service provider may still charge too much for a given level of quality. In a competitive environment, the customer has several combinations of price and quality from among which to choose, and is thus in a better position to make the appropriate tradeoffs. And vendors have an incentive to sharpen their pencils so they don't overcharge for the level of quality they provide. Finally, awarding contracts or task orders for commercial services competitively should not be difficult – since by definition such services are widely available in the marketplace.

Under current law, the government is precluded from obtaining certified cost data, or applying the cost accounting standards, for any commercial item, even when such items are acquired on a sole-source basis. An important justification for this provision of current law, I would assume, is that with regard to products, firms often compete on the basis of providing some unique feature or technology, which in turn can on occasion require a sole-source award to a commercial firm that would not sell to the government otherwise. As suggested above, this is not the case for commercial services. Firms don't compete based on offering something unique, but rather on offering different mixes of price and quality. Non-competitive awards for commercial services should, except perhaps in cases of time urgency (an exemption to competition under the Competition in Contracting Act), be made competitively.

There is a second issue with regard to applying current statutory language on commercial items to time and materials/labor hour contracts. Current statute forbids the government from conducting audits of any sort, including post-award, for commercial

items. This makes sense in a fixed-price commercial item environment. However, for commercial services contracts, the government should certainly have the right to conduct post-award incurred-cost type audits, to see if labor and materials provided were as billed for.

Therefore, I would support the language in Section 403 with two amendments. The first would be that, for a contract, order under the GSA schedules, or task order under a multiple-award task order contract, in order for work to be classified as a commercial service, the contract must meet the "adequate price competition" test in statute (with the hourly labor rates being considered a "price") and that for orders or task orders, at least two proposals for the specific work in question have been received by the government. The second would be that, for commercial services purchased using T&M or labor hours contracts, incurred-cost type audits (that labor and/or materials billed for were provided as billed) be permitted.

Section 404: Designation of Commercial Business Entities

Attracting predominantly commercial firms to do business with the government has been a central theme of the procurement reform efforts of the past decade. Through changes in policies and definitions regarding commercial items in FASA and Clinger-Cohen, we've made great progress in that regard. However, an ongoing theme throughout these discussions– a theme that was actually raised in the Report of the Section 800 Panel in 1993 at the beginning of procurement reform efforts -- has been to increase the ability of the government to attract predominantly commercial firms – that is to say, firms that don't primarily deal with the government – to do non-commercial work for the government, such as defense R&D or production of defense items off of

commercial production lines. The basic idea is that many firms may have research capabilities and/or technology that the government needs, but that these firms, which do not deal with the government, are unwilling to begin to do so because of large costs they would need to incur to meet government audit requirements, and the legal/public relations exposure that falling under such audit requirements would create. This deprives the government, in this view, of access to an important part of this country's knowledge and technology base. This is a particular problem in the post-September 11 environment, which makes addressing this issue more urgent and also expands its scope beyond the Defense Department to include homeland security products and services that civilian agencies might want to procure.

The language in this section seeks to encourage such commercial entities to do business with the government by applying the same legal regime used for commercial items to commercial entities, even if they are not selling commercial items.

I support the direction in which this language moves us, but I have some concerns. Most importantly, I am troubled by the language that allows, in the percentage test for designating a commercial entity, to include items sold to the government under FAR Part 12 (i.e. commercial items). The problem is that this goes away from the original justification for the creation of a category of commercial entities in the first place – to attract firms into the government marketplace that are not doing business with the government at all. Firms selling under Part 12 are already selling to the government. I would be concerned that, as written, existing government contractors, perhaps even firms most or even all of whose work is for the government, would take various measures to get the percentage of their company's commercial and FAR Part 12 work up to 85%,

including by acquiring other firms, and then be exempted from audit/disclosure requirements designed for traditional defense contracts on existing defense production, so that the government lost even the possibility for various audit/disclosure rights when it buys tanks or warships from existing defense contractors under cost-based pricing arrangements. This would be totally contrary to the spirit behind the effort to create special provisions for commercial entities.

Perhaps this language was put in to encourage entry into the government marketplace of commercial divisions of firms having other divisions that deal extensively with the government; in that case, it would be better to find a way to create language involving commercial divisions than to proceed with this language.

Second, I think we need to learn more about the impact of changes in this area before proceeding aggressively. How many commercial firms would want to do contract R&D for the government, or produce non-commercial items on commercial production lines, even if none of these barriers existed? Do the problems these firms currently face arise only if the products or services in question are being bought on a sole-source basis, or do they arise even with competitive procurements? If the former, what kinds of contract types, or other ways to protect the government's interests, are appropriate in the case of sole-source contracts for non-commercial products or services?

I would therefore support the idea of designating predominantly commercial firms as "commercial business entities," but with several changes from the bill language. First, I would suggest either eliminating the inclusion of items sold to the government under FAR Part 12 from the percentage test in the bill or to include in the percentage test only sales of "commercial off-the-shelf items," which is a narrower category than commercial

items and would make it considerably harder for a company to meet the percentage test. The second alternate has a number of attractions. Allowing off-the-shelf items to be included in the percentage calculations would provide the government potential access to R&D capabilities, for national-security related work, of large IT hardware/software companies that may sell a fairly significant amount of off-the-shelf products to the government, or of consumer/industrial products firms that do the same.

Second, because there is some uncertainty about the effect of such a change on the government's access to commercial firms and to the government's ability to obtain fair and reasonable prices, and also in order to increase the attractiveness of the government marketplace to small businesses, I would suggest, at least initially, that the percentage test for becoming designated as a commercial entity be somewhat more limited than in the bill – I would suggest that for a large business to be so designated, 95% of its sales would need to be non-governmental (or commercial off-the-shelf), while keeping the percentage for small businesses at 85%. Third, many earlier discussions of this issue have referred to commercial divisions of firms, that is, the part or parts of a multi-divisional firm, other parts of which might be government contractors, that did not deal with the government. I would urge that consideration be given to restoring the division as a useful unit here. Finally, I would consider making this a five-year test program.

I should add that I believe there is some confusion, with regard to the current language in the bill, as to whether the items a firm sells to the government that would benefit from the firm's designation as a commercial entity are limited to fixed-priced products or services. I assume that the intention of the bill is to include flexibly priced

contracts, such as R&D contracts, but there may need to be some clarifying language to make this clear.

Finally, a technical suggestion on this section: I suggest that the percentage test be limited to United States sales of a company. There is such variation, in terms of foreign governmental procurement practices, about the kinds of adaptations a company needs to make in terms of auditing/legal exposure that it doesn't seem to make sense to include the percentage of a firm's non-U.S. sales to foreign governments in calculating whether it is a commercial entity.

Section 405: Continuation of Eligibility After Providing Design/Engineering Services

This provision seeks to address a genuine problem in government contracting. Right now, organizational conflict of interest rules prohibit a contractor who has designed an IT project to bid on implementation of the project. Such an approach is extremely uncommon in the private sector, where typically the same firm designs and implements a project.

The current system creates problems for the government. First, the best firms often don't want to bid on design/engineering work, because it precludes them from the larger work, which involves implementation and execution. Second, with a division of tasks between the design and implementation contractors, rich opportunities for avoidance of responsibility and finger-pointing exist: the design firm is not adequately incentivized to develop a good design, because it can blame failure on the implementers, and vice versa. Third, this division makes it difficult to attract the most talented people to a job, because such people generally get the most job satisfaction out of being both

designers and implementers – developing ideas and bringing them into reality, as opposed to being a cog in a services assembly line.

However, the current system also exists for obvious reasons. A firm that designs a project has a clear advantage in bidding for implementing it, which unlevels the competitive playing field in a dramatic way. And if competition occurs only for the smaller design contract with a sole-source follow-on for implementation, the government has trouble protecting its interests – especially with no cost disclosure requirements – for the larger implementation work.

I do not know how commercial customers, who, as noted, typically engage the same vendor for both stages, deal with this problem. I suspect reforms are warranted in how the government does business in this regard, but at this stage, more research is needed. Rather than legislating at this point, I would urge the Subcommittee to request from GAO a study of private-sector practices in this area and for suggestions about reforms that would allow gaining the advantages of keeping design/implementation work together while also protecting the government's interests.

Section 601: Simplified Acquisition Threshold Inflation Adjustment

I support this provision. Original congressional intent in establishing a simplified acquisition threshold, based on price levels obtaining at the time of the original legislation, should not be hollowed out simply because of inflation.

Mr. DAVIS. Thank you very much.

Professor Schooner. You have been quoted already.

Mr. SCHOONER. I should stop while I am ahead, but I won't. Thank you.

Chairman Davis, Congressman Turner, first let me thank you for the opportunity to be here today. As the hearing highlights, the Federal procurement system has experienced dramatic change during the 1990's. Against that backdrop, as I flesh out more in my testimony, I will address four topics briefly today.

First, I encourage this committee to do anything within its power to restore meaningful oversight to the procurement process. Second, I encourage you to invest in the acquisition work force. Third, I strongly recommend that you drop the proposal to increase the purchase card threshold. And fourth, I suggest caution and further study on the provisions related to commercial purchasing.

During the 1990's, it is my opinion that the government failed to prepare its acquisition work force for or support it through the dramatic transition. At the same time, the acquisition work force, particularly at DOD, experienced a sustained, dramatic reduction in force that was made without empirical evidence supporting the reductions. At the same time, the promise of DAWEA and the mirror provisions in the Clinger-Cohen Act remain underfunded and accordingly unfulfilled. As a result, much of our current work force is overwhelmed, undertrained, and as you heard earlier, retirement eligible.

SARA does not offer the solutions to the startling decrease in oversight in Federal procurement. In my opinion, the bill's provisions related to the acquisition work force unfortunately appear more cosmetic and they do not require the necessary investment of resources needed to solve the pressing problems. You will get only what you pay for, as you discussed earlier with Ms. Styles and Ms. Lee. I think we need more and better personnel and we need the training of that personnel, and that requires money. I believe that this committee is extremely well-positioned to make the case that investing in additional acquisition personnel and work force training is needed to restore meaningful oversight to Federal procurement.

Specifically, as my written testimony explains at length, I fear that the training fund will not enhance the current state of training for all acquisition personnel. The government repeatedly has issued broad proclamations supporting training and professional development, such as DAWEA and Clinger-Cohen, while failing to invest in a properly trained work force. I believe this initiative continues that trend.

I have a similar reaction to the government-industry acquisition professional exchange program. I applaud the initiative, but it will not generate sufficient return on investment. My experience in government makes me skeptical that senior managers will release their most talented personnel for these opportunities. Also, the potential for conflicts of interest, both actual and apparent, is sufficiently great so as to merit further study.

I offer a similar response to the proposal regarding performance-based service contracting. I support any initiative to broaden the government's use of performance-based contracting. As the govern-

ment increases its reliance on the private sector for commercial services, performance-based service contracting expertise grows in importance, but statutory exhortations are not enough. Congress needs to appropriate money to train government personnel in the use of PBSC. They need to mandate classroom training. They need to specify that training will include practical drafting and negotiation exercises.

As I suggest in my testimony, you might want to consider establishing an annual high profile, governmentwide contest that awards excellence in drafting performance-based statements of work and publishing lessons learned from successful performance-based acquisitions.

As I address at length in my testimony, particularly pages 8 through 10, I am extremely concerned regarding the state of high-volume, low-dollar purchasing. The proliferation of purchase cards has revolutionized government purchasing, but with few exceptions the government has accepted an ostrich-like approach to oversight. I do not doubt the efficiency of the purchase card when used appropriately. But given the proliferation of cardholders, insufficient investment in training, and the current absence of oversight, we cannot conclude that purchase card use is under control.

Even as disclosure of purchase card abuse has become widespread, few are willing to rein in the purchase card. This bill would increase purchase card authority ten-fold, while imposing no controls. This expanded authority would encompass 98.5 percent of all government purchases, and for those purchases buyers could ignore all of the government's normal procurement rules, procedures and protections.

Also, it is undeniable that such a change would further reduce small business participation in Federal Government procurement, and in effect the bill would exempt 98.5 percent of the government's purchases from all congressionally mandated social and economic policies.

With regard to the provisions related to commercial acquisition, I urge caution. I am concerned with permitting the use of time and material or labor hour contracts under FAR Part 12. Use of these vehicles seems antithetical to your policy statement favoring performance-based service contracting. Further, the authority in effect would facilitate the government's use of cost-plus percentage of cost arrangements, which as you know are prohibited.

Similarly, I question the value of the designation of commercial business entities. As I see it, the proposal invites corporate organizational gamesmanship, which has no place in the public procurement regime.

Finally, I am not aware that a compelling case has been made for changes to the current definition of commercial items. I believe the current definition accommodates reasonable and appropriate uses of commercial purchasing authority. I think the initiatives are premature and they require further study. In their current form, they pose undue risk to the system.

Mr. Chairman, in concluding, I do want to make clear that, as Steve Kelman knows, I generally supported the acquisition reform

movement. What I call for is appropriate oversight to see that those reforms are implemented appropriately.

Thank you again for the opportunity to be here. Obviously, I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Schooner follows:]

TESTIMONY OF

PROFESSOR STEVEN L. SCHOONER
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

before the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

regarding H.R. 3832
THE SERVICE ACQUISITION REFORM ACT OF 2002 (SARA)

March 7, 2002

INTRODUCTION AND OVERVIEW

Chairman Davis and members of the Committee, I appreciate the opportunity to appear before you today to discuss H.R. 3832, the Service Acquisition Reform Act of 2002 (SARA). As your invitation letter highlighted, the federal procurement system experienced dramatic change during the 1990's. While I applaud the intent behind many of these acquisition reforms, significant concerns regarding the implementation of these reforms merit this Committee's attention and effort. This Committee is uniquely well positioned to further acquisition reform by neutralizing a number of arguably unanticipated, but nonetheless problematic, results of the 1990's reforms. Against this backdrop, I will address four key topics.

First, I encourage this Committee to seize this opportunity to restore meaningful oversight within our procurement system. Second, I encourage you to utilize this legislative initiative to invest in, and revitalize, the acquisition workforce, a necessary first step towards sustaining public trust and confidence in federal procurement. Third, I hope to draw the Committee's attention to one potentially unnoticed, but hugely problematic provision in the bill. Specifically, I recommend that section 221, the proposal authorizing a ten-fold increase in the purchase card threshold, be dropped. Fourth, I suggest caution and further study on the provisions related to commercial purchasing.

THE ACQUISITION REFORM CONTEXT: SYSTEMIC CHANGES; INADEQUATE OVERSIGHT

The 1990's acquisition reform movement dramatically increased individual buyers' discretion and flexibility. In so doing, it prompted significant changes in the way the government buys. Arguably, the 1990's reforms altered the system more dramatically than, in 1984, when the procurement community confronted not only the Competition in Contracting Act (CICA), but also the formal introduction of the Federal Acquisition Regulation (FAR). It should come as no

surprise to this Committee that change, however positive, is hugely disruptive.[1] As discussed below, however, despite the scope of these reforms, the government failed to prepare its acquisition workforce for, or support it through, the transition to the reformed regime. The procurement process and the acquisition workforce – those individuals upon whom the system depends – have not yet recovered from this tsunami of change.

During this shift towards more a business-like model, the uniform procurement system envisioned in 1984 (yet never fully realized) has slowly but inexorably become balkanized. The proliferation of purchase cards usage, in conjunction with the micro-purchase threshold has exempted high-volume, low-dollar purchasing from conventional constraints and controls. Through creation of the "other transactions authority," Congress suggests that certain sophisticated exchanges of promises between the government and its contractors are not procurement contracts. Inter-agency multiple award contractual vehicles permit program managers to by-pass their agencies' contracting officers in favor of more pliable buyers in other agencies.[2] Unfortunately, these buyers' responsiveness is driven by their dependence upon a transaction fee and appears unfettered by traditional public procurement norms such as transparency, competition, and integrity. Individual government instrumentalities, such as the Federal Aviation Administration, simply have been removed from the uniform procurement system. This reduced uniformity imposes significant transaction costs on both the government and the private sector. Balkanization reduces the government's ability to efficiently train, assign, and promote its personnel. As discussed below, in the current environment, the government simply cannot afford this type of inefficiency with regard to its workforce.

At the same time, the acquisition workforce, particularly at the Defense Department, experienced a sustained, dramatic, Congressionally-mandated reduction in force. These reductions occurred despite a complete absence of any empirical evidence supporting such a policy. As a result, at a macro level, our current workforce is overwhelmed, under-trained, and retirement eligible. Accordingly, the workforce is ill suited to meet the daunting demands it faces.[3] A number of factors contributed to this dilemma. The promise of the Defense Acquisition Workforce Improvement Act (DAWIA) and the Clinger-Cohen Act remains

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[1] See generally, Steven L. Schooner, *Book Review: Change, Change Leadership, and Acquisition Reform*, 26 PUBLIC CONTRACT LAW JOURNAL 467 (1997).

[2] Experienced acquisition professionals recognize that contractors equate inclusion in these contractual arrangements to the issuance of a "hunting license."

[3] Office of the Inspector General, Department of Defense, *DOD Acquisition Workforce Reduction Trends and Impacts*, Report D-2000-088 (February 29, 2000). This study identified, among others, the following effects of the personnel reductions: (1) increased backlog in closing out completed contracts; (2) insufficient staff to manage requirements; (3) reduced scrutiny and timeliness in reviewing acquisition actions; (4) difficulties retaining personnel; and (5) insufficient contract surveillance.

underfunded and, accordingly, unfulfilled.[4] The pace of recent reforms outpaced whatever investment agencies chose to make in training and professional development. Meanwhile, the unequivocal mandate from the White House and Congress to increase outsourcing of commercial services prompted a dramatically increased workload, both in volume and complexity. These service contracts not only require additional skill and effort at the formation stage, but they require additional effort during the contract performance or administration phase. Today, the federal government's contract administration resources are inadequate. As the acquisition workforce continues to be stretched thinner, oversight of the process suffers. The constant deluge of unfulfilled purchasing requirements mandates that the remaining acquisition workforce must keep buying. Unfortunately, what this means is that fewer resources remain to conduct adequate acquisition planning, monitor existing contracts, or supervise (or review) the procurement professionals responsible for these activities.

The reduction in *internal* oversight might raise fewer concerns but for the corresponding reduction in *external* oversight. Throughout the 1990's and beyond, external oversight of the procurement system has plummeted. By external oversight, I mean non-governmental, third-party monitoring of the system or what some refer to as private attorney general activity. While few would argue that litigation is a public good, the importance of external oversight is elevated by the dramatic reduction in internal oversight. For a host of reasons, the federal government can no longer rely upon the private sector to assist in any meaningful way in ensuring compliance with procurement laws, regulations, and policies.[5]

Much has been made of what some perceive as a difference of opinion between me and Professor Steve Kelman in this regard. I remain convinced, however, that – on this issue – we are of one mind. Oversight of the procurement process is a key ingredient to maintaining public trust in our government. Moreover, during periods of intense change, oversight cannot be ignored and, if anything, must be increased. In his popular book, which later became the roadmap for his agenda at OFPP, Professor Kelman stated:

> I take very seriously the goal of keeping the level of corruption in government low. The costs of government corruption are far greater than the monetary or performance losses to the government that result from corrupt bargains. Public corruption

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[4] Defense Acquisition Workforce Improvement Act (DAWIA), 10 U.S.C. §§ 87, 1701 et seq., and the Clinger-Cohen Act, Pub. L. No. 104-106, § 4307 (February 10, 1996), adding 41 U.S.C. § 433.

[5] Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government,* 50 AMERICAN UNIVERSITY LAW REVIEW 627 (2001). This article details – and attempts to explain, in the context of the 1990's acquisition reforms – the dramatic reduction in protest activity (or disappointed offeror litigation) and contract disputes activity during the 1990's.

> can devastate the ethical tone of society as a whole and decrease the inclination of citizens to behave ethically in their everyday lives. . . . Thus, even the economist Arthur Okun has written that government "*should* spend $20 to prevent the theft of $1 of public funds."[6]

Professor Kelman later expanded on this thought:

> Any loosening of the procurement regulatory straightjacket should be accompanied by, and linked to, *increased resources* for public corruption investigations to investigate units both outside the line agencies responsible for procurement and within those agencies. . . . *Deregulation of the procurement system should also be accompanied by an increase in criminal penalties for procurement corruption.* . . . A public announcement of increased resources devoted to investigation and of increased penalties would allow elected officials who might otherwise be worried that procurement deregulation signaled a withering of concern over public integrity, to display a visible signal of continuing concern . . . .[7]

In this context, what is most obviously absent from SARA is what I most hoped to find. Unfortunately, SARA offers no solution to the startling absence of oversight in federal

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[6] STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE 96 (1990), citing ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 60 (1975). Okun elaborates on this point:

> Because the government gets its funds from taxpayers by mandatory, not voluntary, decisions, there is no room for the principle of caveat emptor. . . . The government must be accountable to the citizens, and accountability is as costly in resources as it is precious to the integrity of the political process. *Bureaucratic red tape is neither an accident nor a reflection of bad rules . . . : it is the result of the obligation of political decision-makers to be cautious . . . and to guard against any misuse of taxpayers' money.* Public officials follow the Ten Commandments of their profession, which proclaim that thou shalt not be experimental or venturesome or flexible.

Id. (emphasis added).

[7] KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT 98-99 (1990) (emphasis added).

procurement. Thus, my concerns related to our currently inadequate oversight regime lead me to a related topic, the need to restore and revitalize our acquisition workforce.

ACQUISITION WORKFORCE PROPOSALS:
TOO LITTLE TOO LATE

Here, too, my hopes for SARA were dashed. To the extent that the bill addresses concerns related to the acquisition workforce, they are primarily cosmetic changes that fail to require investment of admittedly scarce government resources to solve this pressing problem. My reaction to most of these proposals is simple: you will get what you pay for, and these proposals pay for nothing.

There is little point today in re-visiting the Faustian bargains made during the 1990's – bargains that, apparently, traded acquisition workforce cuts in exchange for increased flexibility in the process. Both parties revel in, and claim credit for having contributed to, the reduction in size of the federal government.[8] No one today can claim responsibility, nor can we assign blame, for the fact that the existing acquisition workforce is improperly staffed or insufficiently trained. More (and better) personnel – and the training of both new and existing personnel – requires additional money. This Committee, arguably more so than any other, can make the case that investing in additional acquisition personnel and workforce training is needed to restore meaningful oversight to federal procurement.

In that context, you asked whether the training fund, contained in section 102, would enhance the current state of training for all acquisition personnel. I fear it will not. Worse, I remain concerned that it may actually lead to a reduction in acquisition training. At its core, this is smoke and mirrors akin to mandating educational requirements while ignoring the costs associated with such a mandate. This practice has become commonplace in the acquisition community. As an institution, the government repeatedly has issued broad proclamations supporting training and professional development – such as DAWIA and Clinger-Cohen (referenced above) – while failing to invest in a properly trained workforce.

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[8] The naive quest for a "smaller" government masks the more important policy question of whether a large shadow government (or contractor corps) is preferable to the perceived entrenched and bloated civil service. See, generally, Paul C. Light, *The Public Service* (June 1, 1999) available at <http://www.GovExec.com>. Light suggests that the shadow government, which resides mostly outside the public's consciousness, reflects decades of personnel ceilings, hiring limits, and unrelenting pressure to do more with less. See also, VICE PRESIDENT AL GORE, THE BEST KEPT SECRETS IN GOVERNMENT: A REPORT TO PRESIDENT BILL CLINTON 1, 207 (GPO, 1996) (reflecting that the Executive Branch, excluding the independent Postal Service, has "the smallest workforce in 30 years"); RICHARD STILLMAN II, THE AMERICAN BUREAUCRACY: THE CORE OF MODERN GOVERNMENT 307-309 (2d ed. 1996) (cautioning that the growth of contracting out has "tended to accelerate numerous problems and dilemmas of managerial efficiency, oversight, and accountability.").

While I laud any effort to invest in acquisition training, it is clear that *Congress should fund necessary training programs through the normal budget and appropriations process.* Putting this obvious issue aside, the training fund could prompt any number of unfortunate externalities. For example, if GSA or other agencies (whose contractual vehicles bear this burden) choose to raise prices to cover the shortfall, buying agencies simply may choose to take their business elsewhere rather than foot the bill for an amorphous training fund. Similarly, some government managers – faced with scarce resources – will choose merely to fund their current training plans with these funds, rather than utilizing the fund for *additional* training. Others may interpret the statutory regime to suggest that the *only* acquisition training available would be that which the fund would cover. This would create a worst case scenario – a classic "race to the bottom" – in effect *reducing* the current (albeit meager) investment in procurement training. Nor does it seem likely, in any event, that the fund could generate sufficient revenue to accomplish the needed training.

To the extent that you asked what type of metrics should be established for this (or any) training fund, I suggest consideration of the following:

> (1) Quantity: Did the fund permit federal acquisition professionals to obtain more training than in the preceding year? (That would be a good start and, given the current environment, I think this is an entirely appropriate aspiration. Ultimately, however, we must do much better, and the metric should reflect this.) Does the fund permit appropriate travel to reasonable venues for training and sufficient additional personnel so that participation in training is not routinely cancelled, deferred, or denied due to office exigencies?[9]
>
> (2) Quality: Did the fund permit a greater percentage of the workforce to obtain needed skills? One way to measure this would be to determine whether more of the workforce was able to achieve higher DAWIA or Clinger-Cohen qualification standards. Another measure might query whether it permitted additional personnel to obtain professional certifications such as the Certified Professional Contracts Manager (CPCM) or Certified Associate Contracts Manager (CACM)?
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> (3) Diversity: Does the fund afford managers and acquisition personnel the flexibility to craft specific training solutions that include degree-based or non-degree undergraduate and graduate courses of study at community colleges, colleges, and universities; continuing education programs offered by professional training organizations (both not-for-profit and for-profit); government-sponsored training (whether at government teaching facilities such as the Defense Acquisition University or through various delivery methodologies), etc.? Does the fund permit acquisition professionals the time and resources necessary to participate in and, where appropriate, assume leadership positions

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[9] In this context, I am reminded of popular complaint that "the immediate drives out the important."

within, professional government-industry organizations (such as the National Contract Management Association (NCMA)) at the local, regional, and national levels?

You also asked whether I believed that the proposed government-industry acquisition professional exchange program, contained in section 103, will help alleviate the current difficulties in recruiting and retaining a highly-qualified acquisition workforce. While I applaud this initiative and believe it could prove valuable, I do not believe it would generate sufficient return on investment. Nor do I believe that it will, in more than a token fashion, help alleviate the current acquisition workforce difficulties. Based upon my experience in government service, I am skeptical as to the ability and willingness of senior managers to release their most talented personnel for these opportunities, particularly given the current – and projected long-term – inadequacy of the procurement workforce. I am concerned that the administrative burden, if not hassle, associated with such an endeavor may deter many organizations from participating. I also fear that the potential for conflicts of interest – both actual and apparent – is sufficiently great so as to merit further study. Given these hurdles, I would rather see Congress identify and earmark resources needed to hire additional personnel, grade the positions commensurate with experience and education, and invest in additional training.[10]

I offer a similar response your question regarding performance based service contracting, for which a statutory preference is stated in section 401. I firmly support any initiative to broaden the government's use of performance based contracting. As the government annually increases its reliance upon the private sector for its commercial services, performance based service contracting expertise grows in importance.

Having said that, statutory exhortations – like talk – are cheap. If Congress wants to send a clear message on this issue, I suggest that Congress: (1) appropriate a significant sum of money – consistently, for a number of years – to be used to train government personnel in the use of performance based service contracting; (2) draft authorizing legislation mandating a minimum number of hours of annual classroom training (e.g., 40 hours, but in no event less than 24 hours), while specifying that a certain percentage of that training include practical drafting and negotiation exercises; and (3) task an agency or office (such as the Office of Federal Procurement Policy) with establishing an annual government-wide contest (with numerous awards publicly presented in Washington, D.C.) rewarding excellence in at least two categories: (a) drafting performance based statements of work and (b) publishing lessons learned from successful performance based acquisitions.

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[10] For the same reasons, I applaud the intent behind the bill's provision, section 201, that would upgrade agencies' senior procurement executives to chief acquisition officers. I do not object to this provision, but it elevates form over substance. I do not mean to disregard the value of symbolic gestures. Given the current state of the acquisition workforce, however, much more is needed. Unfortunately, provisions such as section 201 and 103 divert focus from the larger issues and squander the opportunity to correct significant problems.

SECTION 221: SUBTLE ADDITION OF A SINGLE ZERO: A HIGH-RISK APPROACH TO DECONSTRUCTING PUBLIC PROCUREMENT

Nowhere is the need for this Committee's scrutiny more acute than in the context of high-volume, lower-dollar purchasing. The micro-purchase threshold and the corresponding proliferation of government purchase cards have revolutionized government purchasing. Yet, with few exceptions (primarily in the General Accounting Office and agency inspectors general), the government has adopted an ostrich-like approach to oversight concerns while trumpeting the efficiencies associated with purchase card use.[11] Even as disclosure of purchase card abuse has become more widespread,[12] few are willing to attempt to rein in purchase card use. Indeed, section 221 of SARA quietly proposes to multiply the threshold ten-fold, from $2,500 to $25,000. The bill would increase the purchase card authority without imposing any additional controls or any acknowledgment of the risks associated with such an endeavor. Should SARA become law in its current form, its greatest impact likely would be felt as a result of its subtle addition of a single zero.

During Fiscal Year 2000, government employees, wielding more than 670,000 purchase cards, completed more than 23 million transactions, worth over $12 billion.[13] Those 23 million purchase card transactions – not surprisingly – comprise the lion's share of the 33 million total transactions captured by the Federal Procurement Data System (FPDS).[14] Unfortunately, the FPDS neither collects nor reports information relating to the nature of these purchases.

As dramatic as these numbers appear, it is helpful to examine what impact the increase would have on insight into what, how, and from whom the government buys. Excluding purchase card transactions, the FPDS currently suggests that approximately 95% of the reported

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[11] Steven L. Schooner & Neil S. Whiteman, *Purchase Cards and Micro-Purchases: Sacrificing Traditional United States Procurement Policies At the Altar of Efficiency*, 9 PUBLIC PROCUREMENT LAW REVIEW 148 (2000); Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?*, 30 PUBLIC CONTRACT LAW JOURNAL 403 (2000).

[12] See, generally, General Accounting Office, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse*, GAO-01-995T July 30, 2001; and the subsequent report, GAO-02-32, November 30, 2001, which contains a host of organization-specific recommendations.

[13] See the Federal Procurement Data System's Federal Procurement Report at <http://www.fpdc.gov/fpdc/fpr.htm>.

[14] For Fiscal Year 2000, the FPDS captured 9,847,967 transactions, plus 23,457,456 purchase card transactions, for a total of 33,305,423 transactions.

purchases are for $25,000 or less.[15] If the purchase card authority were expanded to $25,000, it could encompass approximately 98.5 percent of all government purchases.[16] Put another way, if this authority became law, the FPDS might, in the future, give insight into as few as 520,000 transactions out of a total of more than 33 million transaction each year.

For this huge number of transactions, law, policy, and practice permit purchase card users to ignore the Government's normal procurement rules and procedures. The current regime basically requires *nothing* of the government employees who buy using a government purchase card. Their average training in procurement is less than four hours (and, to be clear, that is four hours of classroom time, not semester hours). To the extent that regulations may require efforts to rotate purchases among vendors or encourage the use of small businesses, this guidance is routinely ignored. I do not doubt the efficiency of the purchase card *when used appropriately*. Yet, given the proliferation of card holders, the insufficient investment in training, and the current absence of meaningful oversight into purchase card use, it is irrational to conclude that purchase card use is under control. In summarizing 382 reports addressing various aspects of the Defense Department's purchase cards program, the DoD Inspector General "identified problems related to the integrity of some cardholders [and] internal control weaknesses or noncompliance[.]" Ultimately, the DoD IG concluded:

> Because of its dollar magnitude and the number of cardholders, the purchase card program is an *area requiring continuing management, emphasis, oversight, and improvement by DoD. Continued audit coverage is needed* of the purchase card program to maintain its credibility with Congress and the American Public as a cost efficient method of procurement.[17]

Accordingly, it simply is irresponsible to suggest a ten-fold increase in the micro-purchase threshold.

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[15] Of the total 9,847,967 transactions covered by the report, 9,328,187 were reported on the Standard Form 281, used for purchases of $25,000 or less.

[16] To be clear, however, purchases above $25,000 – though few in number – would still account for the lion's share (more than 85 percent) of the dollars spent.

[17] Summary Report of the DoD Inspector General, *DoD Purchase Card Audit Coverage*, D-2002-029 (December 27, 2001) (emphasis added). I strongly encourage perusal of the report, which, among other things, notes that: (1) "[i]n 222 reports, the auditors reported cardholders made unauthorized purchases"; (2) management oversight was discussed in 115 reports; (3) "[i]n 79 reports, auditors reported inadequate controls over accountable property purchased using the credit cards"; and (4) "[p]roblems with . . . account reconciliation and certification reviews were discussed in 88 reports."

Also, it is axiomatic that such a change would also further reduce small business participation in the federal procurement process.[18] Increased purchase card usage already has shrunk the size of the pie from which the government attempts to allocate a fair share (currently defined as 23 percent) to small businesses. Anecdotal evidence (uncontroverted by any empirical evidence) suggests that large retailers such as Office Depot, Best Buy, Staples, and Home Depot capture most of the purchase card opportunities. Few doubt that small businesses today obtain less of government's purchases due to purchase card use. The federal government's disenfranchisement of small businesses would no doubt accelerate with a ten-fold increase in the purchase card threshold.

For these reasons, I oppose any increase in the purchase card threshold, and I strongly counsel against a ten-fold increase.[19] If this provision is not removed from the bill, at a minimum, I suggest that any legislation broadening the use of purchase cards should: (1) mandate (and fund) additional training; (2) mandate (and fund) internal controls; (3) mandate (and fund) appropriate audit resources; and (4) require collection of meaningful information detailing what these purchases entail.[20]

Moreover, you asked whether certain provisions in SARA might enhance the federal government's ability to leverage its buying power in the commercial marketplace. I do not. This bill, however, *could* make a valuable contribution specifically by either requiring a study of, or mandating an investment in, the leveraging of the government's purchase card power. The government should routinely concatenate meaningful data on its purchase card transactions. The government should collect, sort, and use this information to demand favorable price treatment. For example, the government (most likely through the General Services Administration) should determine the dollar volume of its transactions with large retail vendors (such as Office Depot, Staples, Best Buy, or Home Depot, etc.) with whom it did substantial business in the preceding year. The government should then negotiate (if not demand) volume discounts for future purchases. For example, this could take the form of automatic point-of-sale discounts whenever and wherever the purchase card is used. The analogy to the government travel card – particularly with regard to government-wide automobile rental and hotel discounts – should pave the way for

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[18] The same would be true of small disadvantaged businesses, women-owned businesses, etc. This legislation, in effect, would exempt 98.5 percent of the government's purchases from all Congressionally mandated social and economic policies, including domestic preferences, etc. Were Congress to make a conscious, deliberate decision that the procurement system was an inappropriate vehicle for the pursuit of social policy, I would not object. Conversely, it seems almost underhanded, if not devious, to subvert the existing regime in this manner.

[19] I believe that a rational case could be made for an inflation adjustment to the current $2,500 threshold. Anything more, however, troubles me.

[20] For an exhaustive list of potential purchase card program controls suggested by the General Accounting Office, see the report referenced in note 12, *supra*.

such practice.

CONCERNS REGARDING EXPANDED COMMERCIAL AUTHORITIES

In my effort to focus my testimony upon what I perceived as the most important issues in SARA, I have avoided an extensive discussion of the matters related to commercial acquisition.[21] Nonetheless, I urge caution here. I have grave concerns with section 402's authority permitting the use of time and material or labor-hour contract types under FAR Part 12. Use of these vehicles seems antithetical to the clear policy, expressed elsewhere in the bill, that favors performance based service contracting (PBSC). In addition, ultimately, this authority would facilitate the government's use of what are, in effect, cost-plus-percentage-of-cost arrangements. As this Committee well knows, use of these types of vehicles is prohibited.[22] Similarly, I question the value of section 404's designation of commercial business entities. Proposals of this type merely invite corporate organizational gamesmanship, which should have no place in the public procurement regime. Finally, I am unaware that a compelling case has been made for the changes suggested in section 403. I believe that the current definition of commercial items is sufficiently broad to accommodate reasonable and appropriate uses of the commercial purchasing authority. As a whole, I believe that these initiatives are premature. They require further study and, in their current form, pose undue risk to the procurement system.

Conclusion

Mr. Chairman, that concludes my testimony. Thank you again for the opportunity to share this information and these thoughts with you. I would be pleased to answer any questions you may have.

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[21] To the extent my general opinions on the larger topic may be of assistance, see Steven L. Schooner, *Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice* (this book chapter, forthcoming in 2002, is available in draft form at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=285536>).

[22] 48 C.F.R. § 16.102(c); 10 U.S.C. § 2306(a); 41 U.S.C. § 254(b).

Mr. DAVIS. Thank you very much.

Mr. Dever.

Mr. DEVER. Chairman Davis, Congressman Turner, Congressman Horn, as a private sector purchasing professional and taxpayer, I commend you for the work that you are doing here in this important area of reform, and thank you for the opportunity to participate.

I am currently Vice President of Global Procurement for Hasbro, Incorporated, based in Rhode Island. Hasbro is a worldwide leader in children's and family leisure-time entertainment products and is involved in the design, manufacture and marketing of traditional and high-tech games and toys. Mr. Woods from the GAO in panel one mentioned several companies that were involved in their study, and Hasbro was one of those.

Over the past 3 years, Hasbro has worked to enhance the value of its supplier relationships by taking a more strategic approach to the selection and integration of various suppliers. We have taken several actions designed to improve our purchasing effectiveness across the organization. For example, we have centralized the development of sourcing strategies for key raw materials and have taken a more broad-scoped approach to supplier selection and negotiation.

We have adopted a more streamlined supply chain management organization to reduce costs and improve customer service. We have created a new section of the purchasing organization whose primary focus is on non-production goods and services. This function works collaboratively across the various Hasbro businesses and locations to rationalize the supply base in various categories. And finally, we have selectively adopted new technologies such as electronic procurement and purchasing cards to help streamline activities and improve the sourcing process.

In line with the intent of the legislation which you have introduced, Mr. Chairman, the focus of this testimony will be on Hasbro's experience in managing service providers.

Hasbro relies on service providers in support of many areas of our business. Historically, decisionmaking in the selection of providers has been decentralized. Our intent was to improve the process for acquiring services, without restricting the business manager's ability to select the most appropriate suppliers. We noted that there were opportunities to reduce the number of suppliers in more tactical areas of service acquisition, while providing broader exposure to service providers in more strategic areas. We felt that we could, in fact, improve the quality of the supplier selection process and reduce costs concurrently.

In this testimony, I would like to define two broad categories of service providers and discuss the traditional approach for acquiring such services, key considerations, and our desired approach to acquisitions. It should be noted that Hasbro is in various stages of implementation and is continually considering further opportunities for improvement in all areas of procurement.

The first category of service contractors is service contractors. In the course of conducting business, Hasbro sometimes requires certain services that do not make good business sense to develop internally. Facilities maintenance, security, administrative and cater-

ing are examples of services that are purchased externally. Such services are highly leverageable because the requirements are easy to define and there are several qualified sources which behave competitively in the market. Traditionally, each Hasbro location or business unit established one or more supplier relationships for a given service need. Accordingly, the process for requisitioning and contracting for services varied by department and location. Our strategy was to reduce the number of suppliers across our various locations and to implement a standardized requisitioning system that streamlined the ordering process.

Cross-functional teams representing various stakeholders work collaboratively to establish consistent service requirements, review supplier proposals, and negotiate primary source agreements. Through these efforts, we have negotiated lower costs and improved service standards. Such standards ensure that all locations are being serviced consistently. We measure the performance of the suppliers against the agreed standards and renegotiate agreements annually.

The second category of service acquisition that we identified was professional services, which are typically provided by independent contractors or specialized agencies which represent individuals with unique skill sets. During peak workloads, Hasbro requires the support of such resources to support our business. There are also situations where we need to acquire specific knowledge or experience that we have not developed internally. Services provided within this category include technology support like programming, systems integration, creative services, and business consulting.

The selection process has not been fully competitive in the past. Multiple proposals from alternative suppliers are not always obtained. Project specification and desired outcomes have not been clearly specified in all cases, and supplier payments are not always tied to clear delivery of value against specified objectives. We also found that the tactical purchasing aspects of their acquisition process were cumbersome and often delayed the commencement of work and payment to the service providers.

Our approach in this area has been to provide tools and purchasing support to the business, which encourages a more thorough review of qualified providers. We recognize and support the need for business managers to quickly identify and acquire the most qualified resources for their specific requirement. We have found that when the process for selecting professional service providers is more competitive, there is more flexibility on cost and other agreement terms.

We have also developed a more consistent process for requesting such services, thereby ensuring that Hasbro's liability and risk is minimized. We require a detailed breakdown of resources, time, and billing rates to help ensure that each phase of the project is completed successfully and invoiced appropriately.

We have recently adopted a Web-based system which facilitates a more rapid identification of multiple qualified resources. This system helps ensure competitive pricing and a more consistent approach to engagement management. In order to ensure that services acquisition is managed effectively, we have created a position within the purchasing department which is focused on services ac-

quisition. This position will continue to provide support in the selection, negotiation, contracting and management of service providers from tactical to strategic.

Thank you again for your time, and I would be happy to address any questions you may have.

[The prepared statement of Mr. Dever follows:]

TESTIMONY

of Scott M. Dever
Vice President, World Wide Procurement
Hasbro, Inc.

On the acquisition of professional services in the private sector

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

March 7, 2002

Mr. Chairman, members of the subcommittee; thank you very much for the opportunity to testify before you today. I am Scott Dever and currently serve as Vice President of World Wide Procurement for Hasbro, Inc., based in Rhode Island. Hasbro is a worldwide leader in children's and family leisure time entertainment products and is involved in the design, manufacture and marketing of traditional and high-tech games and toys. Hasbro's worldwide net revenues for 2001 were $2.9 Billion.

Over the past three years, Hasbro has worked to enhance the value of its supplier relationships by taking a more strategic approach to the selection and integration of various suppliers. We have taken several actions designed to improve our purchasing effectiveness across the organization.

- Hasbro adopted a global commodity management structure and developed sourcing strategies for plastic resins, packaging and electronic components. Historically, each operation has sourced its own raw materials. For some of the key raw materials like plastic resins, we have centralized the development of sourcing strategies and have taken a more broad scoped approach to supplier selection and negotiation. This allows Hasbro to leverage its buying power more effectively thereby reducing costs. The Global Commodity Manager can track material price trends and react more effectively to opportunities and threats in the market.
- We have adopted a more streamlined supply chain management organization to reduce costs and improve customer service. By segmenting our product mix into core items and promotional items, we have been able to design specific processes that optimize the manufacture and distribution of product. We've consolidated various roles in sales and operations planning to create better production forecasts and manage the product supply chain to improve customer service levels and reduce product obsolescence.
- We have created a new section of the Purchasing organization whose primary focus is on non-production related goods and services. This function works collaboratively across the various Hasbro functions and locations to rationalize the supply base in categories of spending like travel, supplies, equipment and services.
- Finally, we have selectively adopted new technologies to help streamline activities and improve the sourcing process. We have created a web-based ordering system for various non-production goods and services that allows non-purchasing personnel to place orders without involving the Purchasing department. The suppliers are pre-selected and prices are negotiated to maintain control over spending. This reduces the amount of time that the Purchasing staff spends processing orders allowing them to focus on more valuable activities like negotiation and supplier management.

During the second half of 2001, I was interviewed by the General Accounting Office for their report to the Readiness and Management Support Subcommittee of the Senate Armed Services Committee. One of the GAO staff members had attended a National Association of Purchasing Management conference at which I spoke on the effective procurement of services. It is my contribution to that effort that resulted in my invitation to testify here today.

In line with the intent of the legislation which you have introduced, Mr. Chairman, the focus of this testimony has to do with Hasbro's experience in managing service providers. I will discuss some of the challenges associated with selecting and managing service providers and share specific actions taken by Hasbro to improve the value and quality of acquired services.

Hasbro relies on service providers in support of many areas of our business. We utilize external service providers to support our operations in areas of security, catering, landscaping, building and systems maintenance, business consulting and other, non-core activities. Historically, decision making in the selection of service providers has been decentralized. Business managers in functional roles need the flexibility to acquire external services that fully meet their needs. Our intent was to improve the process for acquiring services without restricting the business manager's ability to select the most appropriate providers. We noted that there were opportunities to reduce the number of suppliers in more tactical areas of service acquisition while providing broader exposure to service providers in more strategic areas of service acquisition. We felt that we could, in fact, improve the quality of supplier selection and reduce costs concurrently.

In recent years, we have implemented various policies and procedures to improve the value of the services we acquire from external providers. The first step in identifying opportunities for improvement was to collect and analyze supplier spend data and segment the various services into categories based on the nature of the service providers. We found that a broad range of services were being acquired by Hasbro. We also assessed the process for selecting, negotiating and managing service providers. We found that there was little consistency in the process for selecting, negotiating and managing service provider agreements.

In this testimony, I will define two broad categories of service providers and discuss the traditional approach for acquiring such services, key considerations and our desired approach to acquisition. It should be noted that Hasbro is in various stages of implementation and is continually considering further opportunities for improvement in all areas of Procurement.

Category I: Service Contractors

In the course of conducting business, Hasbro sometimes requires certain services that do not make good business sense to develop internally. Facilities maintenance, security, administrative and catering are examples of services that are purchased externally. Some service providers operate in a relatively small geography while others operate nationally or internationally. Such services are highly leveragable because the requirements are easy to define and there are several qualified sources which behave competitively in the market.

Traditionally, each Hasbro location or business unit established one or more supplier relationships locally for a given service need. Accordingly, the process for requisitioning and contracting for services varied by department and location.

Our strategy was to reduce the number of suppliers across our various locations and to implement a standardized requisitioning system that streamlined the ordering process. Cross-functional teams representing various stakeholders work collaboratively to establish consistent service requirements, review supplier proposals and negotiate primary source agreements. Through these efforts we have negotiated lower costs and various service standards like requisition fill rates, response times and other more favorable terms. Such standards ensure that all locations are being serviced consistently. We measure the performance of the suppliers against the agreed standards and renegotiate agreements annually.

Category II: Professional Services

The second category of service acquisition that we identified was professional services which are typically provided by independent contractors or specialized agencies which represent individuals with unique skill sets. During peak workloads, Hasbro requires the support of such resources to support our business. There are also situations where we need to acquire specific knowledge or experience that we have not developed internally. Services provided within this category include technology support like programming and systems integration, creative services and business consulting.

Traditionally, Hasbro business managers have selected and engaged professional service providers as needed with approval from Senior Management. The selection process has not been fully competitive in that multiple proposals from alternative suppliers are not always obtained. Project specification and desired outcomes have not been clearly specified in all cases and supplier payments are not always tied to clear delivery of value against specified objectives.

Our approach to this area of services acquisition was to support the need for business managers to quickly identify and acquire the most qualified resource for their specific requirement. We also recognized that the business managers had a limited but dependable pool of resources to draw from based on their prior experience. We found that the tactical purchasing aspects of the acquisition process were cumbersome and often delayed the commencement of work and the payment of the service providers.

Our strategy in this area has been to provide tools and Purchasing support to the business which encourages a more thorough review of qualified providers against a clear list of business requirements. We have found that when the process for selecting professional service providers is more competitive, there is more flexibility on cost and other agreement terms. We have also developed a more consistent process for requesting such services; thereby ensuring that Hasbro's liability risk is minimized. We require a detailed breakdown of resources, time and billing rates to help ensure that each phase of the project is completed successfully and invoiced appropriately. This will allow us to develop benchmark rates and standard costs for various types of work. We have recently adopted a web-based system which facilitates a more rapid identification of multiple qualified resources. This system helps ensure competitive pricing and a more consistent approach to engagement management.

In order to ensure that services acquisition is managed effectively, we have recently created a position within the Purchasing department which is focussed on services acquisition. This position will continue to provide support in the selection, negotiation, contracting and management of service providers from tactical to strategic.

In summary, we have learned the following:

- Many types of services can be leveraged across our business. Fewer suppliers help ensure compliance with business policies, allow for more streamlined processes and provide reduced costs.
- Technology solutions provide access to a broader supply base, facilitate a streamlined selection process and create a more competitive environment for negotiation.
- Consistent policies regarding the acquisition of service providers help ensure that the most appropriate suppliers are selected and that legal and business risk considerations are applied consistently.
- A focussed resource can help ensure that the selection process is competitive and that effective processes and company policies are applied consistently across the business.

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

Mr. DAVIS. Thank you very much.

Mr. Roberts.

Mr. ROBERTS. Mr. Chairman and members of the subcommittee, I am a Senior Vice President and Managing Director of Federal Services at KPMG Consulting, Incorporated. Thank you for inviting me here today to testify on behalf of the 500 corporate members of the Information Technology Association of America, ITAA. KPMG Consulting is one of the world's largest consulting and business systems integration firms and is a proud member of ITAA. ITAA has long been active on issues pertaining to government procurement of IT. Additionally, we have worked with your staff to recommend some of the provisions contained in the legislation introduced this week.

We are especially pleased to testify in strong support of H.R. 3832, the Services Acquisition Reform Act. A recent ITAA survey, which I will include with my testimony, found that this year Federal CIOs are highly focused on information security and infrastructure. Their overriding concern is to address security issues raised by the war on terrorism.

As Federal agencies and the rest of the Nation shift to this new focus, it is particularly important that the Federal Government have fast, efficient access to the best IT solutions. We are certain that these solutions are resident primarily in the private sector, and we believe SARA can help the Federal Government to acquire them.

The leadership shown by this subcommittee to consider changes in the acquisition of services by the Federal agencies is timely for two other reasons. First, IT services has been the fastest growing sector in Federal IT procurement. Second, because the Federal Government is forecasting such a dramatic decrease in the number of Federal IT workers in the next 5 years due to retirement, IT services will likely continue to grow in importance for both government agencies and procurement.

I would like to focus on what ITAA believes are the few key provisions in the bill that will enable meaningful access to commercial solutions. Acquisition work force recruitment and retention—by the middle of this decade, the government will face significant retirement numbers, particularly within the acquisition work force. Agencies will be left to track 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 the facilitate the government's increasingly complex 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 work force recruitment and retention pilot program. This program will assist agencies in matching their respective work forces efficiently and effectively to their needs. ITAA stands ready to assist the subcommittee in this important effort.

Acquisition work force training fund—hand in hand with recruitment is the need for the government to train its acquisition work force. For acquisition reform to be of any value, those who implement the acquisition system must understand how it works. Despite programs put in place with previous acquisition reform legis-

lation, training programs throughout the government are still insufficient. ITAA has long been a supporter of increasing funding for employee training. We have also been highly critical of the fact that these funds were too often the first cut when budget reductions were necessary.

Establish a regulatory review process—despite a decade of acquisition reform, many laws and regulations still inhibit greater use of commercial practices. A continuous review of these laws and regulations is needed, especially in light of the ever-changing dynamics of our marketplace. This will maintain a constant critical eye on acquisition law, always working toward the optimization of the acquisition process. ITAA strongly supports such a review process and would also appreciate the opportunity to participate in an appropriate manner.

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 level, a multiple of it, or a specific dollar amount. By forcing contractors to assume all risk, the Federal Government will attract fewer competitors or companies who will offer only low-risk solutions and higher prices. ITAA commends the sponsors for considering this change to align more closely with commercial practices.

And the last area, conflict of interest—in many instances, the Federal Government may be denying itself 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 pursuing larger development and implementation and maintenance contracts. ITAA supported the provisions in the earlier drafts of the Clinger-Cohen Act that revised the Federal Government's rigid conflict of interest requirements. ITAA believes that the commercial sector's flexibility in selecting the best contract to provide a total solution should also be extended to Federal customers.

Mr. Chairman, that concludes my comments. ITAA thanks you for this opportunity to comment on this critical piece of legislation. We also stand ready to assist you in any modifications or additions to SARA. We again commend you for taking this important and timely reform effort.

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

[The prepared statement of Mr. Roberts follows:]

TESTIMONY

OF

RICHARD J. ROBERTS

SENIOR VICE-PRESIDENT
AND
MANAGING DIRECTOR, FEDERAL SERVICES
KPMG CONSULTING, INC.

BEFORE THE

HOUSE SUBCOMMITTEE ON TECHNOLOGY
AND PROCUREMENT POLICY
2154 RAYBURN HOUSE OFFICE BUILDING

ON THE

SERVICES ACQUISITION REFORM ACT (SARA)

ON BEHALF OF THE

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

MARCH 7, 2002

Introduction

Mr. Chairman and Members of this Subcommittee, I am Richard J. Roberts, Senior Vice-President and Managing Director of Federal Services at KPMG Consulting, Inc. Thank you for inviting me here today to testify on behalf of the 500 corporate members of the Information Technology Association of America (ITAA). As you know, many of ITAA's member firms provide computer software and services to the Federal government, and it is with great pleasure that I represent ITAA.

KPMG Consulting, Inc., based in McLean, Virginia, is one of the world's largest international consulting and business systems integration firms, with approximately $2.9 billion in annual revenues. Our approximately 10,000 employees worldwide provide business and technology strategy, systems design and architecture, applications implementation, network and systems integration, and related services. We help our clients capitalize on information technology (IT) to achieve their business objectives and build real-time enterprises. Working with market-leading hardware and software companies, we serve more than 2,500 clients, including Global 2000 companies, small and medium-sized businesses, government agencies, and other organizations. Our business and technology solutions are tailored to meet the specific needs of the industries we serve, and are delivered through global industry-focused lines of business, including communications and content companies, consumer and industrial markets, financial services industries, high technology companies, and federal, state and local governments.

For nearly two decades, ITAA has been very active on issues and legislation pertaining to government procurement of IT. Additionally, our Procurement Policy Committee worked with your staff to recommend some of the provisions contained in the legislation introduced this week. For these reasons, we are especially pleased to be able to testify in strong support of H.R. 3832, the Services Acquisition Reform Act, or SARA.

ITAA's recently released 12th annual survey of Federal Chief Information Officers, ***The Federal Information Age: Stakeholders, Customers, Citizens***, found that this year, Federal CIOs are more focused on a confluence of issues surrounding information security and infrastructure. Our survey found that the overriding challenge facing the CIO community is the effort to address the broad security concerns raised by the war on terrorism. This effort is broken down into four categories:

- Securing the Internet against terrorist acts
- Providing integration of appropriate data to better fight terrorism
- Ensuring that Internet information content does not aid the enemy
- Ensuring a robust infrastructure with particular emphasis on telecommunications

As both the nation and agencies of the Federal government shift to this new focus, it is particularly important that the federal government have fast, efficient access to the IT solutions that best meet agency needs. Steps that the government takes 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 believes that it is most appropriate for Congress and this Subcommittee to consider changes to the acquisition of services by the Federal agencies for two reasons. First, IT services has been the fastest growing sector in Federal IT procurement. With the President's fiscal year 2003 budget calling for a 15.5% increase in government spending on information technology, strong growth in this key area will no doubt continue. Second, the Federal government is forecasting a dramatic decrease in the number of Federal IT workers in the next five years due to retirements, and, as a result, IT services will likely continue to grow in importance.

Critical Provisions for Meaningful Reform

As I have mentioned, Services Acquisition reform is a broad topic, and since SARA covers such a wide range of subjects, ITAA will not be able to comment on all of the provisions contained therein. I would like to begin by focusing on what we believe are the key provisions within SARA that are most critical to meaningful services acquisition reform:

- Clarification of "Commercial Services" Definition
- Trade Agreements Act (TAA) Exemption for IT Products
- Share in Savings Initiative
- Commercial Liability Limitation
- Share in Savings Provision

Clarification of "Commercial Services" Definition:
ITAA has been advocating this change ever since the enactment of the Clinger-Cohen Act. As you know, commercial items may be purchased through streamlined acquisition procedures because their availability in the marketplace provides buying agencies an incontrovertible reference to quality and competitive price, assuring that these agencies receive the best value for their purchases. The definition of "commercial service" was intended to be the same as that of "commercial item" when Clinger-Cohen was passed by Congress because commercial services and items share the same policy rationale justifying streamlined acquisition procedures. 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, a key distinction.

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, elaborate, government-unique tracking, monitoring, and risk for IT vendors and a restriction on products available to Federal agencies. The significant administrative burden and cost imposed on IT contractors is unlike any they confront in the commercial marketplace. 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

relocate their manufacturing sites. TAA, however, does deny to the Federal government the widest array of products available because vendors are reluctant to establish such monitoring systems separate from the their commercial business. For this reason, we commend the sponsors of SARA for agreeing to reform this outdated provision.

Share in 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 it has a track record of success in the Federal Government where it has been tried. We believe that legislation may be needed to encourage more agencies to utilize this contracting approach to bring value and efficiency to Government program administration. The private sector has willingly invested in upgrading the government's infrastructure. Where this approach has been used, the companies were paid from the savings, and the government agency benefited from the modernization. Thus, both sides share in a win-win, all to the advantage of the taxpayer. We applaud Congressman Davis for including this provision in SARA, which will provide more flexibility to the agencies and to the contractors that select to use the shared savings approach.

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 risk, the Federal government will attract fewer competitors or companies who will offer only low-risk solutions, at higher prices. Again, ITAA commends the sponsors for considering this change to align more closely with commercial practices.

Cooperative Purchasing:
ITAA has continued to support the program of allowing state and local governments to purchase off GSA schedules. We believe that that 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.

Other Provisions Supported by ITAA

A number of workforce and process-oriented provisions contained in SARA are also of interest to ITAA. They include:

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 increasingly 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 matching their respective workforces efficiently and effectively to their programmatic needs, 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 1990s, 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 funding for employee training. We have also been highly critical of the fact that these funds were too often the first cut when budget reductions were necessary.

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, consistent with their practices in the commercial market.

Establish a Chief Acquisition Officer:
ITAA supports naming a Chief Acquisition Officer. Many agencies already have such a position and this will make it uniform across all federal 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. What government and industry needs is a continuous review of these laws and regulations, especially in light of the ever-changing dynamics of our marketplace. 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.

FAR Part 12 Contract Flexibility:
ITAA has long advocated correcting what we perceive to have been 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 materials" or labor hour contracts. We believe that Federal customers should have the same variety of choices in selecting the most appropriate contract vehicle that currently exists in the commercial sector.

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 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 the Federal customers. The proposed language would allow a contractor who 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 to encourage IT companies to compete for design and engineering work.

Conclusion

ITAA thanks you for this opportunity to comment on this critical piece of legislation. We also stand ready to assist you in any modifications or additions to SARA. We again commend the Chairman for taking on this important and timely reform effort. Thank you for the opportunity to submit our views.

Mr. DAVIS. Thank you very much.

Ms. StandsBlack-Carver.

Ms. STANDSBLACK-CARVER. Mr. Chairman and members of the subcommittee, my name is Roberta Carver, President and CEO of Four Winds Services, Inc. I am here today on behalf of Contract Services Association of America, where I serve on its board of directors.

I incorporated in 1991 Four Winds Services, Inc., as an 8(a) certified Native American woman-owned business company that provides various types of contracting services to military installations nationwide. Based on excellent customer service and past performance record of excellence, Four Winds is the recipient of several prominent awards.

I am a member of the Ponca Tribe located in Ponca City, OK. I greatly appreciate the opportunity to testify before you on services acquisition reform, a subject very important to my company, as well as the entire membership of CSA. Services acquisition reform remains one of the top three policy issues for the members of CSA. We applaud your introduction of Services Acquisition Reform, or SARA, and are committed to working with you to ensure its passage.

I would like to touch briefly on a few key areas of your bill that are particularly important to my company and all small service contractors. I have provided a written statement for the record which addresses the majority of the bill's provisions in greater detail.

For CSA, the training and the education is a vital component of the acquisition work force and ranks high as a key area for all concerned. This is certainly true as we move toward greater PBSA contracting, which both Congress and the administration have embraced. PBSA allows the government to identify the what, and it lets the contractor determine the how. PBSA holds great vision and promise to reduce costs, while increasing service quality. It capitalizes on the private sector expertise and leverages IT innovations. Small businesses will greatly benefit from such innovative contract types.

Properly implementing PBSA as a standard is another story. For example, we have bid and won a PBSA contract. It is a worthwhile challenge, but it has been our experience that continual micromanagement is practiced by the government to the extreme, which defeats the whole purpose and leads to unnecessary internal conflicts.

Training is a big stumbling block. Your bill, Mr. Chairman, which provides an innovative method for funding for training, is necessary and a positive step toward ensuring that the acquisition work force have the proper tools to implement PBSA and all the acquisition policies. For example, the Native American Incentive Act, it took literally an act of God to find out the exact source of payment, and then became a self-training effort for us in explaining the Act and its process to our government personnel so that they could properly implement it.

Also, improving payment terms for the service contractors is a win-win for both the government and the private sector contractors. It has definitely been a cost savings to the government be-

cause the contractor will have less carrying cost that would otherwise be passed on to the government. In this electronic age, we should be able to provide electronic invoices, which will expedite the process for getting paid for services already rendered. The provisions in SARA will help alleviate my cash-flow problems and help me meet my payrolls, and saves the government from paying late interest fees.

Recently, it came to our knowledge that a January invoice was not submitted in a timely manner by a government contracting officer, and the payment was held up for 1 month before being submitted to DFAS. Electronic invoicing would have alleviated this problem.

Now, I would like to address the benefits of the longer terms of 7 to 10 years for service support contracts, rather than the traditional 3 to 5 year. There are currently only a few agencies taking advantage of this. The benefits are easy to quantify. The government benefits from the ability for contractors to invest in more productive and efficient capabilities for the job that would not be possible under the short-term contracts. It is common knowledge in our industry that the first couple of years are trouble-shooting and implementing our new innovations to improve the service. A longer-term contract would allow us to perfect and improve our processes. Examples include state-of-the-art quality control plans such as ISO 9000, modern innovative management practices, and new software and efficiency programs.

Finally, as the bill moves through the legislative process, I would urge the subcommittee to consider the revisions to the Service Contract Act. SCA remains an important element to the services contracting arena. It provides basic protections to workers employed under government service contracts, particularly unskilled and semi-skilled workers. While the premise of SCA remains sound, certain revisions are needed to update the Act and move ahead in the 21st century.

For example, the current threshold of $2,500 established upon the Act's enactment in 1965 has not been increased since that time. The SCA threshold should be increased to $100,000, the current simplified acquisition threshold level. There also should be a regular inflationary adjustment to tie to the SCA, as you proposed in your SAT. I have long pushed for similar adjustments in statutory thresholds mandated for the Small Business Administration's 8(a) program. It just makes good common sense. Increasing the SCA threshold would certainly benefit my company and other small service contractors, while still ensuring the Act remains in place on a majority of government contracts.

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

[The prepared statement of Ms. StandsBlack-Carver follows:]

CONTRACT SERVICES ASSOCIATION OF AMERICA

STATEMENT OF

Roberta StandsBlack-Carver,
President and Chief Executive Officer, Four Winds Services Inc.
Board of Directors, Contract Services Association of America

BEFORE
Government Reform Subcommittee on
Technology and Procurement Policy

HEARING ON:
Service Acquisition Reform
March 7, 2002

Mr. Chairman, and members of the subcommittee, my name is Roberta Carver of FOUR WINDS Service Inc. I am here today on behalf of the Contract Services Association of America (CSA), where I serve on its Board of Directors.

FOUR WINDS Services, which I founded in the early 1990s, is an 8(a) certified, Native American, woman-owned company that provides various types of contracting services to military installations nationwide. Based on excellent customer service, FOUR WINDS is the recipient of several prominent awards: 2000 – State Blue Chip Enterprise Award; 1999 – Entrepreneurial Success Award and the Administrator's Award for Excellence; 1998 – ranked by Inc. 500 Magazine as the 33rd fastest growing, privately-owned business in the U.S. and was designated the 3rdFastest-Growing Oklahoma business by the Oklahoma Venture Forum. I am a member of of the Ponca tribe located in Ponca, Oklahoma.

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. CSA 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 CSA members, like FOUR WINDS, 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.

Services Acquisition Reform – Introduction

As noted in the letter of invitation, the Federal government purchases $87 billion in services each year. And yet, the *"Government is not fully utilizing commercial best practices or realizing the importance of performance metrics in acquisition cycles."* For that reason, services acquisition reform remains one of the Top 3 Policy Issues for members of CSA, along with past performance and competitive sourcing issues. We applaud the introduction of the "Services Acquisition Reform Act (SARA) of 2002" (H.R. 3832) and are committed to working with you to ensure its passage. SARA addresses many of our concerns about the reforms needed in services acquisition. We are interested in continued reform because we believe these efforts ultimately benefit the U.S. taxpayer.

Mr. Chairman, since your Subcommittee's first hearing (May 2001) on this issue, where you began exploring the necessity of a services acquisition reform bill, we have been working closely with your staff to identify issues that should be addressed in the legislation. We appreciate your willingness to listen to the views of industry on this important subject

SARA will allow the Federal government to take advantage of the innovations offered in the services arena. It also focuses much needed attention on the training and education of the acquisition workforce – without which the goals of acquisition reform will never be fully realized; and, ultimately services acquisition reform will save taxpayer dollars. Below I have outlined our views on several key provisions of H.R. 3832, which are important to my company and all CSA members.

ACQUISITION WORKFORCE TRAINING

For CSA, the training and education of the acquisition workforce has consistently ranked high as a key area of concern to our membership since it is a vital component of the reform process. This is particularly true as we move toward greater performance based services acquisitions, which both Congress and the Administration have embraced.

PBSA allows the Government to identify the "WHAT" (or, the specific needs) and lets the contractor determine the "HOW." It holds great promise to reduce costs while increasing service quality; it capitalizes on private sector expertise and leverages technological innovations. Small businesses, like FOUR WINDS, will greatly benefit from such innovative contract types. But, properly implementing PBSA is not easy and we currently face a huge stumbling block – TRAINING. We need to focus on what we mean by "performance based," provide the resources and tools to implement it properly, attract qualified personnel to oversee these contracts – and, most important, provide them training.

Furthermore, 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 training these individuals on the options available to them under acquisition reform, will true reform be fully adopted into services industry contracts.

Your bill, Mr. Chairman, which provides an innovative funding method for training, is a necessary and positive step toward ensuring that increased and improved training is available to the acquisition workforce. Access to adequate training is important to all agency acquisition personnel, particularly those at smaller agencies where funds are limited. And, it is clear that innovative funding methods are needed – since specific budget line items for training are all too often cut or delayed. Under SARA, this shortfall would be addressed by requiring a percentage of all administrative fees collected by agencies through Government-wide multiple award contracts and/or purchases from the GSA schedules be devoted to a "Federal acquisition training fund." These funds would be forwarded to the Federal Acquisition Institute (FAI). Presumably, all agencies (particularly the smaller agencies) would have easy access to these funds to provide adequate acquisition training for its acquisition personnel. 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 – as well as the Defense Acquisition University of the Department of Defense – be charged with relying on the private sector for the development and delivery of acquisition training programs. 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. Indeed, CSA has developed its own series of courses for a program manager certification for services contracting for CSA members – we believe that these courses could also be provided to the Federal acquisition workforce. Such training partnerships would benefit both the public and private sector.

Finally, we also support the SARA provisions that would authorize 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.

BUSINESS ACQUISITION PRACTICES

While it may be presumptuous for CSA to comment on a proposal aimed at the internal structure of an agency – in other words, the creation of a chief acquisition officer – it should be noted that the Department of Defense already has such a position. It was created for the very reason that SARA would authorize a CAO for all Federal agencies – to ensure a seat at the table in the early stages of an agency's acquisition planning strategy. This is an integral element in meeting an agency's budgetary and mission goals.

H.R. 3832 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. Such an overall review has not occurred since the monumental report of the Acquisition Law Advisory Panel, which was the basis for the 1994 Federal Acquisition Streamlining Act. Periodically reviewing our laws and statutes is necessary to ensure that what is 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. As part of its review, the Panel should be tasked with looking at the monetary threshold levels for all procurement laws (*e.g.*, Service Contract Act and minority business development programs, etc.) and, where appropriate, recommending an increase in these thresholds, along with a regular inflationary adjustment.

Improving payment terms for service contractors is a "win-win" for both the Government and private sector contractors. It will save the Government money because the contractor will have less carrying costs that would, otherwise, be passed on to the

Government. And in this electronic age, we should be able to provide electronic invoices and, then, be paid electronically. In particular, small businesses like FOUR WINDS depend on timely payment; the provisions in H.R. 3832 will help alleviate cash flow problems and help small companies meet their payroll.

I would like to outline one example of how electronic invoicing will improve payment and efficiency in the process. For many businesses, since September 11, 2001, average payment times have stretched out from the "normal" 30 days to almost 60 days for receipt of payment (especially for firms in the Washington DC metropolitan area). The reason being given is that the Defense Finance and Accounting Service (DFAS) claims they are not receiving the mail (there is a 30 day lag time between mail being sent and received). In these cases, DFAS is NOT applying the Prompt Payment Act (as it relates to interest payment) – because the clock does not start ticking until the invoice is received. This extended payment schedule is particularly harmful to small businesses, which operate on smaller capital cushions than larger firms. One solution would be acceptance of electronic invoicing – however, to date there appears still to be some reluctance by agencies to move in that direction (even though contractors are required to accept electronic fund transfer). SARA will help address this problem.

A brief comment on protests. For small businesses, the ability to protest is generally restricted due to limited funds. Strengthening the procedures for filing an agency protest will allow small businesses the opportunity to challenge agency solicitations or procedures they believe are questionable, while not "busting the budget." And strengthening agency protest procedures should improve the overall contracting process since disputes could be resolved at that administrative level.

CONTRACT INCENTIVES

SARA would promote greater use of "share-in-savings" contracts. We recognize that such contract types are unique and require special attention – yet CSA members have successfully performed such contracts. The Energy Savings Performance Contracting program within the Department of Energy is a prime example of such "share-in-savings" contracting. 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. Finally, as an added incentive to the agency, the agency's portion of the savings generated should not just be funneled back into the U.S. Treasury, but rather should be channeled into the agency toward fulfillment of its budgetary and mission goals.

H.R. 3832 would authorize contracting officers to utilize a variety of contracting tools to improve contract efficiency. Many of these tools are already being employed on a selective basis. By providing statutory authority for their use, we hope that wider use will be made of innovative contracting incentives. For example, 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 "level of effort" schedule provisions that reserve residual funding for reinvestment of savings back into a contract; this encourages contractors to find more efficient and cost effective ways to accomplish the scope of work without penalizing them for delivering reduced man-hours.

With regard to multi-year service contracts, some agencies already take advantage of the benefits of longer terms (7-10 years) for service support contracts rather than the traditional 3 or 5-year contracts. The benefits are easy to quantify. The Government benefits from the ability of contractors to invest in more productive and efficient capabilities for the job that would not be possible under shorter term contracts. Examples include state-of-the-art quality plans such as ISO 9000, modern and innovative management practices, and new software and efficiency programs. Contractors can be required to make capital purchases (and fully amortize them) such as vehicle fleets and other equipment, rather than the Government making these investments.

ACQUISITIONS OF COMMERCIAL ITEMS

Because it is impossible, especially in services, to predict every situation, yesterday's traditional, specific, narrow, ironclad contracts may no longer meet today's needs. The real challenge lies in writing a commercial-like contract that is specific enough to protect an organization yet flexible enough to accommodate unplanned events. Acquisition personnel must learn to "manage the contract, not the contractor."

Performance-based services acquisition (PBSA) is not a new concept. 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.

As already mentioned, 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).

SARA would attempt to address a critical area that has not fully benefited from the reforms enacted under 1994 Federal Acquisition Streamlining Act and the 1996 Clinger-Cohen Act – that of services, especially professional and technical services. H.R. 3832 would expand the available contract types used by Federal agencies in acquiring commercial items to include standard commercial-type contract vehicles, such as time and material (T&M) or labor-hour contracts. In the commercial marketplace, services are regularly acquired on a fixed rate per hour or day because the method is flexible and predictable. For example, T&M contracting allows for a rapid response and is administratively much simpler for both the buyer and the seller. T&M contracts are particularly useful when the scope of work cannot be definitively established to permit a firm-fixed price proposal. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. 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.

In addition, SARA would clarify the definition for stand-alone commercial services and authorize an alternative definition focused on an organizational approach, *e.g.*, a "commercial entity" concept. Business "entities" that are predominantly commercial would be able to do business with the Government under a single set of rules (FAR Part 12); this would encourage these companies to bring their full array of products, technology and services into the Federal marketplace. At the same time, this concept would reduce total costs to the government and contractor that currently results from the imposition of government unique requirements.

INFLATIONARY ADJUSTMENTS

SARA would provide for an inflationary adjustment for the "simplified acquisition threshold" (SAT). This recognizes the realities of the economy. There are other laws, however, where an increase in the threshold should be considered, such as the Service Contract Act – and I would urge the Subcommittee to consider increasing other statutory thresholds as the bill moves through the legislative process. Indeed, as noted earlier, the Review Panel, envisioned by SARA, should consider appropriate increases (linked with an inflationary adjustment) for all statutory thresholds in procurement laws.

The Service Contract Act (SCA) remains an important element in the services contracting arena. It provides basic protections to workers employed on Government service contracts, particularly unskilled and semi-skilled workers. While the premise for SCA remains sound, certain revisions are needed to update the Act. For example, the current threshold of $2500, established upon the Act's enactment in 1965, has not been increased since that time. The SCA threshold should be increased to $100,000 – the simplified acquisition threshold level established in FASA for many procurement statutes. There also should be a regular inflationary adjustment tied to SCA, as you propose for the SAT. I have long pushed for a similar adjustment in the statutory thresholds mandated for the Small Business Administration's 8(a) program. It just makes good common sense. Increasing the SCA threshold would certainly benefit Four Winds and other small service contractors, while still ensuring that the Act remains in place on the majority of the Government's contracts. Agency contracting officials would benefit considerably from the threshold increase as well by improved efficiencies.

SUMMARY

Thank you for this opportunity to share my views with the subcommittee. Four Winds and all CSA members look forward to working with the Subcommittee to ensure passage of the "Services Acquisition Reform Act."

Mr. DAVIS. Thank you very much.

Mr. Howe.

Mr. HOWE. Chairman Davis, Mr. Turner, Mr. Horn, I am Jerry Howe, Senior Vice President and General Counsel of Veridian, a leading provider of information-based systems, solutions and services to the U.S. Government. We specialize in mission-critical national security programs, primarily for the intelligence community, the Department of Defense, law enforcement and other government agencies.

I am pleased to be testifying today on behalf of the Professional Services Council, a membership organization including 140 members, which is the Nation's principal trade association of government professional and technical services providers. The PSC is a strong supporter of the Services Acquisition Reform Act of 2002. We support the legislation because of its focus on three interrelated aspects of a successful system for the acquisition of services—people, structure and processes. I will touch on each of these and hold the rest of my observations for our written testimony.

Mr. Chairman, for services companies there is no more important aspect of what we do than our people. The same is true of the Federal work force. Too often, though, the impact of economic change and legislative and regulatory actions are ignored or dismissed as immaterial. That is a serious policy mistake when dealing with the Federal work force. For our members, it is a prescription for disaster.

Our focus on people is one of the hallmarks of our industry and one of the reasons why PSC has been a vocal advocate for a well-trained, well-compensated Federal acquisition work force. SARA properly includes several provisions that address key human capital needs in the Federal acquisition work force. Among them are the provisions of Title I of the bill regarding a funding mechanism to ensure that work force has meaningful access to ongoing relevant training.

We, like many other witnesses before the committee today, would prefer to see direct appropriations made available to meet employees' training needs, ensuring that Federal employees have ready access to those funds. Regrettably, as has been observed several times also this afternoon, that is not the reality of the current process.

Therefore, as a second-best choice, we have recommended and strongly supported creating an alternative funding mechanism to ensure at least a meaningful amount of training funds are available. Section 102 of the bill is clear in moving toward this purpose. By setting aside for training of the Federal acquisition work force a small portion of the user fees on the transactions made under multiple-award contracts, Congress will have taken a significant step in addressing this important matter.

Another key theme of the legislation is the focus on the appropriate structure for managing growing responsibilities placed on the Federal acquisition system. At PSC, we have worked successfully with the senior procurement executives in many of the Federal agencies. They are dedicated people who have a passion for the work and a strong professional commitment to the execution of their agency's missions. The Federal Government spends $220 bil-

lion on goods and services. Of that, $87 billion is spent on services. The magnitude of the spending, which is increasing every year both in absolute terms and as a proportion of the total, deserves the government's full attention and commitment. In the formal structure of an organization, including the placement of key leadership, is one way to reflect that attention and commitment. Section 201 of the bill creates in each agency a chief acquisition officer. We believe the position of chief acquisition officer with authority for assuring uniformity and accountability across agency activities is crucial.

The Federal Government is slowly upgrading the tools and techniques it uses to acquire services. Many of the best practices for services contracting such as the use of performance-based contracting have been around for decades. Not as much progress is being made in the Federal sector. While progress is being made, agencies' procurements are becoming increasingly complex and technology-driven in the services area. It is important to recognize that agencies need the maximum flexibility to meet their mission needs, consistent with smart acquisition planning and responsible oversight and safeguards. Many of the provisions in Titles III, IV and V of the bill are designed to do just that.

For instance, section 401 makes permanent the temporary authority that exists to treat performance-based contracts or task orders valued at less than $5 million as commercial items eligible for use as special contracting techniques available for commercial items. We support making that authority permanent and governmentwide. While the test program being made permanent is clearly a step in the right direction, more can eventually need be done to address to address the barriers to widen Federal agency use of commercial items purchases of services.

Section 402 acknowledges that many services that Federal agencies acquire are best performed on a time-and-materials or labor-hours basis. These contract types are used widely in commercial marketplace for services, and should be made available for use by Federal agencies. Many of the specialized training needs of Federal employees could be met by such contracts.

The nature and scope of services acquisition is evolving and the law should be updated to permit agencies to use a contract type that is most appropriate for the needs, and consistent with commercial practices.

Finally, while Congress examines services acquisitions, it must do so within the broader context of strategic sourcing decisions that agencies make for performing their mission. PSC has consistently opposed legislation that would seek to specifically mandate or give preference to an in-house sourcing policy for the Federal work force or that would further tip the evaluation scales in favor of in-house performance. There is no need for any legislation in this area particularly at this time.

Mr. Chairman, the Services Acquisition Reform Act of 2002 is an important contributor to improving the way the Federal Government acquires services. We at PSC strongly support it. Thank you for the opportunity to appear before the subcommittee, and I would be pleased to answer any questions you might have.

[The prepared statement of Mr. Howe follows:]

ORAL STATEMENT

of Jerald S. Howe Jr.
Senior Vice President and General Counsel
Veridian

H.R. 3832
"SERVICES ACQUISITION REFORM ACT OF 2002"

Before the

Subcommittee on Technology and Procurement Policy
Committee on Government Reform

U.S. House of Representatives

March 7, 2002

I am Jerald S. Howe Jr., senior vice president and general counsel of Veridian, a leading provider of information-based systems, integrated solutions and services to the U.S. government. We specialize in mission-critical national security programs, primarily for the intelligence community, the Department of Defense, law enforcement and other U.S. government agencies.

I am pleased to testify on behalf of the Professional Services Council (PSC). PSC is the nation's principal trade association of government professional and technical services providers.

The Professional Services Council is a strong supporter of H.R. 3832, the Services Acquisition Reform Act of 2002 (SARA). We support H.R. 3832 because of its focus on three interrelated aspects of a successful federal system for the acquisition of services: people, structure, and processes.

A FOCUS ON PEOPLE

Mr, Chairman, for services companies, there is no more important aspect of our business than our people. The same is true of the federal workforce. Too often, however, the impact of legislative or regulatory actions on the contractor or federal workforce is ignored or dismissed as immaterial. That is a serious policy mistake when dealing with the federal workforce; for PSC members, it is a prescription for disaster! Our focus on people is one of the hallmarks of our industry and one of the reasons why PSC has been a vocal advocate for a well-trained, well-compensated federal acquisition workforce.

SARA properly includes several provisions that address key human capital issues for the federal acquisition workforce. Among them are provisions in Title I of the bill regarding a funding mechanism to ensure that the federal acquisition workforce has meaningful access to on-going relevant training.

We would prefer to see direct appropriations made available to meet the employees' training needs, ensuring that federal employees have ready access to those funds. Regrettably, this is not the reality of the federal budget process.

Therefore, we have recommended, and strongly supported, creating an alternative funding mechanism to ensure that at least a meaningful amount of training funds are available. Section 102 of the bill is clear in its purpose of training the federal workforce for the 21st century. By setting aside for training of the federal acquisition workforce a small portion of the user fees on the transactions made under multiple-award contracts, Congress will have taken a significant step in addressing this important matter.

A FOCUS ON STRUCTURE

Another key theme of this legislation is a focus on the most appropriate structure for managing the growing responsibilities placed on the federal acquisition system. At PSC, we have worked successfully with the senior procurement executives in many of the federal agencies. They are

dedicated people who have a passion for their work and a strong professional commitment to the execution of their agencies' missions.

The federal government spends $220 billion on goods and services; of that, $87 billion is spent on services. The magnitude of this spending deserves the government's full attention and commitment, and the formal structure of an organization, including the placement of key leadership, is one way to reflect that attention and commitment. Section 201 of the bill creates in each agency a chief acquisition officer.

We believe that the position of chief acquisition officer, with authority for ensuring uniformity and accountability across agency activities, is critical.

A FOCUS ON PROCESSES

The federal government is slowly upgrading the tools and techniques it uses to acquire services. Many of the best practices for services contracting, such as the use of performance-based contracting, have been around for decades.

While progress is being made, particularly as the services federal agencies acquire become more complex and technology-driven, it is important that the agencies have the maximum flexibility to meet their mission needs, consistent with smart acquisition planning and responsible oversight and safeguards. Many of the provisions in Titles III, IV and V of the bill are designed to do just that.

For example, Section 401 makes permanent the temporary authority that exists to treat performance-based contracts or task orders valued at less than $5 million as "commercial items" eligible for the use of special contracting techniques available for commercial items. We support making the authority permanent and government-wide. While making that test program permanent is clearly a step in the right direction, more can and should be done to address the barriers to wider federal agency use of commercial item purchases of services.

Section 402 acknowledges that many services federal agencies must acquire are best performed on a time-and-materials or labor-hour basis. These contract types are used widely in the commercial marketplace, and should be available for use by the federal agencies. Many of the specialized training needs of federal employees, such as for network maintenance and troubleshooting that we provide in the commercial and government marketplace, are examples of the types of services that might be most appropriately acquired through these T&M or L-H contracts. The nature and scope of services acquisition is evolving, and the law should be updated to provide agencies with a contract type that is most appropriate for their needs and consistent with commercial practices.

OTHER ISSUES

Finally, while Congress examines services acquisition, it must do so within the broader context of the strategic sourcing decisions that agencies make for performing their mission. PSC has consistently opposed legislation that would seek to specifically mandate or give preference to an in-house sourcing policy for the federal workforce or that would further tip the evaluation scales in favor of in-house performance. There is no need for any legislation in this area, particularly at this time.

CLOSE

Mr. Chairman, H.R. 3832, the Services Acquisition Reform Act of 2002, is an important contributor to improving the way the federal government acquires services. We at PSC support it. Thank you for the opportunity to appear before the subcommittee.

Mr. DAVIS. Thank you very much. I want to thank all the panelists very much for your testimony.

I will start with questions, and I will begin with Mr. Horn, the gentleman from California.

Mr. HORN. Thank you, Mr. Chairman.

I think all of us respect the purposes of this fine bill that you have put together, and we do need flexibility and we do need to focus on things. But for those of you that might have still been here when the first panel was, my question to you is the same, whether you are in a corporate frame or whether you are a contractor or whatever, and not in a corporate frame. But can you tell me what kind of responsibility and accountability will you put in your organization so that we do not have the kind of thing that we have had in the Navy in San Diego? Can you tell me how you will structure it and how you will have accountability and responsibility? Because otherwise, it is one great Ponzi scheme, just like this Enron thing, and you have once, and you get away with it, and then of course Congress will just murder it, and they should. So I would like to hear from you, just right down the line.

Dr. Kelman.

Mr. KELMAN. I would like to hear from the gentleman from Hasbro. I guess what I would say is that, first of all, if people commit fraud, you send them to jail. That is the first thing.

Mr. HORN. That is right.

Mr. KELMAN. You have review procedures—actually the purchase card makes it easier to do this kind of review than the traditional system. We don't know what was going on in the traditional system. The purchase card provides computer records of purchases that can be easily scanned, can be data-analyzed and so forth. With the proper management controls in place, it is easier to detect fraud and problems with a purchase card than it is with the prepurchase card system. I think we should also be careful, and I know your concerned with this as well, Congressman Horn, that as Chairman Davis said, we keep a balance here.

Let's remember we have 23 million purchase card transactions a year. Two facts to keep in mind. First, in these small purchases, whether it be in government or in industry, we have learned that the administrative costs of the traditional system, just putting the paper back and forth in the requisition and so forth, are often greater than the amount of the purchase itself; that it runs about $150 whether private sector or public. I have seen some studies in Intel and some private sector companies, and it did that in the government. The government is saving $100 per transaction in administrative costs from the purchase card. If you ask why were we able to downsize the procurement work force in the 1990's, mostly it was people doing these small purchase card transactions.

At 23 million transactions a year, that means the Federal Government is saving $2.3 billion a year in administrative paperwork using the purchase card. So we have to be careful to put in the proper controls, make sure they are there, but it would be, in my view, an anti-taxpayer policy to get rid of or sort of say the purchase card is bad. The purchase card has been a great innovation for the taxpayer, but we need the kinds of controls that you have been talking about.

Mr. SCHOONER. Congressman Horn, if I could do three things first. If you have the opportunity, if I could draw your attention to pages 8 through 10 of my testimony where I discuss section 221 and the purchase card at great length. I think you will find that there are a number of useful statistics in there and you will see that I have addressed a number of the concerns that you have raised.

Second, one thing that concerns me quite greatly, and Steve Kelman may remember this also, but when the purchase card was actually being implemented during the acquisition reform movement, and we went to the multiple award program that permitted the various agencies to choose purchase card vendors, one thing that we pushed very hard, and at the time I was at OMB, we encouraged the agencies to adopt and accept those vendors that were offering smart card technology power, rather than necessarily just blindly chasing the rebates.

Having said that, in 100 percent of the cases, agencies chose rebates over the kind of smart card technology that could do the kind of oversight that Steve Kelman was just referring to. The kind of oversight that we could do automatically through the charge card vendors is mindboggling, but as a general rule the government has not invested in that.

In addition, on page 10 in my testimony, I talk about some specific steps that could be made with regard to the purchase card, but I think the single most important thing that I would recommend in that regard is, as Mr. Woods mentioned, in the followup GAO report on the Navy issues and the purchase card, they list page after page of potential controls that could be used at various agencies. I think those are the kind of things that ought to be considered in lieu of what section 221 does, which is simply raise the threshold and not impose any controls.

So I think that there are a number of things that could be done, and I share your concern on the purchase card. I consider 221 to be the single most threatening thing in the entire SARA legislation.

Mr. HORN. Mr. Dever.

Mr. DEVER. Congressman Horn, the purchasing card has been available in the private sector for probably 10 years. Hasbro adopted its purchasing card about 5 years ago. These are companies that watch dollars very carefully, and yet they continue to find ways to expand the use of p-cards. At Hasbro, as have transaction limits. Per transaction, we have limits per month. The summary billings are reviewed by management. So if there were any abuse, it would be detected quickly.

Additionally, there are, with the smart card technology anyway, the ability to block those cards from being used for certain types of purchases. For example at Hasbro, you cannot use a p-card to buy a computer because we have a different process for procuring computers, so certain retail establishments can be blocked. And there are mechanisms to highlight things that would point toward abuse as well.

So I think the controls are in place. It would be a matter of consistent policy.

Mr. HORN. Mr. Roberts.

Mr. ROBERTS. I would agree with that. The biggest things we have in any business is internal controls. They are implemented, they are in place, and they are understood by all. People are trained on what the controls are, and the key is it comes down to simple individual accountability and responsibility, as well as supervisory responsibility and accountability, and those two things connected. We do not do things at KPMG Consulting with our purchase cards. Again, we have controls, but the key is people understand what the controls are and they are acted upon, and they are trained on it and you know what you are up against in all cases.

Mr. HORN. Ms. Roberta StandsBlack-Carver.

Ms. STANDSBLACK-CARVER. Currently, Four Winds Services does not maintain a contract in which we utilize the smart card. But it is a general consensus in our CSA memberships that we do not permit or accept any fraud among our membership companies. In our other financial business practices, though, without the smart card, we do have our own internal checks and balances in which we do random reviews to ensure that there wasn't any fraud taking place on any of our contracts. And we also are consistently audited by an outside Federal agency, DCAA, on our larger cost-plus-type contract.

Mr. HORN. Mr. Howe.

Mr. HOWE. I will address the question from the point of view of the seller of the services. Our company does not sell any services since we are in the national security arena that could readily be converted to personal use, such as DVD player. But I will address the question this way, our company, and I dare say all members of the PSC, have adopted codes of ethics and standards of conduct which are enforced by internal controls and disciplinary actions when appropriate.

Our company in particular has just opened something that we call the Veridian Institute, which gives training a prominent place within our company and pulls together all the disparate resources and augments them that were previously used to reinforce these kinds of procedures and controls. I think that brings us back to the point that at least I started with, which is the importance of training because you can have as many rules as you would like, if people do not understand the importance of those rules through training and know how to comply with them, it won't work.

Mr. HORN. Any other comments you want to make on this very possible interest of when we need to redraft something in the bill? So I will look at a number of yours, and hopefully we can work something out. I do not know if there are any other suggestions, especially in the training course. You are right, Mr. Howe, that if they are not serious and it is not good teaching, not much is going to happen. So I would hope that all of you would be able to put that program together.

Is there a model somewhere in the United States right now that would be the best kind of corporate teaching, as well as control in the particular card?

Dr. Kelman.

Mr. KELMAN. We have it at Harvard, but I am sure it is not a model.

Mr. HORN. Yes.

Mr. KELMAN. We do have them, though.

Mr. HORN. You mean the model is Harvard?

Mr. KELMAN. We have p-cards.

Mr. HORN. Yes.

Mr. KELMAN. My assistant uses one, and actually I have one as well for some expenditures, but I will not claim that we are a model. Nobody reviews my purchase card expenditures at Harvard. I am sure I am engaging in fraud all the time without knowing it, but whatever. [Laughter.]

Don't throw out the baby with the bath water, I would say, Mr. Chairman.

Mr. HORN. Thank you.

I will yield now to Mr. Turner, the ranking member on this subcommittee, for questioning.

Mr. TURNER. Thank you, Mr. Horn.

Mr. Schooner, I read what you had to say about the purchase card authority. As you said, that is your greatest concern with this legislation, adding that single zero. Do I take it that your position is that it just should not be raised at all, but what we should do is impose accountability and controls? Or if we had accountability and controls, do you think it would be appropriate also to increase it in some amount?

Mr. SCHOONER. Well first, as I suggested in I believe a footnote, I think that it would be entirely appropriate to put an inflationary adjustment on it. I do not see any reason why it arbitrarily has to be $2,500 forever. It seems to me that if, and this is a significant if, if we can establish internal controls, appropriate training and stop the proliferation of cards in terms of numbers of shareholders, and demonstrate some level of stabilities and use some of this technology in the near term to someone's satisfaction, hypothetically GAO's satisfaction, then I think we should in fact be looking at increasing the threshold. But now is not the time, and I guess that the short answer to your question is, for the current, I would hold the threshold where it is and increase controls dramatically. I think that they should be both technological, training-oriented and the like. Only when those controls are in place and only when we have accountability should that increase be made.

I think one of the most important things to remember is when the original initiative for the purchase card and procurement was made, the theory was to make the contracting officer more efficient by giving him or her the purchase card to, as Dr. Kelman said, save a lot of transaction costs. But a funny thing happened on the way to the forum, when 670,000 government employees have a purchase card who on the average have less than 4 hours of training and are unbound by any of the conventional rules related to government procurement. This is a process gone awry.

Mr. TURNER. Dr. Kelman, do you agree with that?

Mr. KELMAN. It is a little bit unclear what the proposed statutory language does. Frankly, I was a little confused when I read it. There are two different ways to use a purchase card, Congressman Turner. One is as a purchasing device—in other words, you use it, you decide what you get and then you use it to pay for something. Using the purchase card as a purchasing device is limited to $2,500. As I understand it, the language in SARA continues using

it in terms of the controls, the procurement controls—having to get bids, all sorts of things that the language in SARA does not change that. What it does is to allow it to be used as a payment device from $2,500 to $25,000. Now, in fact if that is what it does, and frankly it is a little bit unclear to me what exactly it does, but if that is what it does, actually since right now you can use it above $2,500 only for contracts that have been negotiated already by the government. And the biggest way it is being used now over $2,500 is on these various large computer contracts where the government has negotiated fantastic prices. They are world-beating contracts. They are amazing contracts. They are wonderful vehicles with great prices, great terms and conditions and so forth. And people are using a purchasing card to buy computers off of those contracts.

Those, frankly—the ones above $2,500 are actually probably the ones least subject to abuse. If there is abuse and problems and problems with controls, it is actually probably more in the ones under $2,500, which the law does not change at all.

So I think I agree with Congressman Horn. I agree with Steve Schooner that we need to do some more fraud controls in general in the system. If all that SARA says is allow people to pay for something using the purchasing card above $2,500, where the contract has already been pre-negotiated and we know we are getting good prices, they are just buying it off the Internet, or whatever, I don't think that is an area of concern or problem. I think probably the problems are more in the under-$2,500 that this statute does not touch.

Mr. SCHOONER. May I comment?

Mr. TURNER. Yes, Professor.

Mr. SCHOONER. My understanding is the intent of the statute was to actually change the micro-purchase threshold, and I see Mr. Brosnan nodding.

Going back to the point that Steve made, when the original OMB report on electronic payment and purchasing came out in 1998, the theory was use the purchase card up to $2,500 for purchasing, but up to $100,000 for payment. And as Steve has suggested, there are huge efficiencies associated with payment. But my understanding is this bill would in fact raise the micro-purchase threshold to $25,000, which would basically be 98.5 percent of all government purchase transactions—no rules, no controls, no nothing. And I think that is an accident waiting to happen.

Mr. TURNER. Well, as Mr. Horn pointed out a minute ago, when you have examples of abuse, it is certainly a difficult time to make major changes. I think we all understand the private sector, if you abuse a purchase card, you are going to be held accountable as an employee of the company, but you won't likely read it in a newspaper. In government, you are going to read it in the newspaper and it is going to be called a scandal. So we I think share a common interest in proceeding cautiously.

Professor Schooner, you also made a comment regarding the acquisition training exchange portion of this bill in your testimony. You suggested that we ought to be more careful about protecting against conflicts of interest. Would you expand on that? What kind of concerns should be looking out for? What kind of protections

against conflicts should we be including in this legislation to ensure that problem you raised is addressed?

Mr. SCHOONER. Off the cuff, let me confess that I think it would be hard to come up with what those controls could be. I think, for example, that an exchange program, whether you call it the DigiCorps or in the scientific community, it is very, very clear how these exchanges could pay tremendous dividends for both sides, both private industry and government.

But consider the fundamental scenario where, and we are only really talking about senior acquisition executives—a senior acquisition executive goes to work for Lockheed-Martin for a year and then comes back. Under the conventional rules today, they would be recused from every doing business with them directly, or at least doing business with them for a certain period of time. These would be the minimum standards. But the amount of pressure that this would put both ways—imagine the Lockheed-Martin purchaser going to work in the government office. Are they simply not to work with Lockheed-Martin? How would they be perceived by Lockheed-Martin's competitors when they came in to negotiate with those people?

I would love to tell you that I have concrete answers for you, but I think that it is so complex, and despite all its best intentions it raises issues that really need to be studied before we take a shot like this.

There are plenty of people who have lots of experience with regard to this. We have the Office of Government Ethics who might be able to draft something, but I think we need to do a lot of thinking about this because even if we could come up with those rules, the rules that we would probably need would probably be disadvantageous to the career progression of the people who would most benefit from the program. And so I think we could fall into a vicious cycle.

I apologize I do no have a concrete solution for you, but at a minimum I think we need some hardcore study.

Mr. TURNER. Let's address a minute the share-in-savings contract concept. I know, Dr. Kelman, you have spent a lot of time studying it and advocating it. You heard Ms. Lee make the comment today that she thought there ought to be more incentive built in for the Federal agency. I think what she was referring to is, even though it is fundamental in the definition, that the agency shares in savings. She saw a deficiency because I guess the specific section of DOD that was doing the contracting or the negotiating was not going to get the direct share of the savings. It was going to go to the Department of Defense generally.

It does seem that here again we have the potential for conflicts of interest; that an agency negotiating a share-in-savings clearly wants to be able to show sometime during the contract period that there is a savings. And so there would be a natural tendency to want to make the baseline as low as reasonably possible so we can show those savings, that we have actually done something that was positive.

How can we be assured that, No. 1, our Federal work force contracting officers have the expertise to negotiate contract-in-savings? And second, how can we be assured that they are not going to have

an inherent conflict of interest when they structure those contracts, because they want to be sure they show some savings?

Mr. KELMAN. Well, I think—a few observations. People were talking during the first panel about the need to learn to walk. We are not going to learn to walk unless we take some steps such as those outlined in SARA to make it easier for agencies to get the experience doing this. There is experience. There is positive experience in the IT area. Much of it is at the State and local level. One very prominent example which has been highlighted by the Council for Excellence in Government, which is a good government organization here in town, is the successful modernization of the California income tax system, done through a share-in-savings contract while IRS has had many, many problems over the years getting successes in their own modernization.

There have been a number of examples, again at the State and local level, involving parking enforcement, actually tax modernization in a number of other jurisdictions, and so forth. The Education Department contract, which was referred to earlier, even if you accept the IG's version of the baseline, and the Education Department does not agree with it, and it has some—to my mind, I have looked at both the IG report and the Education Department response, the IG report has some to me very obvious errors in it. But even if you hypothetically were to accept the IG baseline, over a 5-year period, the Education Department and the taxpayer will be saving $15 million. By using the IG's numbers, the taxpayers will be spending $15 million less for those services than they would be if that contract had never been signed. And if you accept a more realistic baseline, it is more than $15 million.

I guess what I would say, sir, I think that we need to experiment with how we develop that expertise, get those best practices together. One possibility is involving the IGs in the development of baselines. There are also Federal, you know, FFRDCs, people like Mitre Corp. and so forth, who sort of serve as the government's nonprofit, non-partisan consultants. They could be brought in to help the government develop baselines. I think you are right to raise that as an issue and to say, hey, we need to figure out how to do the best possible job here.

What I think would be a mistake, let's remember the status quo. The status quo is far too many failed information technology modernization projects in the Federal Government. The status quo is agencies having the same conflict of interest of claiming that this is going to work—you know, coming up with exaggerated budget numbers. I mean, some of those problems, that is why we have Congress. That is why we have oversight. That is why we have, you know, whatever.

The status quo is not acceptable. The status quo is not enough incentive for contractors to deliver results for the taxpayer and for the agencies. This is a very creative—this is the most creative idea in contracting that I have come across in the last decade. This is a creative approach that rewards the contractor only to the extent they deliver results. Compared to the status quo, the status quo, sir, is often that we pay contractors tens and sometimes even hundreds of millions of dollars for projects that deliver no results.

Share-in-savings says that if you don't deliver results, you don't get paid.

I want to do anything we as a government can to move us from a situation where we just pay regardless of results, to a situation where we pay only for results. Will we make some mistakes along the way? Of course, but we have got to work to change the way we do business and improve the way we do business in the taxpayers' interest. And let's all again, be it Mitre, be it agency best practices in sharing information about best practices on developing baselines, be it DCAA should be brought in maybe to help on these things, other accounting firms—baseline issues are often accounting issues. So you know, you bring in an accountant or bring in the government's own accountants—again, DCAA. Let's instead of sort of saying, well, this is not perfect so let's stop it before it gets started, let's say we need to move this forward, and I think the provisions in SARA do a great job of trying to move it forward. Let's move it forward and let's exert careful oversight from your end—plural—from Congress' end and let's bring in experts and let's do the best we can so we figure out how to make this work better.

But the potential for moving from a culture that allows or pays for failure and one that only pays for results for the taxpayer, that is too great an opportunity for the taxpayer and the government and us as a people to pass up on, I think.

Mr. TURNER. Thank you.

Thank you, Mr. Chairman.

Mr. DAVIS. Mr. Kelman, let me just continue. You and a number of other witnesses today have just cautioned that the SARA provision that would reserve for work force training 5 percent of the fees collected by agencies under their multi-agency contracts could results in agencies merely substituting money that is collected for funds currently used for such training, rather than adding to the current levels. It is hard to measure how much money is used for training. We tried to go through the budget, but here is what my cursory research shows, is that SARA can produce $600 million to $800 million a year in a training pool. DOD, we find, uses about $100 million a year in training now.

So this would, even if they replace it, I think do a better job, and more importantly it is there year after year. I know that changes—I think we are still want to pay attention to what you cautioned on this, but that may make you feel better if those numbers indeed go up.

Mr. KELMAN. Yes, that is interesting. What I suggested, Chairman Davis, in my written testimony was one way to prevent against that danger, if one is worried about the danger, is to say that the money cannot be used to meet existing statutory requirements under DAWEA or the Clinger-Cohen existing training provisions. Instead, we asked the procurement executives to come up with some special topics—share-in-saving baselining, performance-based contracting, whatever—that would be the subjects of training negotiating techniques; things that help the government, to use Deidre Lee's expression, become business advisor or help the contracting folks become business advisors. Have it be topics in intelligent ways to do business, and use the fund for that reason.

If I could add one other thing, the administration in its testimony referred to this as being, you know, it should come under, this is bad budgeting practice to not have to have sort of a separate line item for this. I am not particularly a budgeting expert, although I know some budgeting experts at the Kennedy School. I guess I would say that there are lots of budgeting experts in academia who would strongly disagree with the view that we should have a micro-line item for every little micro-area. They would argue that this is perfectly acceptable, perfectly good budgeting policy.

Mr. DAVIS. I am sure in academia you can find someone to support almost any position. [Laughter.]

Let me ask Mr. Schooner, in your testimony, I think if I heard you right, you believe that the lack of external oversight is negatively impacting the procurement process.

Mr. SCHOONER. I do.

Mr. DAVIS. And by lack of external oversight, do you mean lawyers filing suits? Bid protests?

Mr. SCHOONER. To the extent that Steve has already taken his cheap shot at me on this one today, and to the extent that we disagree, I take your point, Congressman Davis, that I would not want to come here today and suggest that litigation is a public good. Conversely, the concept of third party monitoring, external monitoring, or private attorney general activity is more important when we have a massive reduction in internal oversight like we saw in the 1990's. It would be absurd for me to come before you and say that generally, in a vacuum, that third party oversight is the preferred alternative. But we have viscerated our oversight system during the 1990's. And so as a second-best alternative, it frightens me that we also saw the reduction in external oversight.

Mr. DAVIS. I think a recurrent theme I am hearing today is the concern over the smart card. Whenever you embolden or empower your purchasers out there in the field to do things, more mistakes are going to happen. That is natural. You gain a lot of efficiencies as a result of that, a lot of good things happen. But you are going to get more mistakes and one way to hopefully curb that and limit your mistakes is by appropriate oversight as is appropriate training.

How you do that, I don't think you are keen on how you do that one way or the other, either internally or externally, but you feel, and I think probably everybody feels, you need to make sure we have enough oversight.

Mr. SCHOONER. Right. Clearly, I prefer the internal oversight to the extent that we could have it, but let me also say to the extent that you mention the smart card technology, one of the other things that I propose if you do want to speak to the purchase cards, one excellent suggestion that this committee could make would be to push the government in the direction of leveraging their purchase power. Right now, no one is concatenating the data on what the government buys from large retailers so that we can go to Home Depot and go to Stapes and go to these places——

Mr. DAVIS. Economies of scale.

Mr. SCHOONER [continuing]. And basically say, we spent $20 million with you last year, so now we want a point-of-sale discount

when someone shows up with a government purchase card. We do it with the travel card with hotels and rentals cars and the like. We should do it with the purchase card as well.

Mr. DAVIS. Absolutely.

Mr. SCHOONER. And the technology is there to do it.

Mr. DAVIS. Mr. Kelman, you would agree with that, too, wouldn't you?

Mr. KELMAN. Yes. That is actually done already to a fairly large extent. GSA, for example, if you use a purchase card at True Value Hardware Stores, you get an automatic I think it is 10 percent discount off the GSA schedules. And of course, a lot of purchases—I think in the long run——

Mr. DAVIS. We do it for hotels, at government rates and stuff.

Mr. KELMAN. We do it for hotels. We do it—absolutely—we do it for air fare and we do it for off-the-shelf computers where the government gets fantastic prices.

Mr. DAVIS. But obviously this is a place where we can expand it and maybe we ought to include something like that here.

Mr. KELMAN. Absolutely.

Mr. DAVIS. The government's goals in this ought to be able to get the best value for the taxpayer dollar; not be concerned with whether it gets outsourced or in-house or all these other rules, and that is what we are trying to get at.

Let me just ask a few more questions. Mr. Dever, in your statement you describe some of the innovative approaches that Hasbro has undertaken to manage its acquisition services. What were the drivers or motivators behind your effort?

Mr. DEVER. Improved financial performance for the most part, and moving away from a decentralized approach to more of a centralized one.

Mr. DAVIS. So basically the bottom line drove it.

Mr. DEVER. Yes. And there are significant service enhancements, increased value, kind of non-financial value opportunities.

Mr. DAVIS. Does Hasbro have the equivalent of an executive level chief acquisition officer?

Mr. DEVER. That is my role.

Mr. DAVIS. OK. So you are the guy, so to speak.

Mr. DEVER. The role was created 4 years ago and I was hired into it at that time.

Mr. DAVIS. OK. Do you use performance-based contracting for services?

Mr. DEVER. Yes. We negotiate service level agreements with various providers and measure that performance on a regular basis, and ultimately renegotiate those contracts based on that.

Mr. DAVIS. OK.

Let me ask Mr. Roberts if you can answer this. Do you know what barriers IT companies would encounter when selling commercial IT services to the Federal Government under the current FAR Part 12 definition?

Mr. ROBERTS. Under the current FAR?

Mr. DAVIS. Just under the current law. Don't worry about the FAR.

Mr. ROBERTS. The biggest things right now are probably conflict of interest, where current IT providers will go in and can do the

requirements analysis, but are precluded, though, from doing implementations in some cases.

Mr. DAVIS. OK.

Mr. ROBERTS. On the commercial side usually you will have, if they can do both, they will do both. A lot of times in the government, some people will be conflicted out just for purposes of conflict. I think that needs to—what is nice about the SARA bill is that takes that out.

Mr. DAVIS. Does KPMG currently do share-in-savings contracting?

Mr. ROBERTS. We do not.

Mr. DAVIS. OK. Do you assist companies in developing appropriate baselines?

Mr. ROBERTS. What we will do is we will help the government determine yes—with some of our clients, we will go and do activity-based costing and determine what the cost of that activity is. We would be in a position to help set up that baseline since you could do a share-in-savings contract. Yes.

Mr. DAVIS. Ms. StandsBlack-Carver, let me ask you, you point out that the SARA provisions on electronic invoicing and agency-level protests are particularly advantageous for innovative small businesses like yours. Are there any other SARA provisions that you find particularly attractive from a small business point of view?

Ms. STANDSBLACK-CARVER. Since the bill was just really introduced on Monday, I really have not had a thorough review on it. But I could get back to you in writing on that, because there are several that are advantageous to small business.

Mr. DAVIS. If you find anything, you can get back to me. All right, I was just throwing it off the top.

Well, let me ask you this, in your testimony you note the ongoing problems with DFAS due to problems we are all encountering with mail. We are having terrible problems with mail on Capitol Hill.

Ms. STANDSBLACK-CARVER. I have heard.

Mr. DAVIS. Is this still the case? Is DOD offering any assistance to small businesses in overcoming these significant time delays through the mail that you have seen?

Ms. STANDSBLACK-CARVER. To be honest, no, sir, not really. There is very little recourse for small businesses.

Mr. DAVIS. OK. Thank you. I don't think that was anything that was anticipated when we went through, but the mail has—e-mails to my office have increased 100fold and regular mail—we have some pictures we took with the President and they were getting them back and they got zapped in the machine and they didn't turn out—I mean, those kind of situations that nobody recognizes, but mostly it is just a delay in everything. And when you are trying to meet a payroll and you are waiting for that check and everything else, it is, for small businesses in particular, it can be——

Ms. STANDSBLACK-CARVER. Luckily, we do have the electronic payments, which have really been great.

Mr. DAVIS. Right.

Ms. STANDSBLACK-CARVER. The invoice—the whole process should be electronic.

Mr. DAVIS. But you cannot invoice electronically?

Ms. STANDSBLACK-CARVER. No, sir.

Mr. DAVIS. You can hand-carry it, I guess. Have you done that?

Ms. STANDSBLACK-CARVER. And we do.

Mr. DAVIS. We used to do that.

Ms. STANDSBLACK-CARVER. We still do that.

Mr. DAVIS. Mr. Howe, can you elaborate on the reference you made to intellectual property issues in your testimony?

Mr. HOWE. I think that it is important for there to be a correct balance between the rights of the owners of the intellectual property being the contractors and the government. Fundamentally in this area, what the government is trying to obtain is a solution to a problem. And if the problem can deliver the solution to that problem, there is no reason for the government to be obtaining any intellectual property rights in all of the research and development and thinking and know-how that the contractors have put into that.

Obviously, the government needs a license to use whatever technological solution is provided, but it does not need any license to any of the background technology or the preceding intellectual property.

Mr. DAVIS. OK, great.

Mr. Horn, do you have any other questions? Anyone from the panel want to add anything in rebuttal or anything that has occurred to you?

Mr. DEVER. Could I make a comment on shared savings proposals?

Mr. DAVIS. Sure.

Mr. DEVER. I have had the opportunity to negotiate a limited number of shared savings, and they tend to be pretty complicated for a number of reasons. But there are some criteria that we look at or that we consider before entering into a shared savings agreement that I think you might adopt.

First of all, and it has been brought up, the ability to accurately benchmark and then measure the savings. If we don't agree on what the savings are, it is hard to share.

Second, these are useful to the supplier. They will take some risk up front on the chance that savings will be delivered, and then they get paid more as a result. If we are very confident that savings will come out of that engagement, then there is no need to share it. OK?

So there is something in between the idea of don't pay unless there are results, and we are paying for no results, and that is pay a fair price and expect and negotiate results. But the shared savings proposals, there is a tendency to overpay.

Mr. DAVIS. Well, if you don't know what you are doing, absolutely. I mean, the whole point there is making sure that your government purchasers when they are doing the deal understand enough technically to know what they ought to get and what that cost ought to be. And that is difficult. That is where the training comes in and that is where we are trying to get the private sector into government and back and forth to understand the different cultures. It all comes into play. But if you have a smart buyer, and you don't want to take the risk at the governmental level of ending up as we have so many times ended up, buying something that

doesn't work or isn't what we wanted and paying tremendous costs, share-in-savings is great.

Now, I think that the difficulty we have is, No. 1, you do not have the tools to do that today. You can try to do it, but it is kind of convoluted to try and do it within government. And second, this will be something that your purchasers are going to be reluctant to use initially, because they are afraid somebody is going to make a big profit on them. But I will tell you what, it is better for that to happen than it is to put a lot of money in and end up with nothing, which happens so many times.

I have been on both sides of that equation and it is no fun, and usually it is the problem with the government just not supervising the contract correctly, asking for what they want. The nice thing about the way we are buying things now, the old days when I was a general counsel, you would respond to an RFP, you would come in and you would go to the best and final. You always worried about a bid protest. And at the end of the day, the government would get something that wasn't quite what they wanted, but it met the criteria and it didn't really work. We wasted a lot of money that way, not just on lawyers. We also wasted a lot of money on systems and stuff because you had to justify it and go through too much external oversight.

There is always a balance to this, and that is what we are trying to get at. It all starts and ends with having your government employee, that official on the front lines who is buying for the agencies, and there is an assumption somehow that purchase knows more about what the agency wants than we do in Congress or the other people who are not as closely involved are, and that they are then trained and have the know-how to go out and drive the best deal for the government.

That takes a lot of training, and it means good people. But if you have it, that is the way it works. And there are tremendous savings, in my opinion, that can be made, and that is what we are trying to get at. And I recognize in all of this that somebody is going to abuse the purchase card. They are going to overcharge, take their friends out to dinner. I mean, who knows what is going to happen. You have had that in government, making long-distance phone calls—you live with a certain amount of that petty stuff because of what you make up over the long term. But human beings are human beings, and you want to exercise oversight so that people are not constrained from doing this and creating efficiencies, but on the other hand, enough oversight so that it is not abused.

And what that balance is, I mean if you look at the history of government procurement, we never quite find the balance. But there is a recognition of the Federal Government being the largest purchaser of IT goods in the world today, that we are spending and wasting billions of dollars, sometimes just because our own rules and regulations require it. And from my perspective, I would rather overpay somebody who gives me a system that I can use and ends up saving me money, than I would to pay somebody who gives me something I can't really use. And we see that all too often in government, if you have to make that tradeoff. Hopefully, we do not have to make the tradeoff.

And I will tell you the other thing about a share-in-savings contract is you incentivize companies to work efficiently because, No. 1, they are going to eat any problems, they have to eat it, on the one hand. On the other hand, if they come up with a good solution, there can be a huge high-end. But again, if you negotiate the agreement bad from the start, then you are going to be overpaying, and the key is making sure you have an adequate baseline, our people are trained and we can do that. So that is what we are working on.

But I appreciate everybody's comments today, and I think all of you have been on the front lines of this. We don't all agree on every single issue. In fact, I will go back and read the testimony, and I probably won't agree with some of the stuff that I thought earlier in the day, but that is why we hold these hearings. And if we can continue to have discussions with you and meet with you, maybe we can come out with something we can at least get a majority of the committee, at least in the House, to agree to and move it through.

Thank you all very much. Before we close, again I want to thank everyone for attending this important oversight hearing. I want to thank the witnesses. I want to thank my ranking member, Representative Turner. I want to thank Mr. Horn who has been a partner in these issues going back several congresses. And I want to thank my staff for organizing what I think has been a very productive hearing.

We are going to keep the record open for 2 weeks for anybody who wants to add anything, get questions through, and the briefing memorandum will be entered into the record.

These proceedings are closed.

[Whereupon at 4:48 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

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Putting the private sector to work...
for the public good.

March 19, 2002

The Honorable Thomas Davis
Chairman
Subcommittee on Technology and Procurement Policy
U.S. House Committee on Government Reform
B-349A Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The education and training of the acquisition workforce, both within the Government and industry, remains a key concern for the membership of the Contract Services Association of America (CSA). For that reason, we applaud your "Services Acquisition Reform Act" (H.R. 3832), which would address the issue of funding for agency training.

Enclosed are white papers detailing industry's concerns on the issues (and providing recommendations) that are briefly outlined in this letter. We ask that these papers be included in the hearing record for your March 7 Technology and Procurement Policy Subcommittee hearing on the "Services Acquisition Reform Act."

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. CSA 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 CSA 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.

A few companies within CSA are involved in the design, development and delivery of acquisition training programs to the acquisition workforce. However, the issue of adequate funding has been an obstacle, as has an apparent reluctance to utilize more fully private sector resources. These issues include:

- The failure of non-Defense agencies to implement the Clinger-Cohen requirement to fund acquisition training and education. The Department of Defense is the only department that has adequate appropriations (approximately one hundred million dollars per annum) for such training and education. Under your bill, Mr. Chairman, this shortfall within the civilian agencies would be addressed by requiring a percentage of all administrative fees collected by agencies through Government-wide multiple award contracts and/or purchases from the General Services Administration

(GSA) schedules to be devoted to a "Federal acquisition training fund." These funds would be forwarded to the Federal Acquisition Institute (FAI) – and, presumably, all agencies would have easy access to these funds to provide adequate training for its acquisition personnel.

- The failure of the Department of Defense (DOD) to provide fair consideration to private sector training companies for the development and deliverance of acquisition training and education programs. The Department continues to rely on the staff of the Defense Acquisition University (DAU) to perform functions that are not inherently governmental. In addition, the staff at DAU has announced that DAU would be providing "free" training to non-Defense agencies (which private training companies are, of course, in no position to counter). We recognize that DAU, established through the Defense Acquisition Workforce Improvement Act, has a valuable role to play in ensuring the proper training of the defense acquisition workforce. However, we believe that the DAU courses could be enhanced through the use of private sector training firms.

As we noted in our testimony before your subcommittee, CSA believes that initiatives such as yours 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 both the FAI and DAU be charged with relying on the private sector for the development and delivery of acquisition training programs. 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. Indeed, CSA has developed its own series of courses for a program manager certification for services contracting for CSA members – we believe that these courses could also be provided to the Federal acquisition workforce. Such training partnerships would benefit both the public and private sector.

We have met with Ms. Deidre Lee, Director of Defense Procurement, on these issues and hope to continue a dialogue with her office to ensure utilization of the private sector in acquisition training courses. We also hope that your office would look into these concerns as well.

I commend your interest in acquisition workforce training and look forward to working with you on the "Services Acquisition Reform Act."

Sincerely,

Gary Engebretson
President

ISSUE: FUNDING ACQUISITION TRAINING AND EDUCATION

That non-Defense agencies lag far behind Defense agencies in funding acquisition training and education is an issue of serious concern to both the public and private sectors.

It also has been the focus of considerable – and ongoing – congressional attention. Four years ago, in a letter to the Honorable Franklin Raines on May 22, 1997, Representative Horn expressed concern that agencies were ignoring the requirements of section 433(h) of title 41 to "set forth separately the funding levels for education and training of the [acquisition] workforce." Member companies of the Contract Services Association of America (CSA) involved with training have been meeting with the procurement executives or their representatives of several Federal agencies (including the Departments of Agriculture, Education, Energy, Housing and Urban Development, Interior, and Transportation as well as in NASA and EPA). These companies can attest that Rep. Horn's concern is as valid today as it was in 1997.

During their tenures as Administrator of the Office of Federal Procurement Policy, both Steve Kelman and Deidre A. Lee used the Administrator's office as a bully pulpit for providing resources for acquisition training and education. They both learned that it is hard to persuade budgeters to abandon their century old prejudice against line items for training and education.

The "Services Acquisition Reform Act" (SARA) provides an innovative method for funding workforce training. Access to adequate training is important to all agency acquisition personnel; and it is clear that innovative funding methods are needed – since specific budget line items for training are all too often cut or delayed. Under SARA, this shortfall would be addressed by requiring a percentage of all administrative fees collected by agencies through Government-wide multiple award contracts and/or purchases from the GSA schedules to be devoted to a "Federal acquisition training fund." These funds would be forwarded to the Federal Acquisition Institute (FAI). Presumably, all agencies would have easy access to these funds to provide adequate acquisition training for its acquisition personnel.

Representative Horn had suggested a similar alternative solution to the problem – namely, tapping the "miscellaneous receipt" funds of the Department of Treasury to create a central pool of roughly $20 million per year to meet the training and education needs of the non-Defense acquisition workforce. He observed that taxpayers would obtain a far better return on investing "miscellaneous receipts" for that purpose (i.e., returns on the order of $100 million to 1 billion per annum, conservatively estimated) than on using those receipts to buy back Savings Bonds.

Another possible source for such a central fund are the rebates from commercial purchase card transactions, which potentially total as much as $14 million a year and, as these transactions continue to multiply, will probably be even larger in subsequent fiscal years. Steve Kelman tried several years ago to so dedicate the rebates, only to be advised that such use would constitute an illegal augmentation of appropriations – absent a change in law to legalize the creation of a central fund.

For non-Defense agencies, the problem is not lack of good training and education opportunities; rather it is a problem of affordability. Until non-Defense agencies begin investing more seriously in the training and education of the acquisition workforce, the Government cannot hope to overcome the growing gap between the promise of acquisition reform and its ability to realize that promise.

ISSUES AND RECOMMENDATIONS FOR BETTER UTILIZING PRIVATE SECTOR CONTRACTORS IN ACCOMPLISHING FEDERAL AGENCY TRAINING MISSIONS

#1 – Contractor Support for Acquisition Courses to Civilian and DOD Audiences

Issue Statement:
Private sector training companies should be afforded the opportunity to design, develop and deliver acquisition workforce training courses for civilian and Department of Defense acquisition workforce audiences.

Discussion:
The design, development and delivery of training courses are by no means an inherently governmental function. For example, non-Defense agencies rely almost exclusively on private sector contractors for acquisition training and education. Prior to the establishment of the Defense Acquisition University (DAU), the Defense Department (DOD) often contracted for delivery of training when its own staff was insufficient in numbers to accommodate the demand for its courses; and those contractors have generally earned high marks from DOD students. Since the establishment of DAU, opportunities for private sector training firms to participate in the design and delivery of training courses has been greatly diminished. Instead, the Defense Department now relies on the staff of the DAU to perform all training functions (including design and development of courses). In addition, the staff at DAU has announced that DAU would be providing free training to non-Defense agencies. "Free" training is difficult for private training companies to provide but "free" is a relative term – with the increase in the demand for services, DAU will have to add to its staff and develop courses that are non-defense oriented. Instead of "bulking up" DAU staff, DAU courses could be enhanced through the use of private sector training firms.

Over the past twenty years, the Federal Acquisition Institute (FAI) – which has focused on training for the civilian agencies – has demonstrated the value of contractor support for the design and development of contracting courses. For example, the Advanced Contract Administration (ACA) textbook was largely drafted by a private sector contractor, in conjunction with FAI staff and support from an interagency team. This textbook goes well beyond simply reciting the Federal Acquisition Regulations (FAR) by providing practical, substantive, and comprehensive guidance on "Performance Monitoring: Technical and Schedule Issues," "Informal Problem Resolution," and "Contract Remedies." Again with private sector contractor support, the FAI also developed an Instructor Guide, which provides students with opportunities to solve problems encountered in the course of the contractor's performance of a CPFF contract for research studies.

Another example of private sector support relates to the General Services Administration (GSA). In the mid-1990s, GSA recommended that civilian agency procurement executives look to DAU for mandatory training in contracting disciplines. However, DAU had no mandate to furnish training to civilian agencies and was not willing to commit to providing such training on a reimbursable basis. Consequently, a verbal agreement was negotiated between GSA's procurement executive and DAU to allow GSA, with private sector contractor support, to essentially function as a DAU satellite campus for civilian agencies. GSA in turn established a multiple award task order contract to obtain the instructors necessary to deliver those materials to an exclusively civilian agency audience. In compliance with FAR requirements for full and open competition, GSA selected three highly qualified private sector contractors and required those contractors to submit to rigorous post-award quality controls, such as ACE certification.

Clearly, course design, development and delivery is neither an inherently governmental function nor a function hat inherently is best performed entirely by Federal employees without benefit of private sector support.

Recommendation:
DAU and FAI should provide fair consideration to private sector training companies to design, develop and deliver acquisition training and education programs. One potential way to achieve this would be to recommend that Federal agencies, including the Defense Department, meet at least half of their FY 2002 GS-1102 training requirements through a GSA multiple award contract.

#2 – Using the Internet to Support DAU Education

Issue Statement:
With private sector support, the Defense Acquisition University (DAU) should use the Internet for instructor led virtual classrooms and Electronic Performance Support Systems (EPSSs) rather than relying solely on computer based instruction.

Discussion:
Most academic institutions are using the Internet to create virtual classrooms, in which "live" instructors conduct classes using essentially the same methods that they employ in physical classrooms. These instructors still require their students to buy books; they still "lecture" (by posting rather than verbally delivering lecture notes); they still assign individual and group projects (with group members interacting by email instead of in-person meetings); they still require the students to take examinations. Why? Because most colleges and universities are not convinced that Computer Based Instruction (CBI) can succeed at fully developing skills for business making and judgement. Opportunities, however, are being missed by merely transplanting physical classrooms to the Internet for one time episodic training events and not utilizing the full power of the Internet to provide students with a lifetime of continuous educational support in performing their functions.

On the other hand, some members of the DAU staff have fully embraced CBI – with only one instructor for every 300 students in a single class. Here, the issue is whether one can successfully teach highly sophisticated judgmental and decision making skills – the skills that are at the heart of the acquisition profession – through CBI. The issue also is whether DAU students will be willing to scroll through the thousands upon thousands of screens that would replace textbooks. Even when willing to run the gauntlet of screens, students are unlikely to return to those screens after completion of the course for continuing guidance on how to perform their work – but they would, and do, keep textbooks, on their desks for such guidance and reference. Also, unlike textbooks, computer based courses may "disappear" from the Internet if there is a need for space.

A more beneficial approach to using the Internet for educational purposes is Electronic Performance Support Systems (EPSSs) – an approach that has most of the virtues of CBI without its drawbacks; and most of the virtues of virtual classrooms without their drawbacks. With private sector support for its development and delivery, an EPSS would enable Federal employees (and even private sector students) on a non-linear basis to (1) obtain "just-in-time" training in performing an assigned duty and, more importantly, (2) obtain access to all information products and resources of value in performing the duty -- including:

- An introduction to the duty (scope, location on the Contract Specialist Workbook Procurement Process Map, inputs, outputs, standards of performance, et. al.).
- Regulatory cross-references (with hyperlinks).
- On-line Tools (*i.e.,* hyperlinks to existing databases and interactive electronic forms).
- An interactive process map (i.e., the flowchart hyper-linked to a task by task breakdown of the duty).
- A downloadable edition of a complete textbook/desk reference maintained on a real time basis.
- Best-Practice cross-references (hyperlinks to relevant sections of Office of Federal Procurement Policy guides, models, samples, case histories, and articles in professional publications).
- A "what's new" bulletin board of significant changes in governing policies and practices for performing the duty (featuring all updates since the user's last visit).
- On-line forum for shared discussions and collaboration.
- E-mail addresses for private consultations with designated "experts".

Even an EPSS has its limitations. Because of its non-linear nature, there is the problem of learning to view the process as a whole and of learning to make decisions that are optimal in terms of the overall goals and standards for the acquisition system – rather than focusing too narrowly on a sub-optimal accomplishment of duty-by-duty standards of performance. As importantly, textbooks/desk references (either in paper or pdf format) remain the best vehicle for transmitting knowledge to employees. A good textbook is still worth a hundred times its weight in lecture notes and computer screens. Hence, there is value in using the EPSS not to displace but rather to supplement instructor-led courses – whether those courses are offered in physical or virtual classrooms.

Recommendation:
Rather than "bulking up" its own staff for these purposes, the DAU should rely on private sector contractor support both to develop Electronic Performance Support Systems and to develop and deliver Internet-based, instructor led virtual courses.

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April 8, 2002

The Honorable Thomas M. Davis
Chairman
Subcommittee on Technology & Procurement Policy
Committee on Government Reform
U.S. House of Representatives
306 Cannon House Office Building
Washington, DC 20515-4611

Re: Testimony on Service Acquisition Reform Act

Dear Mr. Chairman:

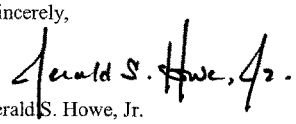
Thank you once again for the opportunity to appear before your Subcommittee's March 7th hearing, on behalf of the Professional Services Council (PSC). We applaud your sponsorship of H.R. 3832, the Services Acquisition Reform Act of 2002.

There was one question posed to another witness that we would also like to address for the record. We strongly support legislative actions to expand the treatment of the procurement of high-technology and other professional services as "commercial items." As you know, when commercial items procurement was considered by Congress in the early 1990's, there was some uncertainty regarding the inclusion of services. That hesitancy has carried over on the administrative side, and, despite demonstrable progress, persists even to this day. For that reason, we believe it would be very desirable to clarify and expand the definition of services as "commercial items" – as is done in Section 403 of the bill. We also favor the idea, embodied in Section 404 of the bill, of designating "commercial entities," whose products and services are presumptively qualified as commercial items.

These steps will not only streamline the acquisition of professional services and thereby save money, but will make available to the Government an increasing range of new technologies and capabilities, at a time when all possible alternatives should be considered to meet critical mission needs. Most potential new technologies and capabilities will only be added to the mix if they can be qualified as commercial items, because the companies that offer them are not, and will not, set up processes to meet the specialized requirements imposed on traditional government contractors. Established government services prime companies such as ours would welcome the opportunity to work with these commercial entities as subcontractors and vendors of their innovative products and services.

Please do not hesitate to call on the Professional Services Council or me if we can be of any further assistance.

Sincerely,



Jerald S. Howe, Jr.
Senior Vice President & General Counsel

cc: Honorable Jim Turner, Ranking Member
Stan Soloway, President, PSC

G:Legal/Ltr. to Hon. Tom Davis re SARA

For Immediate Release
March 5, 2002

Contacts: Bob Cohen, 703-284-5301, bcohen@itaa.org
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ITAA Lauds H.R. 3832, The Services Acquisition Reform Act

Arlington, VA - The Information Technology Association of America (ITAA) today praised Congressmen Tom Davis of Virginia for introducing new legislation, H.R. 3832, The Services Acquisition Reform Act (SARA), designed to change the definition of commercial services and streamline federal acquisition of IT services.

ITAA has long advocated the clarification of the definition of "commercial services" to be the same as that of "commercial item," as was intended by the Clinger-Cohen Act. The association believes that the changes in SARA would give commercial services acquisition parity with commercial products.

SARA has additional provisions supported by ITAA that would:

- Support share-in-savings;
- Create a government-industry personnel exchange program; and
- Create a Trade Agreement Act exemption for IT products.

"The IT services sector is the fastest growing segment of federal IT procurement. In this time of war, it is particularly important that the federal government have fast, efficient access to the IT solutions that best meet agency needs," said ITAA Executive Vice President Olga Grkavac. "We support the measures and goals of the Services Acquisition Reform Act and the leadership of Congressmen Davis for introducing the bill."

The Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 500 corporate members throughout the U.S., and a global network of 41 countries' IT associations. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, digital content, systems integration, telecommunications, and enterprise solution fields. For more information visit www.itaa.org

ACQUISITION REFORM WORKING GROUP

Aerospace Industries Association * American Council of Engineering Companies* American Council of Independent Laboratories * American Shipbuilding Association * AeA * Contract Services Association of America * Electronic Industries Alliance * Information Technology Association of America * National Defense Industrial Association * Professional Services Council * U.S. Chamber of Commerce

March 5, 2002

The Honorable Tom Davis
Chairman
Subcommittee on Technology and Procurement Policy
U.S. House Committee on Government Reform
B-349A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Acquisition Reform Working Group (ARWG) requests that the enclosed executive summary of our 2002 legislative proposals be included in the record for the March 7 Technology and Procurement Policy Subcommittee hearing on services acquisition reform. The complete package, with detailed background papers, was separately provided to you and should be on file in your Subcommittee offices.

We have focused several of our specific recommendations on services acquisition reform. While the trend in Government services contracting is evident, innovation and acquisition reform in the way services are acquired lags behind the vast improvements, which have been achieved in hardware system acquisition. Similar acquisition reform initiatives aimed specifically at government services contracting are now needed to help the government continue to reduce its infrastructure and costs. Therefore, we applaud the introduction of your bill, the "Services Acquisition Reform Act of 2002"(H.R.). We look forward to working with you as the measure moves through the legislative process.

Should you or your staff have any questions regarding the statement, or if we can provide any additional information for your review, please feel free to contact Cathy Garman, of the Contract Services Association of America (at 202-347-0600), who serves as our point of contact.

Thank you for your consideration.

Sincerely,

See ARWG signatories on next page

cc: Honorable Jim Turner

ACQUISITION REFORM WORKING GROUP
(2002 Executive Summary – Signatories)

John Douglass
President and CEO
Aerospace Industries Association

Joan Walsh Cassedy
Executive Director
American Council of Independent Laboratories

Lorraine M. Lavet
Chief Operating Officer
American Electronics Association

Cynthia Brown
President
American Shipbuilding Association

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Dan C. Heinemeier
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Harris N. Miller
President
Information Technology Association of America

Lawrence P. Farrell, Jr.
President and CEO
National Defense Industrial Association

Stan Z. Soloway
President
Professional Services Council

ACQUISITION REFORM WORKING GROUP
2002 LEGISLATIVE PACKAGE

EXECUTIVE SUMMARY

INTRODUCTION

The Congress has taken significant steps toward furthering acquisition reform. Many of these initiatives were based on issues raised by the Acquisition Reform Working Group (ARWG). We greatly appreciate the action taken on our proposals and stand ready to continue to work with the Members and staff. For 2002, we have developed an additional package of legislative proposals. Below is a brief summary of the issues. Extensive background papers on each initiative are available (upon request) should you need further information.

As we move forward with issues to be addressed in the remainder of the 107th Congress, we note that the trend in contracting for services is significant. The government is relying more and more on private industry to deliver cost-effective, quality services. In a January 2, 2001 memo on Performance Based Services Acquisition, Dr. Jacques Gansler (former Under Secretary of Defense for Acquisition, Technology and Logistics) noted that *"From 1992 through 1999, DOD procurement of services increased from $39.9 billion to $51.8. In 1999, total dollars spent on service acquisition equaled the amount spent on supplies/systems."*

However, reforming the way services are acquired lags behind that achieved in the past few years for products. Similar acquisition reform initiatives aimed specifically at ***government services contracting*** is now needed to help the government continue to reduce its infrastructure and costs. To that end, a number of individual proposals are included in this legislative package (*e.g.*, commercial time and material contracting and clarifying the definition of commercial services). In addition, the DOD initiative on Performance Based Services Acquisition will facilitate the adoption of best commercial practices for the acquisition of services. An April 2000 memo from (former) Under Secretary of Defense Gansler states, *"PBSA strategies strive to adopt the best commercial practices and provide the means to reach world class commercial suppliers, gain greater access to technological innovation, maximize competition and obtain the best value to achieve greater savings and efficiencies."* This departmental policy was reaffirmed by Under Secretary of Defense for Acquisition, Technology and Logistics Aldridge in his January 2, 2002 memorandum on *"Use of Performance-Based Contracts for the Acquisition of Services"*.

The Congress also has recognized the value of PBSA. Section 821(b) of the FY01 National Defense Authorization Act (P.L. 106-398) establishes a preference in service contracting for performance-based acquisitions. Any performance-based service contract or performance-based task order under $5 million would be treated as a commercial contract, and could be purchased using the simplified commercial procedures under FAR Part 12.

COMMERCIAL ACQUISITION PRACTICES

The Federal government has developed a broad range of unique controls and requirements for its contractors and subcontractors over the past 50 years. The Government now is attempting to realign its purchasing processes to lower costs and gain access to new commercial technology by eliminating, or at least lowering, barriers that make Government business inefficient and unattractive to commercial firms and inhibit greater integration of commercial and military production lines. The Government must make this transition to commercial practices while maintaining proper stewardship of the public dollar.

The 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act enabled major changes in the way the Federal government buys commercial items. As the Federal government and industry implemented these changes over the last several years, it became evident that further change and clarification was necessary to reap the full savings in cost and efficiency initially envisioned; this is especially true in the services contracting arena. In addition, many of the commercial purchasing techniques for acquiring commercial goods and services that were authorized by Congress have been underutilized because of the resistant culture of Government buyers and end-item users.

We have outlined some areas in which the full potential of existing commercial practices has not been recognized and employed, either because of legislative or regulatory restrictions, or failure to use the flexibility provided. These are more fully discussed in detailed background papers, which are available upon request. Briefly, the ARWG recommendations for 2002 would:

- Authorize Additional Contract Types in FAR Part 12 (for commercial item contracting)
- Clarify Definition of Commercial Services
- Expand Preference for Performance-Based Service Contracting
- Extend Application of Simplified Acquisition Procedures to Certain Commercial Items
- Improve Competitive Sourcing of Commercial Activities
- Modify the Definition of Commercial Item (10 U.S.C. 2464)
- Prohibit Defective Pricing Remedies on Contracts for Commercial Items
- Provide Trade Agreements Act Exemption for Information Technology Commercial Items
- Revise Remedies Provisions under the Civil False Claims Act
- Revise Use of Commercial Leasing by the Government
- Treat Items and Services from a "Commercial Entity" as a Commercial Item
- Waive Government Rights to Commercially Developed Intellectual Property

While not a legislative issue, ARWG also would like to point out that a clarification to FAR Part 12 is needed to facilitate the acquisition of commercial construction services. Clearly, construction services are offered and sold competitively in substantial quantities in the commercial marketplace.

BUSINESS PROCESS STREAMLINING

There are two key goals of acquisition reform. The first is aimed at streamlining and simplifying the procurement process in order to reduce development and production cycle times as well as program costs. The second is to strengthen the technology and industrial base through increased Government access to, and use of, commercial items incorporating advanced technologies.

While recent acquisition reform legislation addressed many of the major policy barriers to achieving these goals, a few still remain. ARWG has focused on a couple of critical areas that need to be addressed to allow for more efficient Federal purchasing. We would recommend changes to current statutes in the following areas:

- Eliminate Impediments to "Other Transaction" Contracting Authority
- Revise the Cost Accounting Standards Act

FINANCIAL HEALTH OF GOVERNMENT CONTRACTING INDUSTRY

The defense industrial base is entering an era of rapidly changing, commercially driven technological change. In November 2001, the Defense Science Board released its final briefing entitled, "*Preserving a Healthy and Competitive U.S. Defense Industry to Ensure our Future National Security.*" The focus of the report is on the adequacy of the defense industry to provide the equipment needed by warfighters in performance of their national security responsibilities. The report reviewed governing policies and regulations and considered whether these rules supported or weakened good business practices, and

whether these same rules supported or weakened the technology capabilities of the defense industrial base. A healthy, competitive and innovative industry meeting defense needs should be closely integrated with the commercial market place.

The Task Force report recommended that use of multi-year contracts be expanded as a means of providing defense companies with stable revenue and cash flow – particularly in the developmental phase. Multi-year contracts result in lower unit costs since the contractor can build in more economical lot sizes with some assurance of recovering non-recurring costs over the life of the contract. A reduction in the uncertainty of ongoing government business enables the contractor to build a more professional, stable workforce, thus potentially enhancing the quality of the product.

Of equal concern is the issue of retroactive environmental liability and the economic threat to the entire defense industrial base. In this regard, retroactive liability is a potential unfunded liability of such enormous magnitude that it could place many Government contractors on the brink of or into bankruptcy.

LIMITATIONS ON GLOBAL COMPETITION

The current export license system and its processing does not support today's business demands. Unless the system is streamlined and aligned with today's objectives, the industries on which the U.S. security depends will be impacted. ARWG recommends that Congress press for rapid implementation of an electronic data system that connects all relevant agencies (State, DOD, Commerce, Customs) and industry, to facilitate not only licensing, but also compliance and data analysis. In its background paper, ARWG also outlines a number of specific recommendations.

The Defense Export Loan Guarantee (DELG) Program was initiated by the Congress in 1996, but it has inherent limitations that reduced its usefulness. ARWG has identified several changes that would result in the DELG being a more effective program by more closely mirroring the provisions that apply to the Export-Import Bank.

STREAMLINING SOCIO-ECONOMIC REQUIREMENTS

There are a number of statutes that focus on important socio-economic issues. Acquisition reform should bring structure and coherency to these initiatives in order to promote clear goals and objectives and streamline acquisition procedures. In particular, the following statutes and programs should be addressed:

- Improve contracting with small business. The issue of the "third-party" certification needs to be clarified as it relates to a contractor's subcontracting goals. Also, we urge the Congress to allow for the value of first-tier subcontract awards to be considered as a prime contract when assessing the dollar value of all contract awards for purposes of goal achievement
- Modify the Small Business Competitiveness Demonstration program. This program has provided increased contracting opportunities for small businesses in certain areas. However, it has created some ambiguities related to task order contracts, which need to be resolved.
- Repeal mandatory source preference for the Federal Prison Industries. Some progress was made in the FY02 National Defense Authorization Act to curtail the mandatory source preference on Federal contracts within the Department of Defense. However, it still remains in force at the civilian agencies, and also needs to be eliminated. Furthermore, attempts by FPI to enter the services marketplace should be curtailed.
- Revise the Service Contract Act. The act provides important protections for service employees but has lagged behind the times and should be updated. The current $2500 threshold for all government service contracts, established when the Act was created in 1965, should be increased to the "simplified acquisition threshold"; and there should be an exemption from its application for commercial purchases (made under FAR Part 12).

THE SERVICES ACQUISITION REFORM ACT OF 2002
SECTION-BY SECTION ANLYSIS

TITLE I – ACQUISITION WORKFORCE TRAINING

Section 101 – Definition of Acquisition.

The section would amend the Office of Federal Procurement Policy Act (41 U.S.C. 403) to provide a comprehensive Government-wide definition of the term "acquisition." The new definition would encompass the entire spectrum of acquisition starting with the development of an agency's requirements through contract administration.

Section 102 – Acquisition Workforce Training Fund.

The section would amend section 37 of the Office of Federal Procurement Policy Act (41 U.S.C. 433) to establish within the General Services Administration an acquisition workforce-training fund to be managed by the Federal Acquisition Institute. The fund is to be funded by depositing 5% of the fees collected by various executive agencies under their Government-wide contracts. The fund can only be used for sorely needed acquisition workforce training across the civilian Government agencies.

Section 103 – Government-Industry Exchange Program.

The section would amend Subpart B of part III of title 5, United States Code by adding a new Chapter 37 establishing an acquisition professional exchange program to permit the temporary exchange of high-performing acquisition professionals between the Federal Government and participating private-sector concerns. Under the program detailed Federal employees would retain their Federal benefits and would be paid by the Federal Government to the extent the private-sector pay is less than the employee's Federal pay. Private-sector employees would either be transferred and receive a temporary appointment or detailed to a Federal agency. Transferred employees would be paid by the Federal agency and deemed a Federal employee for most purposes. Detailed employees would also be deemed a Federal employee for most purposes but would be paid by the Government only to the extent the pay for the Government position exceeds the employee's private-sector pay.

Section 104 – Reimbursement of Costs.

The section would provide that the Federal Acquisition Regulation be amended to allow for the reimbursement of reasonable costs incurred in connection with an employee's participation in the professional exchange program as allowable education and training costs under Government contracts.

Section 105 – Conforming Amendments.

The section would provide conforming amendments to title 5, United States Code and various other laws in connection with the new professional exchange program.

Section 106 – Acquisition Workforce Recruitment and Retention Pilot Program.

The section would permit the head of an agency to determine, for purposes of sections 3304, 5333, and 5753 of title 5, United States Code, that certain civilian Federal acquisition positions are "shortage category" positions in order to recruit and directly hire such employees with high qualifications. The actions under this section would be subject to Office of Personnel Management policies for direct recruitment. The Administrator of the Office of Federal Procurement Policy would be required to submit a report to Congress prior to the pilot's September 2006 expiration date concerning the efficacy of the program and recommending whether the authority should be extended.

Section 107 – Authorization of Telecommuting for Federal Contractors.

The section would provide for an amendment to the Federal Acquisition Regulation (FAR) providing that solicitations for Federal contracts should not contain any requirement or evaluation criteria that would render an offeror ineligible for award or would reduce the scoring of the offeror's proposal based upon the offeror's plan to allow its employees to telecommute unless the contracting officer first determines in writing that the needs of the agency, including security needs, could not be meet without the requirement. The General Accounting Office would report to Congress on the implementation one year after the FAR amendment is published.

Section 108 – Architectural and Engineering Acquisition Workforce.

The section would provide that the Administrator of the Office of Federal Procurement Policy in consultation with the Secretary of Defense and the Director of the Office of Personnel Management develop and implement a plan to assure that the Federal Government maintains a core in-house architectural and engineering capability.

TITLE II – ADAPTATION OF BUSINESS ACQUISITION PRACTICES

Subtitle A – Adaptation of Business Management Practices

Section 201 – Chief Acquisition Officers.

The section would amend section 16 of the Office of Procurement Policy Act (41 U.S.C. 414) to provide for the appointment of a Chief Acquisition Officer for each executive agency. The Chief Acquisition Officer would provide advice and assistance to the agency head and other senior management to ensure, among other things, that full and open competition is increased in agency acquisitions, that clear lines of authority,

accountability, and responsibility for acquisition decision making are established and that an acquisition career management program is developed and maintained. The Chief Acquisition Officer shall have acquisition as the official's primary duty and monitor the agency's acquisition activities and evaluate them based on applicable performance measurements. The Chief Acquisition Officer shall, as a part of the statutorily required annual strategic planning and performance process, assess agency requirements for agency personnel knowledge and skills in acquisition resources management and, if necessary, develop strategies and plan for hiring, training and professional development.

Section 202 – Increased Role for Defense Contract Management Agency.

The section would provide for a review by the Under Secretary of Defense for Acquisition, Technology and Logistics of the feasibility of establishing the Defense Contract Management Agency as the primary organization responsible for contract management on base operating services contracts in excess of $5,000,000.

Section 203 – Study on Horizontal Acquisition.

The section would provide for a study by the Administrator of the Office of Federal Procurement Policy of laws, executive orders, and regulations that hinder the cross-Government performance of acquisition functions and impact the use of Government-wide contracts.

Section 204 – Statutory and Regulatory Review.

The section would provide that the Administrator of the Office of Federal Procurement Policy establish an advisory panel of at least nine experts in acquisition law and policy who represent diverse public and private sector experiences. The panel would review acquisition laws and regulations with a view toward ensuring the greater use of commercial practices and performance-based contracting and make recommendations for the repeal or amendment of laws or regulations that are not necessary for the establishment of buyer and seller relationships while retaining the financial and ethical integrity of the acquisition programs and ensuring that the Government's best interest is protected. The report is to be completed within one year after the establishment of the panel and contain the findings and conclusions of the panel, and its proposed new codification of acquisition laws and regulations.

Subtitle B – Payment Terms

Section 211 – Payment Terms.

The section would provide that the Federal Acquisition Regulation be revised to create a streamlined cost-effective commercial-like payment process for service contracts. The revised process would provide for the submission of biweekly or monthly payment invoices. Biweekly invoices would have to be submitted electronically. All electronic invoices would be accepted or rejected by the agency within 5 working days and all accepted invoices would be paid as soon as possible, but in no case later than 30 days after the invoice date. Either party may make appropriate corrections or adjustments after payment.

Subtitle C – Acquisitions Generally

Section 221 – Increase in Authorization Levels of Federal Purchase Cards.

The section would amend section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428) to increase the threshold for the use of the streamlined "micropurchase" process, which is the basis for the Federal Purchase Card program, from the current $2,500 to a more realistic $25,000.

Section 222 – Reauthorization of Franchise Funds.

The section would amend section 403 (f) of the Federal Financial Management Act of 1994 (31 U.S.C. 501 note) to reauthorize the Government's franchise funds until October 1, 2005.

Section 223 – Acquisition Protests.

The section would amend Chapter 137 of title 10, United States Code and the Federal Property and Administrative Services Act of 1949 to provide statutory authority for an agency-level acquisition protest process. It would provide for a "stay" of the award or of contract performance during the 10 working day period an agency is given to decide the protest. The "stay" could be lifted by the head of the agency procuring activity upon a written finding that urgent and compelling circumstances do not permit waiting for the decision. The section would provide that filing an agency-level protest under this section would not affect the right of an interested party to file a protest with the General Accounting Office (GAO) or in the United States Court of Federal Claims. The section would also amend section 3553 (d) (4) of title 31, United States Code to provide that an interested party filing a protest with GAO within 5 days of the issuance of the agency protest decision would qualify for a stay of performance in connection with a protest filed with the GAO.

Section 224 – Architectural and Engineering Services.

The section would amend section 901 of the Federal Property and Administrative Services Act of 1949 (Property Act) (40 U.S.C. 541) to clarify the terms "surveying and mapping" and "contract" as used in the definition of architectural and engineering services to ensure that the quality-based selection process in title IX of the Property Act is used for the full spectrum of surveying and mapping services. The Federal Acquisition Regulation would also be amended to include the new definitions. Further, the section would amend section 2855 (b) of title 10, United States Code to raise from $85,000 to $300,000 the threshold under which architectural and engineering services acquisitions must be set aside for small business concerns and to conform section 2855 to the Property Act amendments. Finally, the section would provide that executive agencies shall not establish or carry out a program to offer or contract for professional engineering services unless the performance of the services are supervised by a licensed professional engineer and the contract for the services is awarded pursuant to the quality-base selection procedures in title IX of the Property Act.

TITLE III – CONTRACT INCENTIVES

Section 301 – Revisions to Share-in-Savings Initiatives

The section would amend Chapter 137 of title 10, United States Code and title III of the Federal Property and Administrative Services Act of 1949 to authorize the use of share-in-savings contracts Government-wide. These contracts represent an innovative approach to encourage industry to share creative technology and management solutions with the Government. Through these contracts agencies can lower their costs and improve service delivery without large "up front" investments as the contractor provides the technology and is compensated by receiving a portion of savings achieved.

The section would authorize agencies to enter into share-in-savings contracts for a term of up to 10 years, to pay contractors from the savings realized and to retain those savings that exceed the amount paid to the contractor. The section would permit agencies to use various options for funding cancellation or termination costs and would permit the cancellation or termination amount to be negotiated by the parties. The section would also require the Director of the Office of Management and Budget (OMB) to identify potential opportunities for, and encourage the use of, share-in savings contracts through incentives and by permitting agencies to retain a portion of the savings achieved as future funds are appropriated. Further the section would require that the Federal Acquisition Regulation be revised to implement this section and require that the Director of OMB issue guidance on the use of share-in-savings contracts that provides for the use of competitive procedures, maximizes regulatory flexibility to facilitate the use of such contracts, and assists agencies in determining baselines and saving share ratios. Finally the section would require the Director of OMB to report to Congress two years after

enactment describing the number of share-in savings contracts entered into and recommendations for changes in law needed to encourage their use.

Section 302- Incentives for Contract Efficiency

The section would amend Chapter 137 of title 10, United States Code and title III of the Federal Property and Administrative Services Act of 1949 to authorize agencies to enter into services contracts for up to ten years if they are performance-based. The ten-year performance period would consist of multiple performance period extensions made by the agency based on exceptional contractor performance as measured by performance parameters set forth in the contract. The section would also authorize agencies to enter into a level-of-effort contracts that would provide for savings realized to be shared with the contractor in an amount that is sufficient to encourage contractor investment that is likely to reduce overall cost of performance.

TITLE IV – ACQUISITIONS OF COMMERCIAL ITEMS

Section 401 – Preference for Performance Based Contracting.

The section would provide that in administering the preferences established in the Federal Acquisition Regulation (FAR) pursuant to section 821 (a) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (as enacted into law by Public Law 106-398: 114 Stat. 1654A-218), a performance-based service contract or task order may be treated as a contract for commercial items if it sets forth each task to be performed, defines it in measurable, mission related terms, identifies specific products or outputs and the source provides similar services to the public under similar terms to those offered the Government. The special simplified procedures provided in the FAR for commercial items would not apply to these contracts or task orders. Such performance-based contracts or task orders may be awarded pursuant to the special simplified procedures provided in the FAR for commercial items if the contract or task order would be valued at $5,000,000 or less. The section would further provide that it would be in effect for three years after enactment and would provide for a Comptroller General report on the implementation two years after enactment. Finally the section would require the Administrator of the Office of Federal Procurement Policy to establish a center of excellence for service contracting to assist the acquisition community in identifying best practices in service contracting.

Section 402 – Authorization of Additional Contract Types in FAR Part 12.

The section would provide that section 8002 (d) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355: 41 U.S.C. 264 note) be amended to provide that the Federal Acquisition Regulation include a provision that time and material, labor-hour or similar contract types for services could in appropriate circumstances be used for the acquisition of commercial items.

Section 403 – Clarification of Commercial Services Definition.

The section would amend section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403 (12)) to clarify the definition of commercial item to place services on the same level as supplies in Federal acquisitions.

Section 404 – Designation of Commercial Business Entities.

The section would amend section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) to further clarify the definition of commercial item to include products or services that are produced by a commercial entity whose primary customers are other than the Government. The section would provide that a commercial entity must have made 85% of its sales over the past three years to non-government entities or as commercial items under Federal Acquisition Regulation Part 12.

Section 405 – Continuation of Eligibility of Contractor for Award of Information Technology Contract After Providing Design and Engineering Services.

The section would provide that a contractor providing architectural design and engineering services for an information system would not, solely for that reason, be ineligible for award of a contract or subcontract for the acquisition of information technology under that program. The section would define architectural and design services as including such activities as business process reengineering, evaluation of test data, determination of specifications and developing work statements.

Section 406 - Commercial Liability.

The section would amend the Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) to provide that the Federal Acquisition Regulation shall require the inclusion in all solicitations for contracts and in all contracts a provision that bars the payment of consequential damages because of contractor liability and places a cap on direct damages for contractor liability that does not exceed the cost of the service not performed or product not delivered.

TITLE V – TECHNOLOGY ACCESS IN A COMMERCIAL ENVIRONMENT

Section 501 – Trade Agreements Act of 1979 Exemption for Information Technology Commercial Items.

The section would provide that, in order to promote Government access to commercial information technology, the Buy American Act (41 U.S.C.10a) restriction on the acquisition of nondomestic products and the Trade Agreements Act of 1979 (Public Law 96-39; 19 U.S.C. 2512 (a)(1)) prohibition on noneligible foreign products would not

apply to the acquisition of commercial information technology as defined in the Clinger-Cohen Act of 1996. The section would also amend section 5002 (3)(B) of the Clinger-Cohen Act of 1996 by including in the definition of information technology, imaging peripherals and certain devices necessary for security and surveillance

Section 502 – Authorization for Acquisition of Information Technology by State and Local Governments Through Federal Supply Schedules.

The section would amend section 201 (b) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481 (b)) to give the Administrator of General Services (Administrator) the authority to provide for the use by State or local governments of the Federal Supply Schedules of the General Services Administration for automated data processing equipment, software, support equipment and services, and other items contained in Federal supply classification group 70. The section would further provide that participation by a Federal Supply Schedule contractor in a sale to a State or local government would be voluntary. Not later than December 31, 2004, the Administrator is to report on the implementation and effects of the new provision.

Section 503 – Certain Research and Development by Civilian Agencies.

The section would amend title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) to authorize the head of a civilian executive agency, if authorized by the Director of the Office of Management and Budget, to engage in basic, applied and advanced research, and development projects that are necessary to the responsibilities of the agency and may facilitate defense against, or recovery from, terrorism or nuclear, biological, chemical, radiological, or technological attack. This authority would be the same as that exercised by the Secretary of Defense under sections 2358 and 2317 of title 10, United States Code with certain exceptions.

Section 504 – Authority for Carrying Out Certain Prototype Projects.

The section would provide that the head of an executive agency, authorized by the Director of the Office of Management and Budget under the Federal Property and Administrative Services Act of 1949, as amended by section 503 above, may carryout prototype projects that meet the requirements of the amendment in section 503 above in accordance with the same requirements and conditions for prototype projects as are provided under section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160; 10 U.S.C. 2371 note).

TITLE VI – INFLATIONARY ADJUSTMENTS

Section 601 – Simplified Acquisition Threshold Inflation Adjustment.

The section would provide that the Administrator of the Office of Federal Procurement Policy may adjust the simplified acquisition threshold as defined in section 4(11) of the

Office of Federal Procurement Policy Act (41 U.S.C. 403 (11)) every three years to account for inflation.

U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

March 5, 2002

The Honorable Tom Davis
Chairman
Technology and Procurement Policy Subcommittee
Committee on Government Reform
United States House of Representatives
B349 A Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Turner
Ranking Member
Technology and Procurement Policy Subcommittee
Committee on Government Reform
United States House of Representatives
B350 A Rayburn House Office Building
Washington, D.C. 20515

Re: Draft Services Acquisition Reform Act

Dear Chairman Davis and Representative Turner:

Thank you for providing us the opportunity to submit our comments for the hearing record on the draft Services Acquisition Reform Act. We note that services procurements account for a large portion of orders placed under GSA's Multiple Award Schedule (MAS) contracts, as well as other agency-managed contracting vehicles, and we applaud the Subcommittee's attention to and efforts in this area. In our view, services contracts present concerns that are often distinct from those that arise in contracts for products.

Generally, we endorse the bill's focus on increasing the efficiency of services contracting. We particularly favor the provision at section 502 which would authorize a cooperative purchasing program for information technology items through GSA's MAS program. Such a program would, in our view, benefit the federal government by increasing expected overall purchase volumes under the MAS schedules. Contracting officers (COs) would thus have the opportunity to wield increased leverage over pricing during such negotiations. Further, cooperative purchasing would give state and local governments a ready source to satisfy their requirements, while providing industry with a single vehicle (and somewhat streamlined bid and proposal costs) with which to access both the federal Government and state and local government markets.

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We do have some concerns, however, regarding several of the bill's provisions. Based on our audit work, we believe that certain competition and pricing-related problems exist in service contracts, and we are concerned that the bill's proposed expansion of commercial items procurement authorities to include more such services would only exacerbate these existing problems.

Expanding Services Eligible for Commercial Items Procurement Authorities

Current law defines "commercial items" to include stand-alone services that are "offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions." 41 U.S.C. § 403 (12)(F). Section 403 of the draft bill would eliminate the requirement that services be offered and sold competitively in the commercial marketplace based on established catalog or market prices for specific tasks performed. The draft bill would also, at section 404, establish a new definition of "commercial business entity." For companies then that fit this definition, any item or service they would provide to the Government would statutorily be deemed a commercial item, regardless of whether the company offered or sold the item or service commercially. As a result of being classified as a "commercial item," such items or services could be procured under a variety of streamlined and simplified procurement authorities.

We believe that these proposed revisions are unwarranted expansions of the commercial items definition, and that current law, which requires that a vendor sell substantial quantities of services competitively for the service to qualify as commercial, is more sound and strikes a better balance between streamlining acquisition authorities and protecting the Government's interests. In the absence of a requirement that a vendor have sold a particular service commercially subject to market competition, there are few safeguards in place to protect against such a "commercial business entity" overcharging for the particular service being procured by the government. The substantial quantities requirement is particularly important to the procurement of services, where comparability between the Government's requirement and commercial services is problematic. The requirement serves to ensure that real competition is occurring in the commercial market, and that a price for the Government service can validly be derived from such commercial transactions.

We note that reviews we performed last year of the use by GSA's Federal Technology Service (FTS) of its multiple award contracts found many instances of task orders being awarded without meaningful competition -- which requires a fair opportunity to be considered in the multiple award contract context. The reviews found that this occurred because, among other reasons, contracting officials had problems articulating performance-based statements of work and because contract awards were made for follow-on work to incumbent contractors.

We believe it would be better and more effective to focus on addressing current pricing and competition-related problems in the acquisition of services, rather than expanding the universe of services that can be acquired.

Authorizing Labor-Hour and Time-and-Materials Type Contracts for Services

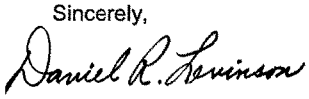
Section 402 of the draft bill would require that regulations be issued to make clear that services could be procured under time-and-materials and labor-hour contracts in appropriate circumstances. As the FAR specifically notes, time-and-materials contracts "provide no positive profit incentive to the contractor for cost control or labor efficiency." Therefore, the FAR anticipates that the Government perform oversight of such contracts to ensure that contractors are using effective methods and cost controls. Further, the FAR limits use of such contracts to instances where it is not possible to estimate accurately the extent of the work required, and requires COs to execute a determination and findings that no other type of contracting vehicle is suitable.

Our audit experience has indicated certain recurring problems on time-and-materials or labor-hours type contracts. These have included contractors who have not actually expended the number of hours for which they have billed the Government. Also, we have seen instances where contractors have employed individuals on Government jobs who have not met the qualifications prescribed by the contract's designated labor category.

Although we understand that in some cases these contract types may be warranted for commercial items purchases, we would suggest that FAR guidance both specifically set out the circumstances under which using non-fixed price contract vehicles is appropriate and clearly provide for certain safeguards, including relevant audit authority or payment protections, for such contracts. We believe that such safeguards would be appropriate to at least partially offset the increased risks to the Government presented by using these contracting vehicles for commercial items buys.

Please do not hesitate to call me on (202) 501-0450, or have your staff call Kathleen S. Tighe, my counsel, on (202) 501-1932, with any questions or concerns regarding these comments.

Sincerely,



Daniel R. Levinson
Inspector General

Written Testimony of Danielle Brian
Executive Director
Project On Government Oversight
before the
House Government Reform Subcommittee on Technology and Procurement Policy
Legislative Hearing on H.R. 3832, The Services Acquisition Reform Act of 2002 (SARA)
March 7, 2002

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. Usually, as we consider which public policy issues we will pursue, we return to this mission statement to ensure that it would fall in one of those three categories. In the case of Acquisition Reform it is easy. It falls into all three.

George Orwell would be proud of the Acquisition Reform community. It has created such Orwellian concepts for the acquisition of goods as competitive one-bid contracting; "commercial items" that are only bought by the government; information about cost and pricing that "need not be current, accurate, and complete;" and "indefinite delivery, indefinite quantity" contracts. Only those who have sipped from the acquisition reform well could believe that these "reforms" benefit the taxpayer.

At the Subcommittee's last hearing, one of Acquisition Reform's most vigorous cheerleaders, Stan Soloway testified that POGO's 1998 report contained "errors" and "misconceptions as to what's going on" but declined to articulate what those were. He asked to be allowed to submit a challenge to our findings for the record. We're still waiting. In the meantime, I am introducing for the record our newest report on the damage caused by Acquisition Reform.

We have found that, in fact, Acquisition Reform has been extremely detrimental to oversight and accountability of federal procurement. Examples include:

One-bid contracts that have been labeled "competitive" have clearly proven wasteful: a May 2001 DoD IG audit of 145 sole-source and competitive one-bid contracts discovered that overpricing had occurred in more than 1/3 of the contracts, totaling $23.1 million. In the vast majority of the remaining cases, the DoD IG was unable to determine whether overpricing had occurred, due to inadequate data.[1]

The term "commercial" has been weakened so much that it is practically useless. For instance, C-130J military transport aircraft have been offered for commercial sale in the past, and while not a single sale was ever made to civilians, oversight was loosened. Similar attempts are being made to classify the C-17 cargo plane. 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

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[1] "Contracting Officer Determinations of Price Reasonableness when Cost or Pricing Data Were Not Obtained." Office of the Inspector General, Department of Defense, Report No. D-2001-129, May 30, 2001.

are truly commercial and whose prices are set 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.

Although using Indefinite Delivery Indefinite Quantity multiple award contracts frequently reduces the length of the acquisition process by as much as 90 percent, they actually stifle competition. A 2001 DoD IG audit reported that, "The underlying goal of multiple award contracting was to obtain the best value while sustaining competition throughout the contract period. . . . However, the large percentage of sole-source orders demonstrates that most DoD contracting organizations continued to be increasing the risk to the Government and losing the benefits of price competition."[2]

A GAO study of micropurchase credit cards revealed that purchase cards have been used for "fraudulent [personal business] transactions for pizza, jewelry, phone calls, tires, and flowers." Perhaps the most telling example is that of one cardholder indicted for making over $17,000 in fraudulent personal transactions who "commented that illegal use of the card was 'too easy' and that she was the sole authorizer of the card purchases."[3] A recent DoD IG audit found that overcharging occurred on no fewer than 42% of the audit sample. Not surprisingly, the DoD IG recommended "replacing [i.e. eliminating] the electronic commerce interface" or, at the very least, "improv[ing] management controls on micro-purchases."[4]

We are not alone in our concern. As is included in our report, the GAO and DOD IG have repeatedly warned that Acquisition Reform efforts have worked counter to the interests of the taxpayers. In fact, the IG, using atypically colorful language concluded that Acquisition Reform-endorsed multiple award contracts have resulted in an "anemic level of competition."

We are now here to witness the beginning of the infection of services contracting with the Services Acquisition Reform Act (SARA).

The first provision of SARA that alarms us is Section 221, the increased threshold for "micropurchases" from $2,500 to $25,000. Perhaps some of the Members of this Subcommittee are unaware of Representative Horn's fine work in the Government Efficiency Subcommittee of this very same Government Reform Committee. He held hearings last year entitled, "The Use and Abuse of Government Purchase Cards: Is Anyone Watching?" It would appear from Section 221 that this

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[2] "Multiple Award Contracts for Services," Office of the Inspector General, Department of Defense, Report No. D-2001-189, September 30, 2001.

[3] "Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse." Statement of Gregory D. Kutz, Director, Financial Management and Assurance, and Robert H. Hast, Managing Director, Office of Special Investigations, before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, House Committee on Government Reform. GAO Report No. 01-995T, July 30, 2001.

[4] "Buying Program of the Standard Automated Material Management System Automated Small Purchase System: Defense Supply Center Philadelphia." Office of the Inspector General, Department of Defense, Report No. D-2001-077, March 13, 2001.

Subcommittee is not. Senator Charles Grassley, who had initiated the investigation of the federal purchase card program testified that, "The GAO reports that purchase cards are being used to buy expensive items for personal use – with no accountable records. There were over 500 known purchase card fraud cases in the last two years alone. And with just a small sample, GAO found some more. And the worst part about it, Mr. Chairman, no one seems to care. The Defense Finance and Accounting Service simply pays the bills in full – no questions asked." At this hearing, Representative Horn concluded that, "the cost of this program may far outweigh its benefits." Why on earth then, would this Subcommittee expand ten-fold a program that has already been found to be so replete with abuse?

Section 301, Revisions to Share-in-Savings (SIS) Initiatives, greatly expands SIS contracts to be used government-wide without a SHRED of evidence that they can be successfully used beyond energy-savings. As we testified last November, projected contractor profits from this program are far more concrete than projected savings. Of particular concern will be how benchmarks will be established to prove that savings have in fact been realized. It is certainly premature and irresponsible to expand this initiative before there has even be an evaluation of the Department of Education's pilot SIS program.

In circular logic, Section 401 of SARA encourages the use of performance-based contracting, yet in the very next section, Section 402, this bill encourages the use of what is essentially the polar opposite – Time and Material and Labor Hour contracting. These types of contracts pay for time or money spent, not for milestones reached or work completed. Anyone who has hired a lawyer knows what happens when you pay by the hour – the customer, in this case the taxpayer, will pay more for less. The government should not be encouraging the use of a class of contracts with as clear a disincentive to produce as are provided in Section 402.

We are also very concerned about Section 404 – the designation of "Commercial Business Entities." Again Orwell would give a thumbs-up to the concept of pretending that the free-market had set the prices of goods and services when, in fact, they had not. Why should the government waive the Truth In Negotiations Act or Cost Accounting Standards when it buys Sikorsky Black Hawk military helicopters from United Technologies, simply because it also sells Otis elevators?

Overall, Acquisition Reform has been destructive to accountable, responsible federal acquisition practices. The acquisition reform community has slowing chipped away the safeguards that protect the public fisc by hiding behind the rhetoric of "cutting red-tape." This SARA legislation is a continuation of these damaging "reforms" and would appear to be evidence that political contributions are swaying the direction of public policy.

PICK POCKETING THE TAXPAYER:
THE INSIDIOUS EFFECTS OF ACQUSITION REFORM

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POGO MISSION STATEMENT

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.

INTRODUCTION

Spending $200 billion per year, the federal government is the biggest consumer of goods and services in the world. As all consumers, the government relies heavily on free-market forces to ensure fair prices. Simplified, a large number of suppliers coupled with a large number of consumers create a competitive market in which consumers can be confident they are getting a fair deal. But a large portion of federal dollars buy goods and services that are not affected by these market forces. Because the government is often the only consumer of a particular product, and more importantly, because often times only one supplier exists, free market forces cannot regulate prices. This scenario most often plays out in defense spending, where the federal government is, by necessity, the only buyer of weapons systems and military-unique services, and where, due in part to recent mega-mergers, there are very few companies able to provide these goods and services. In these instances, the government must use other tools to guarantee fair pricing, namely, oversight.

It is this oversight, which promotes the responsible spending of taxpayer dollars, that is again under attack in the latest wave of "Acquisition Reform." Spurred on by powerful contractor associations, Members of Congress and the Pentagon are pushing for ever-more relaxation of the regulations and oversight put in place to prevent contractor rip-offs. Under the media-friendly guise of "Acquisition Reform" and "cutting red tape," association lobbying has been successful in its quest for reduced oversight. After a decade of this "Acquisition Reform," the procurement policies are in such a state of disrepair, that defrauding the government has become as easy as it was in the early 1980's, the era of spare parts horror stories.

Recent examples include:

- A United States General Accounting Office (GAO), November 2000 report, "Defense Acquisitions: Price Trends for Defense Logistics Agency's Weapon System Parts," reveals that spare parts prices are skyrocketing, just as in the 1980s. The report revealed that the cost of 2,993 spare parts purchased by the military in 1998 **increased by ten times or more in just one year.** Ironically, these parts were bought under the much-touted "commercial" price system.

  Examples include:

Hub	initial estimate **$35**;	actual price **$14,529**
Self-locking nut	initial estimate **$3**;	actual price **$2,185**
Radio transformer	initial estimate **$683**;	actual price **$11,701**
Thermal insulation	initial estimate **$1**;	actual price **$3,390**

  In 64% of the cases, prices originally provided by the contractor were increased later when the parts were purchased. Defense officials told the GAO that discrepancies between estimated and actual prices were often the result of a lack of manpower needed to perform a "thorough price scrub."

- The same GAO study also reported that even 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, representing purchases totaling about $193 million. By comparison, in 1995, only one out of twelve (8%) had such price increases.

- Another GAO report, in February 2002, came up with similar problems:

  - "We [GAO] found that prices for all Navy-managed aviation parts increased at an average annual rate of 12 percent from 1994 to 1999." GAO also found that higher volume mysteriously lead to higher prices: "However, prices for parts [again for the Navy] with high sales volume increased substantially more, at an average annual rate of 27 percent."

  - The Marine Corps experienced similar price spikes for ground system spare parts: "We [GAO] found that the prices for these parts had increased at an average annual rate of about 14 percent from 1995-99."

  - Even worse, contractors without competition jacked up prices at twice the rate of contractors facing competition: "DLA [Defense Logistics Agency] reported that, from fiscal year 1993 to 2000, materiel costs grew 10.8 percent for competitively purchased commercial items, but increased more than twice as much for noncompetitive purchases."[1]

- Another audit revealed that the Department of Defense (DoD) unknowingly paid prices "280 percent higher than fair and reasonable" for a variety of spare parts costing $6.1 million from one unnamed supplier.[2]

- The Defense Supply Center in Philadelphia, one of three major Defense Logistics Agency supply centers nationwide, was overcharged an estimated $1.2 million for 9,733 "micropurchases" (i.e. purchases under $2,500 each).[3]

- The Raytheon Corporation overcharged the Navy by $572,302 on contracts costing about $1.6 million, an overcharge rate of 56%, under an "industrial prime vendor program" (effectively, a monopoly) which was intended to reduce logistics costs, improve financial

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[1] "Defense Acquisitions: DOD Faces Challenges in Implementing Best Practices" United States General Accounting Office Report No.GAO-02-469T, February 27, 2002.

[2] Statement of Robert J. Lieberman, Assistant Inspector General for Auditing, Dept. of Defense, before the Subcommittee on Government, Management, Information, and Technology, House Committee on Government Reform and Defense Acquisition Reform on Defense Acquisition Management. DoD IG Report No. D-2000-106, March 16, 2000.

[3] "Buying Program of the Standard Automated Materiel Management System Automated Small Purchase System: Defense Supply Center Philadelphia." Office of the Inspector General Department of Defense, Report No. D-2001-077, March 13, 2001.

accountability, streamline the Defense infrastructure, and add value to the Defense supply system, but which, according to the DoD Inspector General (IG), accomplished none of these objectives.[4]

- Rockwell Collins, Inc. overcharged the Army by $395,316 for radio parts costing $1.3 million. Government contracting officers had examined prior pricing data to determine a fair price, but unfortunately, the DoD IG found that "prior prices were not justified as reasonable."[5]

- The AM General Corporation overcharged the Army $480,000 on a $4.9 million contract for Hummer diesel engines. The IG commented that "if anything, we would have expected a lower rate because of the increase in quantity from 120 engines to 300 engines on the order."[6]

- The Army paid $174,675 for a variety of vehicle parts from the Minowitz Manufacturing Co. which the DoD IG determined were truly worth $71,205 – an overcharge rate of 145 percent. The responsible contracting officer had commented, **"...their price is so OUTRAGEOUS I cannot possibly find any justification for their offer** unless you will support the blank check." Because of acquisition reform, the contract was considered "competitively bid," and therefore exempt from much of the usual oversight, even though competition was nonexistent: "the contract was solicited three times without generating other bidders."[7]

These, and many other cases like them, are simply tolerated because the laws that regulate acquisition have been so severely weakened. Simply put, "Acquisition Reform" has been a gold mine for defense contractors, allowing them to easily overcharge the government, resulting in the waste of billions of taxpayer dollars.

Among the most detrimental provisions of "Acquisition Reform" are new contracting methods ungoverned by the usual oversight, such as "competitive" one-bid contracting, "commercial items" procurement, Indefinite Delivery Indefinite Quantity contracts, and the proposed "Share-in-Savings" contracting. This form of contracting leaves the government vulnerable to contractor rip-offs.

"Commercial items" procurement is equally permissive and troubled. Under the "Acquisition Reform" definition of "commercial items," goods such as C-130J military cargo planes qualify.

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[4] "Industrial Prime Vendor Program at the Naval Aviation Depot - North Island." Office of the Inspector General Department of Defense, Report No. D-2001-072, March 5, 2001.

[5] "Contracting Officer Determinations of Price Reasonableness When Cost or Pricing Data Were Not Obtained." Office of the Inspector General Department of Defense, Report No. D-2001-129, May 30, 2001.

[6] Ibid.

[7] Ibid.

Regardless of the fact that these military-specific goods have no demand in the civilian market and, likewise, have never been sold to any consumer except the military, they can be called "commercial" merely because they have been *offered* for sale. Due to such a tortured definition of commercial, these items are not being regulated by the government.

Also troubles are the Indefinite Delivery Indefinite Quantity contracts, which include Government-Wide Acquisition contracts (GWACs) and Multiple Award contracts. Under these contracts, the government does not specify exactly which products or services it wants, but asks the contractor to be available to perform services or manufacture products if called upon – basically the equivalent of a hunting license. Such contracts, stifle small business competition by providing perfect opportunities for large contractors to monopolize entire market segments and thereby liberally overcharge the government. A recent DoD Inspector General report states, "The underlying goal of multiple award contracting was to obtain the best value while sustaining competition throughout the contract period. . . . However, the large percentage of sole-source orders demonstrates that most DoD contracting organizations continued to be increasing the risk to the Government and losing the benefits of price competition."[8]

"Share-in-Savings" (SIS) contracting is the latest proposed contracting loophole making its way through Congress. As part of the proposed Services Acquisition Reform Act (SARA), Share-in-Savings contracting would allow agencies to outsource government projects that have not received Congressional approval, thereby avoiding the Constitutional system of checks and balances. While the intent of SIS contracting is to encourage savings and efficiency, the lack of proven benchmarks to calculate such savings leaves the process entirely subjective and leaves the government open to manipulation and endless lawsuits by contractors. Projected contractor profits from this program are far more likely than projected savings.

DoD Contract Management has been cited as a "High-Risk area" since 1992 by the General Accounting Office (GAO). Last year the GAO reported that, "DOD . . . continues to experience significant challenges related to improving oversight and accountability in the acquisition of services."[9] With defense spending set to sharply increase under the Bush Administration's latest budget, the "Acquisition Reform" that has taken place over the past decade has put the government in a dangerously vulnerable position where it is not only possible for contractors to get away with defrauding the government, but very likely.

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[8] "Multiple Award Contracts for Services," Office of the Inspector General, Department of Defense, Report No. D-2001-189, September 30, 2001.

[9] United States General Accounting Office, "High_Risk Series." January 2001. GAO-01-263.

WHY AND HOW IS THIS HAPPENING?

In the 1990s, the defense industry mounted an offensive against what it saw as overbearing procurement reforms of the 1980s. Most of those reforms, however, were useful protections for the taxpayer against contractors that had been defrauding the government in the 1980s. A Department of Defense (DoD) Inspector General report notes that the reforms "resulted in dramatic increases in reported competitive procurements and savings from 1985 to 1988."[10]

Former DoD Inspector General Eleanor Hill noted the dangers of rolling back these reforms:

> "We remain concerned about suggestions to limit or repeal controls that have proven effective over time, such as the False Claims Act, the Cost Accounting Standards, the statute that prohibits contractors from charging unallowable costs, and the Defense Contract Audit Agency. We believe that **these controls have been critical to maintaining the Government's ability to adequately protect its interests** in the acquisition area."[11]

IMPORTANT PROCUREMENT REFORMS OF THE 1980S AND THEIR CURRENT STATUS

Summary:

Reform	*Purpose*	*Status Today*
Competition in Contracting Act	Requires contracts to be fairly competed.	New legislation has created numerous loopholes.
Cost Accounting Standards (CAS) Board	Sets accounting rules for contractors.	Weakened by recent legislation.
False Claims Act (FCA) Strengthened	Allows citizens to come forward and sue fraudulent contractors on behalf of the government.	Under industry assault.
Penalties Increased for Disallowed Costs	Increased fines for contractor fraud.	Under industry assault.
Procurement Integrity Statute	Prohibits government contracting officers from revealing bid information to competing bidders.	No significant change.
Truth in Negotiation Act (TINA) Emphasis	Requires contractors to submit accurate pricing data.	Weakened by 1990s legislation.

[10] "Commercial and Noncommercial Sole-Source Items Procured on Contract N000383-93-G-M111." Department of Defense Office of the Inspector General, Report No. 98-064, June 24, 1998.

[11] Statement of Eleanor Hill, Inspector General, Department of Defense, before the Subcommittee on Readiness and Management Support, Senate Committee on Armed Services, on Acquisition Reform in the Department of Defense. Department of Defense Office of the Inspector General, Report No. 99-117, March 17, 1999.

THE COMPETITION IN CONTRACTING ACT OF 1984

The Competition in Contracting Act of 1984 arose in response to findings revealed in an influential GAO report that concluded that only a small share of contracts were being competed, and noted that competition brought down contract prices sharply. The act opened up competition by requiring contracts to be "fully and openly competed."

This act has since been weakened. Technically, full and open competition is still in place, but now only to the extent that it is "consistent with efficiency." In many cases, the competition requirement is satisfied even if only one bid is received, as long as there is a belief by the contracting officer that other contractors may bid.

THE COST ACCOUNTING STANDARDS BOARD (CAS BOARD)

The Office of Federal Procurement Policy Act amendments also reestablished the Cost Accounting Standards Board, which had been abolished in 1980. The CAS Board sets accounting rules for noncommercial contracts which are designed to achieve uniformity and consistency in contractors' accounting practices. Such rules are especially crucial to prevent the use of accounting gimmicks in an often noncompetitive environment.

Since its reestablishment, the Board has been facing a relentless onslaught by the defense industry and sympathetic lawmakers, even though, on average, it saves taxpayers a 5% margin on expenditures – about $7 billion a year.[12]

A report, "Future Role of the Cost Accounting Standards Board," was issued in April 1999 by a review panel comprised largely of industry representatives. Predictably, the panel recommended weakening the CAS Board by stripping it out of the Office of Management and Budget, and increasing the monetary threshold for full CAS monitoring from $25 million to $50 million per year. (Appendix A) Congress adopted the recommendation through the National Defense Authorization Act of 2000. The defense industry continues to promote further legislation which would undermine the structure and authority of the CAS Board.

THE FALSE CLAIMS ACT (FCA)

The False Claims Act was originally passed in 1863 at the urging of President Lincoln, who was attempting to halt the Civil War profiteering which was crippling the Union Army. Amendments to the Act in 1986, championed by Senator Charles Grassley (R-IA), increased the penalties for fraud and encouraged private citizens to come forward if they were aware of corporations defrauding the government.

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[12] Charles Tiefer and Danielle Brian. "Defense Contractors Take Aim at a Critical Accounting Watchdog." *Legal Times*, August 10, 1998.

Today, the Act is under heavy assault by defense industry representatives, who argue that "innocent disagreements" are being prosecuted as fraud, and complain that companies are deterred from doing business with the government for fear of alleged excess vulnerability to fraud lawsuits. Their ire is easily explained: annual monetary recoveries from lawsuits filed under the False Claims Act have jumped from $200,000 in 1987[13] to $1.2 billion in 2001.[14]

The DoD is warming to the industry's viewpoint. In January 2000, Deputy Secretary of Defense John Hamre initiated an 18-month-long FCA ("Qui Tam") Review Panel, claiming that the act "has already driven some firms out of government contracting," and that it may be "a major obstacle to acquisition reform."[15]

The Justice Department, in fact, has strongly rebutted the notion that the False Claims Act is burdensome and needs amending. For example, it stated that there is "no support beyond mere assertion for the proposition that the False Claims Act liability has any substantial effect on defense industry profits or on the industry's relationship with the DoD. Moreover, analysis of the data available to us shows no such effect."[16]

PENALTIES INCREASED FOR DISALLOWED COSTS

Various increased penalties for disallowed costs have also been instrumental in cutting down on waste. Most notably, the 1985 Department of Defense Authorization Act increased the penalties for costs submitted for reimbursement by contractors that the government determines are not valid claims.

The statutes are still currently in effect, but have come under heavy industry criticism since the industry feels that these increased penalties excessively "criminalize" what they see as "civil" violations.

THE PROCUREMENT INTEGRITY STATUTE

The Procurement Integrity Statute was created in 1988 through amendments to the Office of Federal Procurement Policy Act. The law attempted to prevent the types of corruption that were exposed by "Operation Ill Wind." The scandal revealed that contracting officials were selling source selection information – the strengths and weaknesses of competing bids based on the proposals under review – so that favored contractors could strengthen their own proposals when they went into negotiations. This new statute that prohibited revealing such information to contractors and required that contractor employees sign statements saying they were aware of the integrity laws.

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[13] The False Claims Act Resource Center, http://www.falseclaimsact.com. Downloaded July 13, 2001.

[14] Department of Justice Press Release, November 14, 2001.

[15] Richard F. Busch II of Faegre and Benson LLP. "Legal Updates." http://www.faegre.com/articles/article_515.asp. Downloaded July 13, 2001.

[16] Letter from Assistant Attorney General Frank Hunger to DoD General Council Judith Miller, November 8, 1998.

THE TRUTH IN NEGOTIATIONS ACT (TINA)

The Truth in Negotiations Act requires contractor cost and pricing data submitted to the government to be current, accurate, and complete. Enforcement and emphasis on TINA were boosted in the 1980s – a sensible measure, since the DoD's purchasing environment often lacks the competition found in a true free market. Congress kept a close eye on the issue, and the GAO published many reports that emphasized the importance of TINA.

However, this progress was seriously undermined by the Federal Acquisition Streamlining Act (FASA) and Clinger-Cohen Act also known as the Federal Acquisition Reform Act (FARA), which exempted so-called "commercial items" from TINA. But, many of these "commercial items" are actually only sold to the military. In addition, Congress is concerned that DoD improperly grants TINA waivers, even when no price competition is present.[17]

"ACQUISITION REFORMS"

The following legislation, passed within the last decade, represents the industry's most successful efforts to change acquisition practices for the worse.

Summary:

Reform	*Purpose*
Federal Acquisition Streamlining Act of 1994 (FASA)	Reduced oversight on a large number of government purchases, in part by undermining the Truth in Negotiations Act (TINA).
Clinger-Cohen Act (Federal Acquisition Reform Act of 1996)	Further relaxed acquisition oversight and expanded the definition of, and exemptions available to, so-called "commercial items."
Proposed Services Acquisition Reform Act (SARA)	Proposes to remove most of the remaining taxpayer pricing protections on government service contracts by creating oversight loopholes.

THE FEDERAL ACQUISITION STREAMLINING ACT (FASA)

The Federal Acquisition Streamlining Act, enacted in 1994, was intended to make federal agencies "more responsive and accountable to the public/customers relative to achieving program results," and required a 90% success rate for all established goals.[18] However, along with these reasonable demands, the Act also allows the use of uncertified information about cost or pricing that "need not

[17] United States General Accounting Office, "Defense Acquisitions: DOD Faces Challenges in Implementing Best Practices," GAO-02-469T, February 27, 2002.

[18] "White Paper Modular Contracting." Prepared by General Services Administration, July 1997. http://www.contracts.ogc.dc.gov/cld/papers/mcwp.html. Downloaded August 1999.

be current, accurate, and complete." This uncertified data is now called "information other than cost or pricing data." In addition, the Act loosened the definition of "commercial" (i.e. commercially available) parts to include parts with military-specific modifications, allowing such parts to be purchased with scant oversight. FASA also exempted many sole-source contracts (e.g. "competitive" one-bid contracts) from the careful monitoring stipulated by the Truth in Negotiations Act, and raised the "Simplified Acquisition Threshold" – under which contracts are not fully monitored – from $25,000 to $100,000 per contract.[19]

THE CLINGER-COHEN ACT

The Federal Acquisition Reform Act of 1996, also known as the Clinger-Cohen Act, took FASA's statutes a step further. It increased the "Simplified Acquisition Threshold" from $100,000 to $5 million, and lifted various other oversight thresholds by similar degrees. Additionally, the Act further undermined the government's ability to monitor "commercial parts" acquisition.

PROPOSED SERVICES ACQUISITION REFORM ACT (SARA)

The latest acquisition reform proposal is Representative Tom Davis' SARA bill. Picking up where the Federal Acquisition Streamlining Act (FASA) and the Clinger-Cohen Act left off with purchasing goods, SARA proposes to apply acquisition reforms to service contracting. SARA promotes:

- Increased thresholds from $2,500 to $25,000 for "micropurchases" on federal credit cards which don't receive the normal oversight (Further explained on p. 14);
- Share-in-Savings contracting which emphasizes outsourcing but has unclear and hard-to-audit benchmarks for savings, leaving taxpayers at risk (Further explained on p. 15);
- "Commercial-Business Entities" which creates a new class of government contractors. If 85% or more of a company's overall business is commercial – including companies such as United Technologies & General Electric – its government contracts would not be subject to the normal oversight of TINA, CAS, or post-award audits, regardless of whether those contracts qualified as "commercial"; and
- "Time and material" and "labor hour" contracts for acquisition of "commercial items"– in other words, paying for hours spent rather than for performance or results. This is in direct conflict with earlier provisions in the bill that suggest that all acquisition activities will be evaluated using performance measures. Bush-appointed Administrator of the Office of

[19] "FASA Q&A Knowledge Base." http://www.acq.osd.mil/ar/text/tfasaq&a.htm. Downloaded July 13, 2001.

> Federal Procurement Policy Angela Styles warns, "before we...endorse use of labor-hour and time-and-material contracts – we must challenge ourselves to demonstrate that the tools which would serve as a surrogate for the safeguards provided today will adequately protect the public fisc."[20]

Interestingly, the draft SARA bill appears to have been literally written by contractors. Copies that have circulated contain actual drafting notes that mention specific contractor lobbyists, by name, as well as ARWG, or the Acquisition Reform Working Group, which includes ten major contractor associations, and has been at the forefront of "Acquisition Reform" lobbying. (Appendix B)

SARA is so extreme that even the normally business-friendly Bush Administration's Office of Federal Procurement Policy Administrator has expressed strong reservations about the bill.

PROBLEMATIC CONTRACT TYPES

The changing federal acquisition environment has given rise to a number of new types of contracts, as well as the increased use of certain existing types. Several have been promoted enthusiastically by defense contractors as efficient and fair. Unfortunately, most have been problematic in practice, contributing to increased waste in defense spending. Some examples:

- **"COMPETITIVE" ONE-BID CONTRACTING.** As authorized by the Federal Acquisition Streamlining Act (FASA), a contract can be labeled "competitive" and therefore free of TINA-related oversight even when only one potential contractor bids on a contract and wins it by default. Such contracts have clearly proven wasteful: a May 2001 DoD IG audit of 145 sole-source and "competitive" one-bid contracts discovered that overpricing had occurred in more than 1/3 of the contracts, totaling $23.1 million. In the vast majority of remaining cases, the DoD IG was unable to determine whether overpricing had occurred, due to inadequate data. In fact, the various contractors were found to have **provided inaccurate or incomplete pricing data in 86% of the 145 cases examined.** Staffing shortages and "pressure to award contracts quickly" were also cited as key causes of the waste.[21]

- **"COMMERCIAL ITEMS" PROCUREMENT.** Through the Federal Acquisition Streamlining Act (FASA) and the Clinger-Cohen Act, "commercially available" parts were exempted from much procurement oversight, such as TINA regulations. To encourage such deregulation, contractors argued that a commercial market ensures reasonable pricing. Unfortunately, the current definition of "commercial" is almost absurdly loose. As stated by Angela Styles, the Bush-appointed

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[20] Statement of Angela B. Styles, Administrator for Federal Procurement Policy, Executive Office of the President, before the Subcommittee on Technology and Procurement Policy, House Committee on Government Reform, November 1, 2001.

[21] "Contracting Officer Determinations of Price Reasonableness when Cost or Pricing Data Were Not Obtained." Office of the Inspector General, Department of Defense, Report No. D-2001-129, May 30, 2001.

Administrator of the Office of Federal Procurement Policy, "While proponents of statutory change may suggest otherwise, make no mistake: the framework Congress gave us for buying commercial items is broad and accommodating." As outlined by Styles, **parts and items may be labeled "commercial" as long as they are merely "of a type" *offered* for sale to the general public, even if no such sale ever occurs.**[22] For instance, C-130J military transport aircraft have been offered for commercial sale in the past, and while not a single sale was ever made to civilians, oversight was loosened. Similar attempts are being made to classify the C-17 cargo plane. 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 whose prices are set 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. Many other "commercial items" are purchased by the public, but with such low frequency that prices are by no means determined by the free market.

- **INDEFINITE DELIVERY INDEFINITE QUANTITY CONTRACTS,** which include **GOVERNMENT-WIDE ACQUISITION CONTRACTS (GWACS)** and **MULTIPLE AWARD CONTRACTS** (though they originate from different statutory authorities), are not actual contracts for specific work, but rather agreements by the government to award an unspecified amount of future work to approved contractors – the federal acquisition equivalent of a hunting license. Requirements for competition on such contracts is extremely weak, effectively allowing for hundreds of millions of dollars worth of noncompetitive contracting. New legislation mandated that DoD service contracts – and *only* DoD service contracts – must receive a minimum of three bids, but the regulations have yet to be drafted, let alone implemented. Although using such contracts frequently reduces the length of the acquisition process by as much as 90 percent, they actually stifle competition. Steven Kelman, the former administrator of the Office of Federal Procurement Policy and the architect of "Acquisition Reform," admits that **GWACs cause "many task orders [to become] de facto sole-source awards,"** because they often create a bidding environment in which "vendors assume that if they weren't first to get to a customer on a requirement, they shouldn't bother bidding." There is also "evidence that GWACs are... making it harder for qualified small firms to get business,"[23] who are unable to provide such a wide array of goods and services. It is only logical to conclude that such contracts often provide perfect opportunities for large contractors to monopolize entire market segments and thereby liberally overcharge the government.

  The DoD Inspector General's office has commented that "the broad scope of these contracts makes it very difficult to establish accurate pricing..." – a troubling fact considering such contracts are frequently worth hundreds of millions of dollars. According to a DoD IG audit of

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[22] Statement of Angela B. Styles, Administrator for Federal Procurement Policy, before the Readiness and Management Support Subcommittee, Senate Committee on Armed Services, February 27, 2002.

[23] Steven Kelman. "Managing GWACs: Procurement reform's biggest challenge." FCW Government Technology Group webpage, http://208.201.97.5/pubs/fcw/1997/1110/fcw-kelman-11-10-1997.html, published November 11, 1997. Downloaded July 13, 2001.

124 randomly-chosen multiple-award contracts, **nearly half of the contracts studied were sole-sourced** (i.e. awarded without competition) "without providing the other contractors a fair opportunity to be considered." Moreover, only 8 of the 66 sole-sourced contracts had valid justification for sole-source award.[24] In 2001, the DoD IG updated its study, finding: "Contracting organizations continued to direct awards to selected sources without providing all multiple award contractors a fair opportunity to be considered. We found that 304 of 423 task orders **(72 percent) were awarded on a sole-source or directed-source basis** of which 264 were improperly supported. As a result, DoD was not obtaining the benefits of sustained competition and the reduced costs envisioned when Congress provided the authority for multiple award contracts."[25]

- **SERVICE CONTRACTING.** This type of contracting has increasingly been used in the past decade, topping $96.5 billion in FY 1999 – an incredible 69% of the annual defense procurement budget, more than was spent on supplies and equipment.[26] There is nothing inherently wrong with service contracting, but it has recently proven very problematic. The DoD IG conducted an audit of 105 service contracts valued at $6.7 billion. **Major problems were found in each and every contract,** such as poor government cost estimates (81 contracts), inadequate competition (63 contracts), and inadequate contract surveillance (56 contracts), among others. The Assistant IG commented, "In nearly ten years of managing the audit office at the IG, DoD, I do not ever recall finding problems in every item in that large a sample of transactions, programs, or data."[27]

- **PURCHASE CARDS.** Many Defense Department employees are now permitted to use credit cards to complete "small purchases," also known as "micropurchases" (i.e. under $2,500 each). More than 10 million such purchases were made in FY 2000, valued at $5.5 billion.[28] This arrangement allows government purchases to be made **without a formal contract and with essentially no oversight.** According to Senator Chuck Grassley (R-IA), a longtime advocate of ending wasteful defense spending, "issuing credit cards to Pentagon employees without proper checks and balances is like giving people keys to the federal treasury."[29]

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[24] "DoD Use of Multiple Award Task Order Contracts." Office of the Inspector General Department of Defense, Report No. 99-116, April 2, 1999.

[25] "Multiple Award Contracts for Services," Office of the Inspector General, Department of Defense, September 30, 2001.

[26] "Contract Management: No DOD Proposal to Improve Contract Service Costs Reporting," United States General Accounting Office, Report No. GAO-01-295, February 2001.

[27] Statement of Robert J. Lieberman, Assistant Inspector General for Auditing, Dept. of Defense, before the Subcommittee on Government, Management, Information, and Technology, House Committee on Government Reform and Defense Acquisition Reform on Defense Acquisition Management. DoD IG Report No. D-2000-106, March 16, 2000.

[28] "Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse." Statement of Gregory D. Kutz, Director, Financial Management and Assurance, and Robert H. Hast, Managing Director, Office of Special Investigations, before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, House Committee on Government Reform. GAO Report No. 01-995T, July 30, 2001.

[29] "Grassley Seeks to Stop Abuse of Pentagon-Issued Credit Cards." Press Release of the Office of U.S. Senator Chuck Grassley, July 30, 2001. http://grassley.senate.gov/releases/2001/p01r7-30.htm.

A GAO study of these credit cards revealed that purchase cards have been used for "fraudulent [personal business] transactions for pizza, jewelry, phone calls, tires, and flowers." The Fayetteville (NC) *Observer-Times* shed some light on this issue: it performed an independent audit of 100 military credit card purchases, and found major problems with 34% of the purchases, such as missing receipts, improper record-keeping, and misuse.[30] Perhaps the most telling example is that of one cardholder indicted for making over $17,000 in fraudulent personal transactions who "commented that illegal use of the card was 'too easy' and that she was the sole authorizer of the card purchases."[31]

Representative Steve Horn (R-CA), the Chairman of the House Subcommittee on Government Efficiency, held hearings on the subject last year. In his opening statement he pointed out, "This credit card program was designed to save money by eliminating the bureaucracy and paperwork associated with making 'small' purchases. . . . Those benefits, however, do not consider the cost of fraudulent or improper use of the cards for personal expenses. And . . . they fail to consider the cost of proper oversight and management of the programs. . . . the cost of this program may far outweigh its benefits."[32]

Additionally, purchase cards pave the way for contractors to overcharge on micropurchases due to the lack of competition and virtually nonexistent purchase monitoring. A recent DoD IG audit found that overcharging occurred on no fewer than 42% of the audit sample. Not surprisingly, the DoD IG recommended "replacing [i.e. eliminating] the electronic commerce interface" or, at the very least, "improv[ing] management controls on micro-purchases."[33]

The proposed SARA legislation would increase the maximum allowable size of credit card purchases from $2,500 to $25,000.

- **"SHARE-IN-SAVINGS" (SIS) CONTRACTS.** "Share-In-Savings" means that the government hires a contractor to take over an in-house function in hopes of increasing monetary efficiency, and the contractor is paid a certain percentage of whatever savings it generates. While the intent of SIS contracting is to encourage savings and efficiency, the lack of proven benchmarks to calculate such savings, leaves the process entirely subjective and leaves the government open to

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[30] Jeff Newton and Lorry Williams. "IMPAC record-keeping a challenge." *Fayetteville Observer-Times,* January 22, 2000.

[31] "Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse." Statement of Gregory D. Kutz, Director, Financial Management and Assurance, and Robert H. Hast, Managing Director, Office of Special Investigations, before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, House Committee on Government Reform. GAO Report No. 01-995T, July 30, 2001.

[32] Statement of Representative Steve Horn. "The Use and Abuse of Government Purchase Cards: Is Anyone Watching?" July 30, 2001.

[33] "Buying Program of the Standard Automated Material Management System Automated Small Purchase System: Defense Supply Center Philadelphia." Office of the Inspector General, Department of Defense, Report No. D-2001-077, March 13, 2001.

manipulation and endless lawsuits by contractors. Furthermore, share-in-savings contracts undermine Congressional appropriations and oversight by going elsewhere for capital – to the contractor. But this capital is not a free gift and these contracts ensure that the contractor will be paid regardless of Congressional project approval. In addition, this borrowing of capital occurs outside the normal bounds of government procedures creating off-the-books debt at a higher private interest rate, rather than the government's more favorable interest rate. Charles Tiefer, a professor of government contract law at the University of Baltimore, stated that, **"SIS contracts could turn out to be sweetheart deals on an unsound off-the-books basis for politically-favored contractors."**[34]

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These new developments in contracting have made government work more appealing than ever for private industry. Calling such work a **"new hot market,"** the Federal Times reports that "government progress at making purchases faster and easier has prompted many contractors to seek revenue growth in the federal marketplace, according to a new contractor survey." And the executive director of the Coalition for Government Procurement, which represents many major contractors, contentedly reports that "the procurement laws are easier to negotiate, and the government market is more accessible."[35]

DOWNSIZING PROCUREMENT OVERSIGHT

Another major cause of the egregious waste has been massive budget and staff cutbacks in governmental contract oversight, achieved in part through lobbying by defense contractors and a sympathetic Congress. Incredibly, some of the biggest cuts have been imposed upon contract oversight agencies which **consistently save taxpayers far more money than they themselves cost to run.**

An analysis by the Department of Defense Inspector General of audit coverage for defense weapons systems found that "there were 2,531 acquisition programs with estimated costs of $1.4 trillion. Our survey indicated that 58 audit reports addressed 129 of those programs between October 1999 and March 2001. Nineteen of the reports were from the General Accounting Office, 22 from the OIG DoD, and 17 from the Service audit organizations. Nearly all of the audits dealt with selected aspects of programs and were not intended to be comprehensive reviews. It is particularly significant that **only 14 of the largest 906 programs (2 percent) received evaluations of all significant program elements."**[36]

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[34] Charles Tiefer. "'Share-in-Savings' Contracts: Risky Business." http://www.pogo.org/goodgov/crimcont/sharinsavings.htm, published June 13, 2001. Downloaded on July 13, 2001.

[35] Dan Davidson. "Government Is New Hot Market for Contractors." *Federal Times*, May 7, 2001. http://www.federaltimes.com/issues/iss050701a.html. Downloaded July 13, 2001.

[36] Semiannual Report to the Congress, Department of Defense Inspector General, April 1-September 30, 2001.

Robert Lieberman, the DoD Deputy Inspector General, testified to Congress that "in recent years our **oversight of Defense acquisition has been severely constrained by resource shortfalls and conflicting priorities**....Audit coverage has been inadequate in nearly all Defense management sectors that we and the General Accounting Office have identified as high risk areas." Indeed, the DoD IG worries that cuts are "reducing the [oversight] workforce past the point where it can effectively handle its workload."[37]

In a later report to Congress he added: "**Audit reports during the period identified continued problems in purchasing supplies and spare parts due to combinations of procurement personnel cuts**, poorly designed purchasing systems, and inadequate oversight. To restore credibility to the DoD procurement process, the Department needs a more serious effort to avoid overpriced items, such as those we identified during the reporting period. Those included for example, $409 sinks that should have cost $39, $2.10 screws worth $.48, and $.25 dust plugs worth $.03."[38]

DoD Inspector General (DoD IG)

The DoD Inspector General, which investigates and prosecutes procurement fraud (among other useful services), reported in March 2000 that its budget level had been cut by 26% since 1995 and that further cuts are likely. During 2001, the DoD Inspector General identified $3.7 billion in potential savings from audits. Despite these cuts, the oversight workload has by no means decreased: in fiscal year 1999, the Department of Defense purchased about $140 billion in goods and services, a figure which is expected to grow rapidly in the coming years.

Defense Criminal Investigative Service (DCIS)

The Defense Criminal Investigative Service (DCIS), part of the DoD Inspector General's office, detects, investigates, and prevents fraud, waste, abuse, and other improper acts in the Defense Department. Investigative recoveries by the DCIS totaled $810 million in FY 2000,[39] while the annual budget was only $59.7 million,[40] meaning that the DCIS produced nearly $14 in savings for every dollar spent in 2000. DCIS staffing level has been cut by 11% between 1996 and 2001.[41] The yearly combined number of suspensions and debarments resulting from DCIS cases has fallen from 417 in FY 1994 to 183 in FY 2000, a 56% drop. (Appendix C)

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[37] Statement of Robert J. Lieberman, Assistant Inspector General for Auditing, Department of Defense, before the Subcommittee on Government Management, Information and Technology, House Committee on Government Reform on Defense Acquisition Management. DoD IG Report No. D-2000-106, March 16, 2000.

[38] Semiannual Report to the Congress, Department of Defense Inspector General, April 1-September 30, 2001.

[39] Defense Criminal Investigative Service Annual Report, December 2000.

[40] Telephone conversation with Pat Gause, Director of Financial Management, Office of the Department of Defense Inspector General, June 18, 2001.

[41] Telephone conversation with Pat Gause, Director of Financial Management, Office of the Department of Defense Inspector General, June 18, 2001.

DEFENSE CONTRACT MANAGEMENT AGENCY (DCMA)

The Defense Contract Management Agency (DCMA) manages defense contracts, including analysis, review, fraud investigation, and quality assurance assessments of contracts. DCMA staffing level has been cut from about 26,000 in 1990 to about 12,500 in 2001. Moreover, there are plans to further cut this number to 11,000 over the next several years. (Appendix D)

According to Daniel McGinty, DCMA's Director of Congressional and Public Affairs, because of the reductions, "it would [now] be impossible to maintain the same level of oversight we had [in the 1980s]." It is fair to assume that the reduced oversight allows for greater overcharging and increases the risk of inferior products. As McGinty puts it, "Eventually, what you find is that you incur more risk. We cannot [look at contracts with] the same amount of intensity as we did before, and it's going to get worse."[42]

DEFENSE CONTRACT AUDIT AGENCY (DCAA)

The Defense Contract Audit Agency (DCAA) conducts audits of Department of Defense contracts. DCAA staffing level fell from 5,616 to 4,256 between FY 1993 and FY 2000 (Appendix E), and its annual budget was cut from approximately $452 million to $364 million between FY 1997 and FY 2000 - adjusted for inflation, this represents a budget cut of 41%.[43,44] As a result, the number of audits conducted by the DCAA also fell drastically over that period from 72,287 in FY1993 to 41,722 in FY2000 (Appendix E). The DoD IG similarly reported that the number of case referrals from DCAA also dropped over the same time period: The DoD IG received 88 referrals from DCAA in 1991, but received only 30 in 2000 (Appendix E).

GENERAL ACCOUNTING OFFICE (GAO)

The General Accounting Office (GAO) audits, investigates, and assesses expenditures related to defense and other government programs. The GAO currently saves taxpayers approximately $61 for every dollar spent - about $23 billion in total savings in FY 2000. Yet, despite these savings, its annual budget was cut from $438 million to $378 million between FY 1992 and FY 2000. Adjusted for inflation, this represents a 30% cut. Staff level reduced from 5,062 to 3,275 staffer-years in the same time period, a 35% cut. Since these cuts, the annual monetary benefit to American taxpayers has dropped from $36.2 billion to $23.2 billion between FY 1992 and FY 2000. Adjusted for inflation, this represents a 48% drop.[45,46]

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[42] Telephone conversation with Daniel McGinty, Defense Contract Management Agency Staff Director of Congressional and Public Affairs, August 6, 2001.

[43] The Project On Government Oversight. "Defense Waste & Fraud Camouflaged as Reinventing Government." September 1999.

[44] Defense Contract Audit Agency webpage, http://www.dcaa.mil/products.htm. Downloaded July 13, 2001.

[45] United States General Accounting Office (GAO) Comptroller General's 1992 Annual Report, p.2.

[46] United States General Accounting Office (GAO) 2000 Performance Accountability Report.

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It does not make sense to cut back on such highly profitable activities. **Drastically cutting oversight personnel robs the government of good, effective oversight of tens of billions of dollars in contracts each year.** This serves only to make the government and the taxpayer highly vulnerable to exploitation.

But, contract oversight personnel find themselves singled out by Congress for special "separate downsizing emphasis" above and beyond the general downsizing of the federal government that has occurred over the course of the past decade .[47] Unfortunately, "Acquisition Reform" advocates, including former Vice President Al Gore, regard these essential oversight personnel as *part of the problem*:

> "As we pare down the systems of overcontrol and micromanagement in government, we must also pare down the structures that go with them: the oversized headquarters, multiple layers of supervisors and auditors, and offices specializing in the arcane rules of budgeting, personnel, procurement, and finance."[48]

But auditors, investigators, and other oversight personnel do not constitute a bloated bureaucracy; they produce large net savings for the taxpayer. The situation is made all the more dire by the increasing demands being put on oversight agencies, such as:

- Increases in the number and value of procurement contracts.
- New contract types, which take oversight personnel time to learn to monitor effectively.
- Expanded outsourcing of work formerly performed by the government, which is increasing the number of contracts, and hence management and oversight requirements.
- A hampering of competition by the recent wave of defense mega-mergers. Competition used to be a silent ally in keeping contractors from bending the rules.

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[47] Statement of Robert J. Lieberman, Assistant Inspector General for Auditing, Dept. of Defense, before the Subcommittee on Government, Management, Information, and Technology, House Committee on Government Reform and Defense Acquisition Reform on Defense Acquisition Management. DoD IG Report No. D-2000-106, March 16, 2000.

[48] Vice President Al Gore. "Creating a Government That Works Better & Costs Less." Report of the *National Performance Review*, September 7, 1993.

By all accounts, procurement oversight personnel are being stretched very thin – so much so that they have become unable to carefully monitor contractors and prevent overcharging and fraud.

But why would Congress initiate such seemingly ill-advised cutbacks? The simple answer: **defense industry lobbying.** As discussed later in the section entitled "Current Defense Industry Efforts Against Oversight," **these well-funded interests are constantly pressing for reduced contract monitoring, hoping to further overcharge the taxpayer and increase their profit margin.**

TURNING THE JUNKYARD DOGS INTO LAPDOGS

"...there aren't any inspectors around anymore. Because we're 'working with industry.' ... That's part of the problem: where will it unfold and how will it unfold if you've got the government almost in concert with the contractor?"

– William Dupree, former head of the Defense Criminal Investigative Service[49]

In addition to budget and staffing cuts, procurement oversight personnel are quietly but forcefully being told not to carefully root out waste and fraud, and not to strictly remedy these violations.

In January 1994, all 61 federal Inspectors General adopted a brand-new "Vision Statement," in response to "criticisms of their style and focus" by Vice President Gore's "National Partnership for Reinventing Government" campaign. While the text of the statement itself is convoluted and vague (Appendix F), an internal Office of Management and Budget memorandum sheds some light on its true purpose: "To put it simply, the IGs have pledged to focus more on whether Federal programs are working (the 'big picture') and less on identifying individual, minor infractions of procedures (the 'gotchas')." (Appendix G)

This shift marked a major and unprecedented departure from the Inspectors General's original mission. Much of the work that the IGs were designed to do is specific and focused, such as gathering evidence of fraudulent contracting to build a legal case.

THE TROUBLE WITH OUTSOURCING

Defense contractors, along with many Members of Congress, have long advocated for the outsourcing of government jobs under the guise of streamlining and saving money. This practice, accomplished through what are called A-76 job competitions, has been enthusiastically championed by the Bush administration, which plans to privatize 425,000 federal jobs over the course of the next

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[49] John Donnelly and Tony Capaccio. "The Underbelly of Acquisition Reform." *Defense Week,* July 27, 1998.

several years.[50] Unfortunately, outsourcing has proven to be a highly flawed initiative which continues despite overwhelming evidence gathered by the military that **"the A-76 process has not generated anything near the results expected,"** that "the savings are at best marginal," and that "cost-driven outsourcing strategies are undermining the DoD." In one survey of military installation commanders, for example, 79% disagreed with the statement, "Outsourcing has improved my mission performance."[51]

According to the think tank Reason Public Policy Institute (which supports outsourcing in principle but sees the current system as flawed), the competitions often "take years to complete at a high cost per position studied," and furthermore, "inadequate cost accounting systems... make cost comparisons suspect at best." (Appendix H)

Even as DoD is frequently forced to outsource work, it is generally unable to determine whether the work is being done competently and efficiently. No law currently mandates collecting careful data on contracted work, and contractors generally refuse to disclose any such data when not required to do so.

A reported contracting workforce of 737,000, in fact, marks "the first acknowledgment by the department that the contractor work force has grown larger than its own civilian work force, which numbers 672,000." The American Federation of Government Employees has observed that **"DoD's workforce has not gotten smaller; it's merely been reconfigured"** through abundant outsourcing.[52] The Federal Times also recently voiced concerns that:

> **"There is nothing efficient in developing a shadow government** of underpaid second-class employees. ... Far too often these jobs are merely stripped of the benefits federal employees have earned, and bid out to the lowest bidder. ... It has resulted in less information, less innovation, less communication and less empowerment. ... As such, outsourcing becomes an **extremely inefficient and wasteful use of... taxpayer funds."**[53]

CURRENT DEFENSE INDUSTRY EFFORTS AGAINST THE TAXPAYER

Several powerful associations of defense contractors are in the midst of lobbying hard to loosen contracting regulations even further. The Acquisition Reform Working Group (ARWG), a lobbying group which is comprised of ten major contractor associations, includes the Aerospace Industries

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[50] Laurence McQuillan. "Bush puts federal overhaul on hold: Civil service changes to happen over time." *USA Today*, July 3, 2001. http://www.usatoday.com/news/washdc/july01/2001-07-03-overhaul.htm. Downloaded July 18, 2001.

[51] Lt Col. Warren Anderson, LTC John McGuiness, and CDR John Spicer. "From Chaos to Clarity: How Current Cost Based Strategies are Undermining the Department of Defense." Defense Acquisition University, September 2001.

[52] Tichakorn Hill. "Contractors Outnumber Employees at Defense." *Federal Times*, April 2, 2001. http://www.federaltimes.com/issues/iss040201b.html. Downloaded July 13, 2001.

[53] Ed Exum and Mimi Johnson. "Outsourcing is Ineffective 'Sleight of Hand.'" *Federal Times*, June 4, 2001. http://www.federaltimes.com/commentary/com01.html. Downloaded July 13, 2001.

Association, the National Defense Industrial Association, the Professional Services Council, and the U.S. Chamber of Commerce, among others. They generally claim that they fight for "Acquisition Reform" which will "cut red tape" and save the taxpayer money, but their recommendations have historically led to increased waste and fraud.

Not only is ARWG cited in the drafting notes of a copy of the Services Acquisition Reform Act, as mentioned earlier (Appendix B), but ARWG's 2002 legislative recommendations start by saying, "We greatly appreciate the action taken on our proposals and stand ready to continue to work with the Members and staff." (Appendix I) It is fair to assume that the current legislation is being unduly influenced by industry's views.

Defense contractors spent $53.1 million lobbying Congress in 1999, along with $13.7 million in 2000 campaign contributions.[54] Indeed, these defense contractor associations wield considerable influence, and meet with frequent successes, despite their transparent desire to increase their own profits at the expense of taxpayers. For example:

- The Aerospace Industries Association, a contractor lobbying agency, has by their own account been **fighting for several years to eliminate statutes which require contractors to provide fair and accurate pricing data,**[55] such as the Truth In Negotiations Act.

- The Contract Services Association of America, which represents over 330 contractors, advocates "broadening the available contract types to include standard commercial-type contract vehicles," (Appendix J) – contracts – including "time and material" and "labor hour" type contracts – that would allow contractors to be paid according to how much time and manpower they invest in a project, regardless of performance, likely opening up a federal money sinkhole.

- The Acquisition Reform Working Group, composed of 10 industry associations, has proposed legislative changes which would allow defense contractors to define entire business segments as "commercial" and thereby exempt them from a large amount of oversight. These regulations would apply even when 25% of a segment's contracts (by dollar amount) are noncommercial. (Appendices K & J)

- The Aerospace Industries Association and the U.S. Chamber of Commerce have questioned the constitutionality of the False Claims Act. Using misleading logic, they claim that whistleblowers should lack legal standing.[56] In 1999, the U.S. Supreme Court ruled unanimously against such claims. Every year, there are new industry attacks on this law.

Clearly, these contractor associations – among others – are eager to undermine many vital regulations that protect the government from procurement waste and fraud.

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[54] Center for Responsive Politics, http://www.opensecrets.org. Downloaded August 1, 2001.

[55] Aerospace Industries Association, http://www.aia-aerospace.org/aianews/aiaupdate/u-march98.cfm. Downloaded July 13, 2001.

[56] Amici Curiae filed November 1999 by the U.S. Chamber of Commerce and the Aerospace Industries Association of America for U.S. Supreme Court, Case No. 98-1828, *Vermont Agency of Natural Resources v. U.S. ex. rel. Stevens.*

RECOMMENDATIONS

As discussed above, the new "Acquisition Reform" has nothing to do with its stated purpose of cutting bureaucratic red tape. To the contrary, it has focused on weakening or bypassing protections, and on unraveling the free market forces that protect the taxpayer. Policies should be revised to encourage contractor competition through the free market where possible, while strengthening important contracting and accounting procedures that aid the government in negotiating with large, powerful defense contractors when no free market exists. The following proposals, including suggestions for legislative changes, could help ensure that newer reforms do not come at the cost of crippling previous reforms:

- **RESTORE COMMON-SENSE DEFINITIONS FOR TWO KEY PROCUREMENT-RELATED TERMS:**

  1) Restore the definition of **"commercial items"** to those *actually* sold to the general public in significant quantities, rather than the current loosened definition: an item not necessarily sold to the public, but merely "offered for sale." Today, many "commercial items" never actually experience sales to the public, allowing the defense contractors that produce them to charge exorbitant amounts while pretending that a competitive commercial market is keeping prices in line. Such parts should not be exempt from the usual oversight.

  2) Restore the definition of **"competitive bidding"** to require at least two bidders. The current definition stipulates that there is "competition" even if there is only one bid, as long as others *could have* bid. The idea of "competitive" one-bid is a blatant oxymoron – competitive oversight exemptions should not apply when the supplier has a monopoly.

- **PROTECT AND RESTORE 1980S-ERA PROCUREMENT LAWS,** discussed earlier in this report, which provide effective protections against contractor fraud:

  1) Eliminate new loopholes created in the Competition in Contracting Act of 1984 to ensure that as many contracts as possible are fully competed. Such competition helps ensure that the government gets a good deal.

  2) Reverse the recent weakening of the Cost Accounting Standards Board (CAS Board), require increased CAS enforcement, and lower the CAS "trigger contract" (the contract that first initiates CAS Board oversight) threshold from $7.5 million to $500,000.

  3) Defend the False Claims Act (FCA) against industry assaults. Since false claims recoveries now total well over $1 billion per year, it continues to be a target of industry lobbying. Furthermore, false claims whistleblowers must be given adequate legal protections.

  4) Restore applicability of the Truth in Negotiations Act (TINA) to its former level. Under the Federal Acquisition Streamlining Act of 1994 (FASA) and the Clinger-Cohen Act, so-called "commercial items" are exempt from TINA, even though many such items have no real commercial market. Requiring contractors to provide accurate, up-to-date cost data will promote fairer pricing.

- **MODIFY PROCUREMENT PRACTICES THAT INCLUDE WASTEFUL OR CORRUPT LOOPHOLES,** specifically including, but not limited to, those outlined earlier in this report:

  1) Government-wide Acquisition contracts (GWACs), as well as Multiple Award Indefinite Delivery Indefinite Quantity contracts, which allow large contractors to monopolize entire market segments and stifle small contractors particularly with regards to service contracting, which is not inherently misguided, but currently lacks adequate oversight and is a significant source of waste;

  2) Purchase cards, which allow government purchases to be made with virtually no oversight; and

  3) Share-in-Savings contracts, which create a high risk for "sweetheart deals on an unsound off-the-books basis for politically favored contractors."

- **RESTORE FUNDING FOR CONTRACT OVERSIGHT.** Many of the oversight agencies save us far more money than they cost, and they prevent a great deal of contractor fraud and waste when properly funded and staffed. Contractors and their friends in Congress consider oversight as unnecessary "red tape," but these agencies have consistently proven themselves to be very effective, and indeed very necessary. In short, to keep cutting back on oversight is to throw away money.

- **REVISE FEDERAL OUTSOURCING POLICIES.** Outsourcing must only be undertaken when there is a clear possibility of increased performance or efficiency. The A-76 Initiative should be modified to discourage purely cost-driven outsourcing which generally fails to benefit the government or the taxpayer. Furthermore, as long as contractors are doing so much formerly-governmental work, it seems only fair to require them to provide detailed performance data, just as federal agencies do under the Federal Activities Inventory Reform (FAIR) Act. In this way, competence can be monitored, and poorly-performing outsourcing programs can be remedied or eliminated.

APPENDICES

Appendix A: Excerpts from "Future Role of the Cost Accounting Standards Board." Prepared for Congress by the Cost Accounting Standards Board Review Panel, April 2, 1999.

Appendix B: "Working Draft: Services Acquisition Reform Act," including drafting notes that mention specific contractor lobbyists, September 7, 2001.

Appendix C: Excerpts from Assistant Inspector General for Investigations Defense Criminal Investigative Service Annual Report for 2000, Office of the Inspector General, Department of Defense, December 2000.

Appendix D: Defense Contract Management Agency Public Affairs Office special report, July 11, 2001.

Appendix E: Defense Contract Audit Agency Freedom Of Information Act document, September 30, 2001, and Department of Defense Inspector General Freedom Of Information Act document, August 29, 2001.

Appendix F: "Inspectors General Vision and Strategies to Apply Our Reinvention Principles," January 1994.

Appendix G: Memorandum for Program Associate Directors, Deputy Associate Directors, and OMB Branch Chiefs, from Alice Rivlin, Deputy Director of the Office of Management and Budget, regarding Inspectors General Vision Statement, April 11, 1994.

Appendix H: Testimony of Carl D. DeMaio, Director of Government Redesign, Reason Public Policy Institute, before the GAO Commercial Activities Panel, June 11, 2001.

Appendix I: Acquisition Reform Working Group 2002 Legislative Package Executive Summary.

Appendix J: Statement of Mark Wagner, Chairman, Public Policy Council for the Contract Services Association of America, before the Government Reform Subcommittee on Technology and Procurement Policy, May 22, 2001.

Appendix K: Letter from the Acquisition Reform Working Group to the Hon. Bob Stump, Chairman, House Armed Services Committee, July 29, 2001.

.....
(Original Signature of Member)

107TH CONGRESS
2ND SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. TOM DAVIS of Virginia introduced the following bill; which was referred to the Committee on _____

A BILL

To make improvements with respect to the procurement of services for the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Services Acquisition Reform Act of 2002".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—ACQUISITION WORKFORCE TRAINING

Sec. 101. Definition of acquisition.
Sec. 102. Acquisition workforce training fund.
Sec. 103. Government-industry exchange program.
Sec. 104. Reimbursement of costs.
Sec. 105. Conforming amendments.
Sec. 106. Acquisition workforce recruitment and retention pilot program.
Sec. 107. Authorization of telecommuting for Federal contractors.
Sec. 108. Architectural and engineering acquisition workforce.

TITLE II—ADAPTATION OF BUSINESS ACQUISITION PRACTICES

Subtitle A—Adaptation of Business Management Practices

Sec. 201. Chief Acquisition Officers.
Sec. 202. Increased role for Defense Contract Management Agency.
Sec. 203. Study on horizontal acquisition.
Sec. 204. Statutory and regulatory review.

Subtitle B—Payment Terms

Sec. 211. Payment terms.

Subtitle C—Acquisitions Generally

Sec. 221. Increase in authorization levels of Federal purchase cards.
Sec. 222. Reauthorization of franchise funds.
Sec. 223. Acquisition protests.
Sec. 224. Architectural and engineering services.

TITLE III—CONTRACT INCENTIVES

Sec. 301. Revisions to share-in-savings initiatives.
Sec. 302. Incentives for contract efficiency.

TITLE IV—ACQUISITIONS OF COMMERCIAL ITEMS

Sec. 401. Preference for performance-based contracting.
Sec. 402. Authorization of additional contract types in FAR part 12.
Sec. 403. Clarification of commercial services definition.
Sec. 404. Designation of commercial business entities.
Sec. 405. Continuation of eligibility of contractor for award of information technology contract after providing design and engineering services.
Sec. 406. Commercial liability.

TITLE V—TECHNOLOGY ACCESS IN A COMMERCIAL ENVIRONMENT

Sec. 501. Trade Agreements Act of 1979 exemption for information technology commercial items.
Sec. 502. Authorization for acquisition of information technology by State and local governments through Federal supply schedules.
Sec. 503. Certain research and development by civilian agencies.

TITLE VI—INFLATIONARY ADJUSTMENTS

Sec. 601. Simplified acquisition threshold inflation adjustment.

TITLE I—ACQUISITION WORKFORCE TRAINING

SEC. 101. DEFINITION OF ACQUISITION.

Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) is amended by adding at the end the following:

"(16) The term 'acquisition'—

"(A) means acquiring, by contract with appropriated funds, property or services (including construction) by and for the use of the Federal Government through purchase or lease, from the point at which executive agency needs are established by the chief acquisition officer of the executive agency; and

"(B) includes—

"(i) acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;

"(ii) the description of requirements to satisfy agency needs;

"(iii) solicitation and selection of sources;

"(iv) award of contracts;

1 "(v) contract performance;

2 "(vi) contract administration; and

3 "(vii) technical and management func-

4 tions directly related to the process of ful-

5 filling agency needs by contract.".

6 **SEC. 102. ACQUISITION WORKFORCE TRAINING FUND.**

7 (a) PURPOSES.—The purposes of this section are to

8 ensure that the Federal acquisition workforce—

9 (1) adapts to fundamental changes in the na-

10 ture of Federal Government acquisition of property

11 and services associated with the changing role of the

12 Federal Government; and

13 (2) acquires new skills and a new mindset to

14 enable it to contribute effectively in the changing en-

15 vironment of the 21st century.

16 (b) AMENDMENT OF OFFICE OF FEDERAL PROCURE-

17 MENT POLICY ACT.—Section 37 of the Office of Federal

18 Procurement Policy Act (41 U.S.C. 433) is amended—

19 (1) by striking subsection (a) and inserting the

20 following:

21 "(a) APPLICABILITY.—Subsections (b) through (g)

22 do not apply to an executive agency that is subject to

23 chapter 87 of title 10, United States Code. Subsection (h)

24 applies to all executive agencies, the United States Postal

25 Service, and mixed-ownership Government corporations

1 (as defined in section 9101 of title 31, United States
2 Code)."; and
3 (2) by adding at the end of subsection (h) the
4 following new paragraph:
5 "(3) ACQUISITION WORKFORCE TRAINING
6 FUND.—(A) The Administrator of General Services
7 shall establish an acquisition workforce training
8 fund, which shall be managed by the Federal Acqui-
9 sition Institute in support of acquisition workforce
10 training across executive agencies other than the De-
11 partment of Defense.
12 "(B) The training fund described in subpara-
13 graph (A) shall be funded by depositing into the
14 fund 5 percent of the fees collected by executive
15 agencies under Governmentwide task-and-delivery-
16 order contracts authorized under sections 2304a
17 through 2304d of title 10, United States Code, sec-
18 tions 303H through 303K of the Federal Property
19 and Administrative Services Act of 1949 (41 U.S.C.
20 253h–253k), Governmentwide acquisition contracts
21 described in section 5112(e) of the Clinger-Cohen
22 Act of 1996 (40 U.S.C. 1412(e)), multiagency acqui-
23 sition contracts authorized under section 5124 of the
24 Clinger-Cohen Act of 1996 (40 U.S.C. 1424), or

1 multiple-award schedule contracts awarded by the
2 General Services Administration.
3 "(C) The head of an executive agency that ad-
4 ministers a contract described in subparagraph (B)
5 shall remit the amount specified to the General
6 Services Administration at the end of each quarter
7 of the fiscal year.
8 "(D) The Administrator of General Services
9 and the Office of Federal Acquisition Policy shall
10 ensure that funds collected for training under this
11 section are not used for any purpose other than the
12 purpose specified in subparagraph (A). Amounts de-
13 posited into the fund shall remain available until ex-
14 pended.".

15 **SEC. 103. GOVERNMENT-INDUSTRY EXCHANGE PROGRAM.**

16 (a) In General.—Subpart B of part III of title 5,
17 United States Code, is amended by adding at the end the
18 following new chapter:

19 **"CHAPTER 37—ACQUISITION**
20 **PROFESSIONAL EXCHANGE PROGRAM**

"Sec.
"3701. Definitions.
"3702. Detail authority.
"3703. Detail of employees to private sector organizations.
"3704. Transfer and detail of employees from private sector organizations.
"3705. Authority of the Office of Personnel Management.

21 **"§ 3701. Definitions**

22 "For purposes of this chapter—

1 "(1) the term 'agency'—
2 "(A) subject to subparagraph (B), means
3 an executive agency; and
4 "(B) does not include—
5 "(i) the General Accounting Office;
6 "(ii) an Office of Inspector General of
7 an establishment or a designated Federal
8 entity established under the Inspector Gen-
9 eral Act of 1978; and
10 "(iii) the Defense Contract Audit
11 Agency referred to in section 2313(b) of
12 title 10; and
13 "(2) the term 'detail' means—
14 "(A) the assignment or loan of an em-
15 ployee to a private sector organization without
16 a change of position in the agency at which the
17 individual is employed; or
18 "(B) the assignment or loan of an em-
19 ployee of a private sector organization to an
20 agency without a change of position in the pri-
21 vate sector organization.
22 **"§ 3702. Detail authority**
23 "(a) At the request of, or with the agreement of, a
24 private sector organization, and with the consent of the
25 employee concerned, the head of an agency may arrange

1 for the detail of an eligible employee of the agency to a
2 private sector organization or an eligible individual em-
3 ployed by a private sector organization to the agency. For
4 purposes of this section, an eligible employee or individual
5 employed is an individual employed at the GS–11 level or
6 above (or the equivalent) who—
7 "(1) works in the field of Federal acquisition or
8 acquisition management;
9 "(2) is considered an exceptional performer by
10 the individual's employer; and
11 "(3) is expected to assume increased acquisition
12 management responsibilities.
13 An employee of an agency shall be eligible to participate
14 under this section only if the employee is serving under
15 a career or career-conditional appointment or an appoint-
16 ment of equivalent tenure in the excepted service.
17 "(b) Each agency that exercises the authority pro-
18 vided by this section shall establish a plan for imple-
19 menting such authority. The plan shall provide for a writ-
20 ten agreement between the agency and the employee con-
21 cerned regarding the terms and conditions of the employ-
22 ee's detail. In the case of an employee of the agency, the
23 agreement shall—

1 "(1) require the employee to serve in the civil
2 service, upon completion of the assignment, for a pe-
3 riod equal to the length of the detail; and
4 "(2) provide that, in the event the employee
5 fails to carry out the agreement (except for good and
6 sufficient reason, as determined by the head of the
7 detailing agency), the employee shall be liable to the
8 United States for payment of all expenses (excluding
9 salary) of the detail. The amount shall be treated as
10 a debt due to the United States.
11 "(c) A detail under this chapter may be terminated
12 by the agency or private sector organization concerned for
13 any reason at any time.
14 "(d) A detail under this chapter shall be for a period
15 of between 6 months and 1 year and may be extended
16 in three-month increments for a total of not more than
17 1 year.
18 "(e) The Procurement Executives Council, by agree-
19 ment with the Office of Personnel Management, may as-
20 sist in the administration of this chapter, including by
21 maintaining lists of potential candidates for detail under
22 this chapter, establishing mentoring relationships for the
23 benefit of individuals who are given a detail under this
24 chapter, and publicizing the program carried out under
25 this chapter.

1 **"§ 3703. Detail of employees to private sector organi-**
2 **zations**
3 "(a) An employee of an agency may be assigned to
4 a private sector organization under this chapter as a detail
5 to a regular work assignment.
6 "(b) Notwithstanding any other provision of law, an
7 employee assigned under subsection (a) is entitled—
8 "(1) to receive supplemental pay from the agen-
9 cy in the amount equal to the difference between the
10 rate paid by the organization to which detailed and
11 the rate of basic pay (including locality pay, where
12 applicable, subject to regulations of the Office of
13 Personnel Management) payable for the employee's
14 Federal position, if the latter is greater;
15 "(2) in the case of an employee who is detailed
16 under subsection (a), to credit for the period of as-
17 signment under this chapter toward periodic step in-
18 creases, retention, and leave accrual;
19 "(3) to retain coverage, rights, and benefits
20 under chapters 87 and 89, if necessary employee de-
21 ductions and agency contributions for the period of
22 the assignment are deposited in the Employees' Life
23 Insurance Fund and the Employees Health Benefits
24 Fund, respectively, and the period of the assignment
25 is service as an employee under chapters 87 and 89;

1 "(4) to retain coverage, rights, and benefits
2 under any system established by law for the retire-
3 ment of employees, if necessary employee deductions
4 and agency contributions in payment for the cov-
5 erage, rights, and benefits for the period of assign-
6 ment are deposited in the system's fund and the pe-
7 riod of the assignment is creditable under the sys-
8 tem, except that such service shall not be considered
9 creditable service for the purpose of any retirement
10 system for Federal employees if such service forms
11 the basis, in whole or in part, for an annuity or pen-
12 sion under the retirement system of the private sec-
13 tor organization; and
14 "(5) to retain coverage, rights, and benefits
15 under subchapter I of chapter 81, and employment
16 during the assignment is deemed employment by the
17 United States, but if the employee or the employee's
18 dependents receive from the private sector organiza-
19 tion any payment under an insurance policy for
20 which the premium is wholly paid by the private sec-
21 tor organization, or other benefit of any kind on ac-
22 count of the same injury or death, the amount of
23 such payment or benefit shall be credited against
24 any compensation otherwise payable under sub-
25 chapter I of chapter 81.

1 During the employee's assignment to the private sector or-
2 ganization, the agency from which the employee is detailed
3 shall make contributions for retirement and insurance
4 purposes from the appropriations or funds of that agency
5 so long as contributions are made by the employee.

6 "(c) The detail of an employee of an agency under
7 subsection (a) may be made with or without reimburse-
8 ment by the private sector organization for the travel and
9 transportation expenses to or from the place of assign-
10 ment, subject to the same terms and conditions that apply
11 with respect to an employee of a Federal agency or a State
12 or local government under section 3375, and for the pay,
13 or supplemental pay, or any part thereof of the employee
14 during assignment. Any reimbursements shall be credited
15 to the appropriation of the agency used for paying the
16 travel and transportation expenses or pay.

17 "(d) An employee assigned on detail under subsection
18 (a) remains an employee of the agency from which de-
19 tailed. The Federal Tort Claims Act and any other Fed-
20 eral tort liability law apply to the employee. The super-
21 vision of the duties of an employee on detail may be gov-
22 erned by an agreement between the agency and the organi-
23 zation to which detailed.

24 "(e) Notwithstanding any other provision of law, an
25 employee detailed under subsection (a) is entitled to ac-

1 crue annual and sick leave to the same extent as if the
2 employee had continued working in the position from
3 which detailed.

4 **"§ 3704. Transfer and detail of employees from pri-**
5 **vate sector organizations**

6 "(a) Notwithstanding any other provision of law, an
7 individual employed by a private sector organization who
8 is assigned to an agency under section 3702(a) may be—
9 "(1) transferred to the agency and appointed
10 without regard to the provisions of this title gov-
11 erning appointment in the competitive service for the
12 period of assignment; or
13 "(2) detailed to the agency.
14 "(b) An individual appointed under subsection (a)(1)
15 is entitled to pay in accordance with chapter 51 and sub-
16 chapter III of chapter 53 or other applicable law, and is
17 deemed an employee of the agency for all purposes
18 except—
19 "(1) subchapter III of chapter 83, chapter 84,
20 or other applicable retirement system;
21 "(2) chapter 87; and
22 "(3) chapter 89 or other applicable health bene-
23 fits system unless the appointment results in the
24 employee's loss of coverage in a group health bene-

1 fits plan the premium of which has been paid in
2 whole or in part by the private sector organization.
3 The exceptions set forth in paragraphs (1) through (3)
4 shall not apply to non-Federal employees who are covered
5 by chapters 83, 84, 87, and 89 by virtue of their non-
6 Federal employment immediately before appointment
7 under subsection (a)(1).
8 "(c) An employee of a private sector organization who
9 is detailed to an agency under subsection (a)(2)—
10 "(1) is not entitled to pay from the agency, ex-
11 cept to the extent that the pay for the position to
12 which detailed (including locality pay, where applica-
13 ble) exceeds the pay the individual was receiving
14 from the private sector organization immediately be-
15 fore the detail;
16 "(2) may continue to receive pay and benefits
17 from the private sector organization from which he
18 is detailed;
19 "(3) is deemed an employee of the agency for
20 the purposes of—
21 "(A) chapter 73, except for section
22 7353(a)(1);
23 "(B) sections 203, 205, 207, 208, 603,
24 606, 607, 643, 654, 1905, and 1913 of title 18;

1 "(C) sections 1343, 1344, and 1349(b) of
2 title 31;
3 "(D) the Federal Tort Claims Act and any
4 other Federal tort liability law;
5 "(E) the Ethics in Government Act of
6 1978;
7 "(F) section 1043 of the Internal Revenue
8 Code of 1986; and
9 "(G) section 27(b) of the Office of Federal
10 Procurement Policy Act; and
11 "(4) is subject to such regulations as the Presi-
12 dent may prescribe.
13 The supervision of an employee who is detailed under sub-
14 section (a)(2) may be governed by agreement between the
15 agency and the private sector organization concerned. A
16 detail under subsection (a)(2) may be made with or with-
17 out reimbursement by the agency for the pay, or a part
18 thereof, of the employee during the period of assignment,
19 or for any contribution of the private sector organization
20 to employee benefit systems.
21 "(d) If a private sector organization fails to continue
22 the employer's contribution to private sector retirement,
23 life insurance, and health benefit plans for an individual
24 who is appointed in an agency under this section, the em-
25 ployer's contributions covering the period of the assign-

1 ment may be made from the appropriations of the agency
2 concerned.
3 "(e) A private sector employee who is given an as-
4 signment in an agency under subsection (a) and who suf-
5 fers disability or dies as a result of personal injury sus-
6 tained while performing duties during the assignment
7 shall be treated, for the purpose of subchapter I of chapter
8 81, as an employee as defined by section 8101 who had
9 sustained the injury in the performance of duty, except
10 that if the employee or the employee's dependents receive
11 from the private sector organization any payment under
12 an insurance policy for which the premium is wholly paid
13 by the private sector organization, or other benefit of any
14 kind on account of the same injury or death, the amount
15 of such payment or benefit shall be credited against any
16 compensation otherwise payable under subchapter I of
17 chapter 81.

18 **"§ 3705. Authority of the Office of Personnel Manage-**
19 **ment**

20 "The Director of the Office of Personnel Manage-
21 ment shall prescribe regulations for the administration of
22 this chapter.".
23 (b) CLERICAL AMENDMENT.—The table of contents
24 for part III of title 5, United States Code, is amended

1 by inserting after the item relating to chapter 35 the fol-
2 lowing:

"37. Acquisition Professional Exchange Program.".

3 **SEC. 104. REIMBURSEMENT OF COSTS.**

4 Not later than 120 days after the date of the enact-
5 ment of this Act, the Federal Acquisition Regulation shall
6 be amended to provide for reimbursement of costs associ-
7 ated with an employee's participation in the program au-
8 thorized by chapter 37 of title 5, United States Code (as
9 added by section 103) as allowable training and education
10 costs. Such costs—
11 (1) include—
12 (A) the employee's salary and fringe bene-
13 fits for a period not to exceed the period of the
14 employee's assignment under such program;
15 and
16 (B) moving and travel expenses; and
17 (2) may be treated, for accounting purposes—
18 (A) as an indirect cost and accounted for
19 in—
20 (i) an established overhead account; or
21 (ii) an overhead account established
22 specifically for such program and allocated
23 exclusively to the contractor's Federal Gov-
24 ernment contracts; or

1 (B) as a direct cost chargeable to fixed
2 price or time and material contracts.

3 **SEC. 105. CONFORMING AMENDMENTS.**

4 (a) TITLE 5, U.S.C.—Title 5, United States Code,
5 is amended—

6 (1) in section 3111, by adding at the end the
7 following:

8 "(d) Notwithstanding section 1342 of title 31, the
9 head of an agency may accept voluntary service for the
10 United States under chapter 37 of this title and regula-
11 tions of the Office of Personnel Management."; and

12 (2) in section 4108, by striking subsection (d).

13 (b) OTHER LAWS.—Section 125(c)(1) of Public Law
14 100–238 (5 U.S.C. 8432 note) is amended—

15 (1) in subparagraph (B), by striking "or" at
16 the end;

17 (2) in subparagraph (C), by striking "and" at
18 the end and inserting "or"; and

19 (3) by adding at the end the following:

20 "(D) an individual assigned from a Fed-
21 eral agency to a private sector organization
22 under chapter 37 of title 5, United States Code;
23 and".

1 **SEC. 106. ACQUISITION WORKFORCE RECRUITMENT AND**
2 **RETENTION PILOT PROGRAM.**

3 (a) IN GENERAL.—For purposes of sections 3304,
4 5333, and 5753 of title 5, United States Code, the head
5 of an agency (including the Secretary of Defense) may de-
6 termine that certain Federal acquisition positions are
7 "shortage category" positions in order to recruit and di-
8 rectly hire employees with high qualifications, such as em-
9 ployees who—

10 (1) hold a bachelor's degree from an accredited
11 institution of higher learning, earned with a grade
12 point average of 3.2 or higher (or the equivalent);

13 (2) hold a law or masters or equivalent degree
14 from an accredited institution of higher education in
15 business administration, public administration, or
16 systems engineering; or

17 (3) have had outstanding experience with com-
18 mercial acquisition practices, terms, and conditions.

19 (b) REQUIREMENTS.—Personnel actions under this
20 paragraph shall be subject to policies prescribed by the
21 Office of Personnel Management for direct recruitment,
22 including the appointment of a preference eligible as long
23 as preference eligibles are available who satisfy the stipu-
24 lated high level of qualifications.

25 (c) PERIOD OF AUTHORITY.—Authority under this
26 section shall expire on September 30, 2006. The Adminis-

1 trator of the Office of Federal Procurement Policy shall
2 submit a report to Congress 180 days prior to the expira-
3 tion of this authority describing the efficacy of this pro-
4 gram in attracting employees with unusually high quali-
5 fications to the acquisition workforce and providing a rec-
6 ommendation on whether the authority should be ex-
7 tended.

8 **SEC. 107. AUTHORIZATION OF TELECOMMUTING FOR FED-**
9 **ERAL CONTRACTORS.**

10 (a) AMENDMENT TO THE FEDERAL ACQUISITION
11 REGULATION.—Not later than 180 days after the date of
12 the enactment of this Act, the Federal Acquisition Regula-
13 tion issued in accordance with sections 6 and 25 of the
14 Office of Federal Procurement Policy Act (41 U.S.C. 405
15 and 421) shall be amended to permit the use of telecom-
16 muting by employees of Federal contractors in the per-
17 formance of contracts with executive agencies.

18 (b) CONTENT OF AMENDMENT.—The amendment
19 issued pursuant to subsection (a) shall, at a minimum,
20 provide that solicitations for the acquisition of goods or
21 services shall not set forth any requirement or evaluation
22 criteria that would—

23 (1) render an offeror ineligible to receive a con-
24 tract award based on the offeror's plan to allow its
25 employees to telecommute; or

1 (2) reduce the scoring of an offeror's proposal
2 based upon the contractor's plan to allow its employ-
3 ees to telecommute, unless the contracting officer
4 first—
5 (A) determines that the needs of the agen-
6 cy, including the security needs of the agency,
7 cannot be met without any such requirement;
8 and
9 (B) explains in writing the basis for that
10 determination.
11 (c) GAO REPORT.—Not later than one year after the
12 date on which the amendment required by subsection (a)
13 is published in the Federal Register, the Comptroller Gen-
14 eral shall submit to Congress an evaluation of—
15 (1) compliance by executive agencies with the
16 regulations; and
17 (2) conformance of the regulations with existing
18 law, together with any recommendations that the
19 Comptroller General considers appropriate.
20 (d) DEFINITION.—In this section, the term "execu-
21 tive agency" has the meaning given that term in section
22 105 of title 5, United States Code.

1 **SEC. 108. ARCHITECTURAL AND ENGINEERING ACQUISI-**
2 **TION WORKFORCE.**

3 The Administrator of the Office of Federal Procure-
4 ment Policy, in consultation with the Secretary of Defense
5 and the Director of the Office of Personnel Management,
6 shall develop and implement a plan to assure that the Fed-
7 eral Government maintains a core in-house architectural
8 and engineering capability to—

9 (1) ensure expertise to determine each agency's
10 need for services;

11 (2) establish priorities and programs (including
12 acquisition plans);

13 (3) establish professional standards;

14 (4) develop scopes of work; and

15 (5) manage and award contracts for such serv-
16 ices.

17 TITLE II—ADAPTATION OF BUSI-
18 NESS ACQUISITION PRAC-
19 TICES

20 Subtitle A—Adaptation of Business
21 Management Practices

22 **SEC. 201. CHIEF ACQUISITION OFFICERS.**

23 (a) APPOINTMENT OF CHIEF ACQUISITION OFFI-
24 CERS.—(1) Section 16 of the Office of Federal Procure-
25 ment Policy Act (41 U.S.C. 414) is amended to read as
26 follows:

1 **"SEC. 16. APPOINTMENT OF CHIEF ACQUISITION OFFICERS.**

2 "(a) To further achieve effective, efficient, and eco-
3 nomic administration of the Federal acquisition system,
4 the head of each executive agency shall appoint a Chief
5 Acquisition Officer for the agency.

6 "(b) A Chief Acquisition Officer appointed under sub-
7 section (a), in accordance with applicable laws, Govern-
8 mentwide policies and regulations, and good business
9 practices, shall be responsible for—

10 "(1) providing advice and other assistance to
11 the head of the executive agency and other senior
12 management personnel of the executive agency to
13 ensure that the agency's mission goals are achieved
14 through the management of the agency's acquisition
15 activities and acquisitions in a manner that imple-
16 ments the policies and procedures of this division,
17 consistent with chapter 11 of title 31, United States
18 Code, and the priorities established by the head of
19 the executive agency;

20 "(2) increasing the use of full and open com-
21 petition in the acquisition of property or services by
22 the executive agency by establishing policies, proce-
23 dures, and practices that assure that the executive
24 agency receives a sufficient number of sealed bids or
25 competitive proposals from responsible sources to
26 fulfill the Government's requirements (including per-

1 formance and delivery schedules) at the best value
2 considering the nature of the property or service
3 procured;
4 "(3) making acquisition decisions consistent
5 with all applicable law and establishing clear lines of
6 authority, accountability, and responsibility for ac-
7 quisition decisionmaking within the executive agen-
8 cy;
9 "(4) managing the direction of acquisition pol-
10 icy for the executive agency, including implementa-
11 tion of the unique acquisition policies, regulations,
12 and standards of the executive agency; and
13 "(5) developing and maintaining an acquisition
14 career management program in the executive agency
15 to assure an adequate professional workforce.
16 "(c) The Chief Acquisition Officer of an executive
17 agency shall—
18 "(1) have acquisition management as that offi-
19 cial's primary duty;
20 "(2) monitor the performance of acquisition ac-
21 tivities and acquisition programs of the agency,
22 evaluate the performance of those programs on the
23 basis of the applicable performance measurements,
24 and advise the head of the agency regarding the ap-

1 propriate business strategy to achieve the agency
2 mission; and
3 "(3) annually, as part of the strategic planning
4 and performance evaluation process required (sub-
5 ject to section 1117 of title 31, United States Code)
6 under section 306 of title 5, United States Code,
7 and sections 1105(a)(29), 1115, 1116, 1117, and
8 9703 of title 31, United States Code—
9 "(A) assess the requirements established
10 for agency personnel regarding knowledge and
11 skill in acquisition resources management and
12 the adequacy of such requirements for facili-
13 tating the achievement of the performance goals
14 established for acquisition management;
15 "(B) in order to rectify any deficiency in
16 meeting those requirements, develop strategies
17 and specific plans for hiring, training, and pro-
18 fessional development; and
19 "(C) report to the head of the agency on
20 the progress made in improving acquisition
21 management capability.".
22 (2) The item relating to section 16 in the table of
23 contents of such Act is amended to read as follows:

"See. 16. Chief Acquisition Officers.".

24 (b) CONFORMING AMENDMENTS.—The Office of
25 Federal Procurement Policy Act (41 U.S.C. 403 et seq.),

1 the Federal Property and Administrative Services Act of
2 1949, and title 10, United States Code, are each amended
3 by striking "senior procurement executive" each place
4 such term appears and inserting "Chief Acquisition Offi-
5 cer".

6 **SEC. 202. INCREASED ROLE FOR DEFENSE CONTRACT MAN-**
7 **AGEMENT AGENCY.**

8 The Under Secretary of Defense for Acquisition,
9 Technology, and Logistics shall review the feasibility of
10 establishing the Defense Contract Management Agency as
11 the primary organization responsible for performing con-
12 tract management services on Department of Defense
13 base operating service contracts in excess of $5,000,000.

14 **SEC. 203. STUDY ON HORIZONTAL ACQUISITION.**

15 Not later than 9 months after the date of the enact-
16 ment of this Act, the Administrator of the Office of Fed-
17 eral Procurement Policy shall submit to the Committee on
18 Government Reform of the House of Representatives and
19 the Committee on Governmental Affairs of the Senate a
20 study on the laws, executive orders, and regulations that
21 hinder the performance of acquisition functions across de-
22 partment or agency lines and otherwise impact the use of
23 Governmentwide contracts.

1 **SEC. 204. STATUTORY AND REGULATORY REVIEW.**

2 (a) ESTABLISHMENT.—Not later than 60 days after
3 the date of the enactment of this Act, the Administrator
4 of the Office of Federal Procurement Policy shall establish
5 an advisory panel to review laws and regulations that
6 hinder the use of commercial practices and performance-
7 based contracting.

8 (b) MEMBERSHIP.—The panel shall be composed of
9 at least nine individuals who are recognized experts in ac-
10 quisition law and Government acquisition policy. In mak-
11 ing appointments to the panel, the Administrator shall en-
12 sure that the members of the panel reflect the diverse ex-
13 periences in the public and private sectors.

14 (c) DUTIES.—The panel shall—

15 (1) review all Federal acquisition laws and reg-
16 ulations with a view toward ensuring the use of
17 greater commercial practices and performance-based
18 contracting; and

19 (2) make any recommendations for the repeal
20 or amendment of such laws or regulations considered
21 necessary as a result of such review to—

22 (A) eliminate any such laws or regulations
23 that are unnecessary for the establishment and
24 administration of buyer and seller relationships
25 in acquisition;

1 (B) ensure the continuing financial and
2 ethical integrity of Government acquisition pro-
3 grams; and
4 (C) protect the best interests of the Gov-
5 ernment.
6 (d) REPORT.—(1) Not later than one year after the
7 establishment of the panel, a report shall be transmitted
8 to the Administrator and to the Committees on Govern-
9 ment Reform and Armed Services of the House of Rep-
10 resentatives and the Committees on Governmental Affairs
11 and Armed Services of the Senate.
12 (2) The report shall contain a detailed statement of
13 the findings and conclusions of the panel, the proposed
14 codification of acquisition laws or proposed regulations
15 prepared pursuant to subsection (c), and such additional
16 recommendations for such legislation or regulations as the
17 panel considers appropriate.

18 Subtitle B—Payment Terms

19 **SEC. 211. PAYMENT TERMS.**

20 Not later than 180 days after the date of the enact-
21 ment of this Act, the Federal Acquisition Regulation shall
22 be revised to provide that—
23 (1) service contractors may submit invoices for
24 payment either biweekly or monthly, provided that

1 any biweekly invoicing must be through electronic
2 means;
3 (2) for an electronic invoice, the date of the in-
4 voice shall be the date the invoice is electronically
5 delivered to the Federal Government;
6 (3) the Federal Government shall accept or re-
7 ject an electronically delivered invoice within 5 work-
8 ing days of the date of the invoice;
9 (4) all accepted invoices shall be paid as soon
10 as possible, but in no event shall an accepted invoice
11 be paid later than 30 days after the date of the in-
12 voice; and
13 (5) payment of an invoice does not prohibit ei-
14 ther the Government or the contractor from making
15 corrections or adjustments to the invoice at a later
16 date.

17 **Subtitle C—Acquisitions Generally**

18 **SEC. 221. INCREASE IN AUTHORIZATION LEVELS OF FED-**
19 **ERAL PURCHASE CARDS.**

20 Section 32 of the Office of Federal Procurement Pol-
21 icy Act (41 U.S.C. 428) is amended by striking "$2,500"
22 in subsections (c), (d), and (f), and inserting "$25,000".

1 **SEC. 222. REAUTHORIZATION OF FRANCHISE FUNDS.**

2 Section 403(f) of the Federal Financial Management
3 Act of 1994 (31 U.S.C. 501 note) is amended by striking
4 "October 1, 2001" and inserting "October 1, 2005".

5 **SEC. 223. ACQUISITION PROTESTS.**

6 (a) DEFENSE CONTRACTS.—(1) Chapter 137 of title
7 10, United States Code, is amended by inserting after sec-
8 tion 2305a the following new section:

9 **"§ 2305b. Protests**

10 "(a) IN GENERAL.—A protest of an acquisition of
11 supplies or services by an agency concerning an alleged
12 violation of an acquisition law or regulation submitted to
13 the agency by an interested party shall be decided by the
14 agency if submitted in accordance with this section.

15 "(b) RESTRICTIONS PENDING DECISION.—(1) A con-
16 tract may not be awarded in an acquisition after a protest
17 concerning the acquisition has been submitted and while
18 the protest is pending except that the head of the acquisi-
19 tion activity responsible for the award of the contract may
20 authorize the award of the contract, notwithstanding the
21 pending protest, upon a written finding that urgent and
22 compelling circumstances do not allow for waiting for a
23 decision.

24 "(2) Performance of a contract shall not be author-
25 ized (and performance of the contract shall cease if per-
26 formance has already begun) in any case in which a pro-

1 test of the contract award is submitted not later than 10
2 days after the date of contract award or 5 days after an
3 agency debriefing, whichever is later, except that the head
4 of the acquisition activity responsible for the award of the
5 contract may authorize performance of the contract not-
6 withstanding the pending protest upon a written finding
7 that urgent and compelling circumstances do not allow for
8 waiting for a decision.

9 "(c) DEADLINE FOR DECISION.—The head of the
10 agency shall issue a decision not later than the date that
11 is 10 working days after the date that the protest is sub-
12 mitted to the agency.

13 "(d) CONSTRUCTION.—Nothing contained in this sec-
14 tion shall affect the right of an interested party to file
15 a protest with the General Accounting Office under sub-
16 chapter V of chapter 35 of title 31 or in the United States
17 Court of Federal Claims.

18 "(e) DEFINITIONS.—In this section:

19 "(1) The term 'interested party', with respect
20 to a contract or a solicitation or other request for of-
21 fers described in paragraph (2), means an actual or
22 prospective bidder or offeror whose direct economic
23 interest would be affected by the award of the con-
24 tract or by failure to award the contract.

1 "(2) The term 'protest' means a written objec-
2 tion by an interested party to any of the following:
3 "(A) A solicitation or other request by an
4 agency for offers for a contract for the acquisi-
5 tion of property or services.
6 "(B) The cancellation of such a solicitation
7 or other request.
8 "(C) An award or proposed award of such
9 a contract.
10 "(D) A termination or cancellation of an
11 award of such a contract, if the written objec-
12 tion contains an allegation that the termination
13 or cancellation is based in whole or in part on
14 improprieties concerning the award of the con-
15 tract.".
16 (2) The table of sections at the beginning of such
17 chapter is amended by inserting after the item relating
18 to section 2305a the following new item:

"2305b. Protests.".

19 (b) OTHER AGENCIES.—(1) The Federal Property
20 and Administrative Services Act of 1949 is amended by
21 inserting after section 303M the following new section:

22 **"SEC. 303L. PROTESTS.**

23 "(a) IN GENERAL.—A protest of an acquisition of
24 supplies or services by an executive agency concerning an
25 alleged violation of an acquisition law or regulation sub-

1 mitted to the agency by an interested party shall be de-
2 cided by the agency if submitted in accordance with this
3 section.

4 "(b) RESTRICTIONS PENDING DECISION.—(1) A con-
5 tract may not be awarded in an acquisition after a protest
6 concerning the acquisition has been submitted and while
7 the protest is pending except that the head of the acquisi-
8 tion activity responsible for the award of the contract may
9 authorize the award of the contract, notwithstanding the
10 pending protest, upon a written finding that urgent and
11 compelling circumstances do not allow for waiting for a
12 decision.

13 "(2) Performance of a contract shall not be author-
14 ized (and performance of the contract shall cease if per-
15 formance has already begun) in any case in which a pro-
16 test of the contract award is submitted not later than 10
17 days after the date of contract award or 5 days after an
18 agency debriefing, whichever is later, except that the head
19 of the acquisition activity responsible for the award of the
20 contract may authorize performance of the contract not-
21 withstanding the pending protest upon a written finding
22 that urgent and compelling circumstances do not allow for
23 waiting for a decision.

24 "(c) DEADLINE FOR DECISION.—The head of the
25 agency shall issue a decision not later than the date that

1 is 10 working days after the date that the protest is sub-
2 mitted to the agency.
3 "(d) CONSTRUCTION.—Nothing contained in this sec-
4 tion shall affect the right of an interested party to file
5 a protest with the General Accounting Office under sub-
6 chapter V of chapter 35 of title 31, United States Code,
7 or in the United States Court of Federal Claims.
8 "(e) DEFINITIONS.—In this section:
9 "(1) The term 'interested party', with respect
10 to a contract or a solicitation or other request for of-
11 fers described in paragraph (2), means an actual or
12 prospective bidder or offeror whose direct economic
13 interest would be affected by the award of the con-
14 tract or by failure to award the contract.
15 "(2) The term 'protest' means a written objec-
16 tion by an interested party to any of the following:
17 "(A) A solicitation or other request by an
18 agency for offers for a contract for the acquisi-
19 tion of property or services.
20 "(B) The cancellation of such a solicitation
21 or other request.
22 "(C) An award or proposed award of such
23 a contract.
24 "(D) A termination or cancellation of an
25 award of such a contract, if the written objec-

1 tion contains an allegation that the termination
2 or cancellation is based in whole or in part on
3 improprieties concerning the award of the con-
4 tract.".
5 (2) The table of contents in section 1(b) of such Act
6 is amended by inserting after the item relating to section
7 303M the following new item:

"303L. Protests.".

8 (c) CONFORMING AMENDMENT.—Section 3553(d)(4)
9 of title 31, United States Code, is amended—
10 (1) in subparagraph (A), by striking "or" at
11 the end;
12 (2) by striking the period at the end of sub-
13 paragraph (B) and inserting "; or"; and
14 (3) by adding at the end the following new sub-
15 paragraph:
16 "(C) the date that is 5 days after the date that
17 the agency issues its decision under section 2305b of
18 title 10 or section 303L of the Federal Property and
19 Administrative Services Act of 1949.".
20 **SEC. 224. ARCHITECTURAL AND ENGINEERING SERVICES.**
21 (a) FEDERAL PROPERTY AND ADMINISTRATIVE
22 SERVICES ACT.—Section 901 of the Federal Property and
23 Administrative Services Act of 1949 (40 U.S.C. 541) is
24 amended by adding at the end the following new para-
25 graph:

1 "(4) The term 'surveying and mapping' means
2 contracts and subcontracts for services utilizing Fed-
3 eral funds for collecting, storing, retrieving, or dis-
4 seminating graphical or digital data depicting nat-
5 ural or manmade physical features, phenomena, or
6 boundaries of the earth and any information related
7 thereto, including but not limited to surveys, maps,
8 charts, geographic information systems, remote sens-
9 ing data and images, and aerial photographic serv-
10 ices performed by professionals such as surveyors,
11 photogrammetrists, hydrographers, geodesists, or
12 cartographers.
13 "(5) The term 'contract' means a contract or
14 subcontract awarded by an agency head, prime con-
15 tractor, or grantee.".
16 (b) AMENDMENT OF FAR.—The Federal Acquisition
17 Regulation shall be revised to include the definitions added
18 by subsection (a) of this section.
19 (c) TITLE 10.—Section 2855(b) of title 10, United
20 States Code, is amended—
21 (1) in paragraph (2), by striking "$85,000"
22 and inserting "$300,000"; and
23 (2) by adding at the end the following new
24 paragraph:

1 "(3) The selection and competition require-
2 ments of this section shall apply to any contract for
3 architectural and engineering services (including sur-
4 veying and mapping services) by all military depart-
5 ments and defense agencies.".
6 (d) PROFESSIONAL ENGINEERING SERVICES.—Not-
7 withstanding any other provision of law, no executive
8 agency shall establish or carry out a program to offer serv-
9 ices or to offer contracts for professional engineering serv-
10 ices unless—
11 (1) such services are performed under the direct
12 supervision of a professional engineer licensed in a
13 State; and
14 (2) such services are awarded in accordance
15 with the selection procedures set forth in title IX of
16 the Federal Property and Administrative Services
17 Act of 1949 (40 U.S.C. 541).

18 TITLE III—CONTRACT 19 INCENTIVES

20 **SEC. 301. REVISIONS TO SHARE-IN-SAVINGS INITIATIVES.**
21 (a) DEFENSE CONTRACTS.—(1) Chapter 137 of title
22 10, United States Code, is amended by adding at the end
23 the following new section:

1 **"§ 2332. Share-in-savings contracts**

2 "(a) AUTHORITY TO ENTER INTO SHARE-IN-SAV-
3 INGS CONTRACTS.—(1) The head of an agency may enter
4 into a share-in-savings contract for a period of not more
5 than ten years.

6 "(2) An agency may retain savings realized through
7 the use of a share-in-savings contract under this section
8 that are in excess of the total amount of savings paid to
9 the contractor under the contract. Amounts retained by
10 the agency under this subsection shall, without further ap-
11 propriation, remain available until expended.

12 "(3)(A) If funds are not made available for the con-
13 tinuation of a share-in-savings contract entered into under
14 this section in a subsequent fiscal year, the contract shall
15 be canceled or terminated. The costs of cancellation or ter-
16 mination may be paid out of—

17 "(i) appropriations available for the perform-
18 ance of the contract;

19 "(ii) appropriations available for acquisition of
20 the type of property or services procured under the
21 contract, and not otherwise obligated; or

22 "(iii) funds appropriated for payments of costs
23 of cancellation or termination.

24 "(B) The amount payable in the event of cancellation
25 or termination of a share-in-savings contract shall be ne-

1 gotiated with the contractor at the time the contract is
2 entered into.
3 "(C) An agency may enter into a share-in-savings
4 contract under this section even if funds are not made spe-
5 cifically available for the costs of cancellation or termi-
6 nation of the contract if funds are available and sufficient
7 to make payments with respect to the first fiscal year of
8 the contract.
9 "(b) DEFINITIONS.—In this section:
10 "(1) The term 'contractor' means a private en-
11 tity that enters into a contract with an agency.
12 "(2) The term 'savings' means—
13 "(A) monetary savings to an agency; or
14 "(B) savings in time or other benefits real-
15 ized by the agency, including enhanced reve-
16 nues.
17 "(3) The term 'share-in-savings contract' means
18 a contract under which—
19 "(A) a contractor provides solutions for—
20 "(i) improving the agency's mission-
21 related or administrative processes; or
22 "(ii) accelerating the achievement of
23 agency missions; and

1 "(B) the agency pays the contractor an
2 amount equal to a portion of the savings de-
3 rived by the agency from—
4 "(i) any improvements in mission-re-
5 lated or administrative processes that re-
6 sult from implementation of the solution;
7 or
8 "(ii) acceleration of achievement of
9 agency missions.".
10 (2) The table of sections at the beginning of such
11 chapter is amended by adding at the end the following
12 new item:

"2332. Share-in-savings contracts.".

13 (b) OTHER CONTRACTS.—(1) Title III of the Federal
14 Property and Administrative Services Act of 1949 is
15 amended by adding at the end the following:

16 **"SEC. 317. SHARE-IN-SAVINGS CONTRACTS.**

17 "(a) AUTHORITY TO ENTER INTO SHARE-IN-SAV-
18 INGS CONTRACTS.—(1) An executive agency may enter
19 into a share-in-savings contract for a period of not more
20 than ten years.
21 "(2) An executive agency may retain savings realized
22 through the use of a share-in-savings contract under this
23 section that are in excess of the total amount of savings
24 paid to the contractor under the contract. Amounts re-
25 tained by the executive agency under this subsection shall,

1 without further appropriation, remain available until ex-
2 pended.
3 "(3)(A) If funds are not made available for the con-
4 tinuation of a share-in-savings contract entered into under
5 this section in a subsequent fiscal year, the contract shall
6 be canceled or terminated. The costs of cancellation or ter-
7 mination may be paid out of—
8 "(i) appropriations available for the perform-
9 ance of the contract;
10 "(ii) appropriations available for acquisition of
11 the type of property or services procured under the
12 contract, and not otherwise obligated; or
13 "(iii) funds appropriated for payments of costs
14 of cancellation or termination.
15 "(B) The amount payable in the event of cancellation
16 or termination of a share-in-savings contract shall be ne-
17 gotiated with the contractor at the time the contract is
18 entered into.
19 "(C) An executive agency may enter into a share-in-
20 savings contract under this section even if funds are not
21 made specifically available for the costs of cancellation or
22 termination of the contract if funds are available and suf-
23 ficient to make payments with respect to the first fiscal
24 year of the contract.
25 "(b) DEFINITIONS.—In this section:

1 "(1) The term 'contractor' means a private en-
2 tity that enters into a contract with an executive
3 agency.
4 "(2) The term 'savings' means—
5 "(A) monetary savings to an executive
6 agency; or
7 "(B) savings in time or other benefits real-
8 ized by the executive agency, including en-
9 hanced revenues.
10 "(3) The term 'share-in-savings contract' means
11 a contract under which—
12 "(A) a contractor provides solutions for—
13 "(i) improving the executive agency's
14 mission-related or administrative processes;
15 or
16 "(ii) accelerating the achievement of
17 agency missions; and
18 "(B) the executive agency pays the con-
19 tractor an amount equal to a portion of the sav-
20 ings derived by the agency from—
21 "(i) any improvements in mission-re-
22 lated or administrative processes that re-
23 sult from implementation of the solution;
24 or

1 "(ii) acceleration of achievement of
2 agency missions.".
3 (2) The table of contents in section 1(b) of such Act
4 is amended by adding at the end the following new item:
"Sec. 317. Share-in-savings contracts.".
5 (c) DEVELOPMENT OF INCENTIVES.—The Director
6 of the Office of Management and Budget shall—
7 (1) in consultation with executive agencies—
8 (A) identify potential opportunities for the
9 use of share-in-savings contracts; and
10 (B) encourage the use of share-in-savings
11 contracts for projects for which significant sav-
12 ings are expected; and
13 (2) in consultation with Congress and executive
14 agencies, develop techniques—
15 (A) to provide incentives for the use of
16 share-in-savings contracts; and
17 (B) to permit an executive agency to retain
18 a portion of the savings (after payment of the
19 contractor's share of the savings) derived from
20 such contracts as funds are appropriated to the
21 agency in future years.
22 (d) GUIDANCE AND REGULATIONS.—(1) Not later
23 than 180 days after the date of the enactment of this sec-
24 tion, the Federal Acquisition Regulation shall be revised
25 to implement the provisions enacted by this section.

1 (2) Not later than 180 days after the enactment of
2 this section, the Director of the Office of Management and
3 Budget shall issue guidance on the use by executive agen-
4 cies of share-in-savings contracts. Such guidance shall—
5 (A) provide for the use of competitive proce-
6 dures for the selection and award of share-in-savings
7 contracts;
8 (B) allow maximum regulatory flexibility to fa-
9 cilitate the use of share-in-savings contracts by exec-
10 utive agencies, including the use of nonstandard
11 Federal Acquisition Regulation contract clauses; and
12 (C) provide guidance to executive agencies for
13 determining mutually beneficial savings share ratios
14 and baselines from which savings may be measured.
15 (e) REPORT TO CONGRESS.—In consultation with ex-
16 ecutive agencies, the Director of the Office of Management
17 and Budget shall, not later than 2 years after the date
18 of the enactment of this section, submit to Congress a re-
19 port describing—
20 (1) the number of share-in-savings contracts
21 entered into by each executive agency under the pro-
22 visions enacted by this section; and
23 (2) any recommendations regarding additional
24 changes in law necessary to encourage increased use
25 of share-in-savings contracts by executive agencies.

1 (f) DEFINITIONS.—In this section, the terms "con-
2 tractor", "savings", and "share-in-savings contract" have
3 the meanings given those terms under section 317 of the
4 Federal Property and Administrative Services Act of 1949
5 (as added by subsection (b)).

6 **SEC. 302. INCENTIVES FOR CONTRACT EFFICIENCY.**

7 (a) DEFENSE CONTRACTS.—(1) Chapter 137 of title
8 10, United States Code, is further amended by adding at
9 the end the following new section:

10 **"§ 2333. Incentives for contract efficiency**

11 "(a) AUTHORITY TO ENTER INTO 10-YEAR SERVICE
12 CONTRACTS.—An agency may enter into contracts for the
13 performance of services to the government for periods of
14 not more than ten years if such contracts are perform-
15 ance-based.

16 "(b) EXTENSIONS.—An agency may enter into con-
17 tracts for the performance of services to the government
18 that provide for the contract to be extended by additional
19 performance periods in instances of exceptional perform-
20 ance by the contractor. A contract that provides for such
21 extensions shall be performance-based, and must include
22 performance parameters that can be used to measure per-
23 formance under the contract. The entire term of the con-
24 tract, including the additional performance periods, may
25 not exceed ten years.

1 "(c) OTHER CONTRACTS.—An agency may enter into
2 a level-of-effort contract that provides for savings realized
3 through cost efficiencies to be shared with the contractor
4 in an amount sufficient to encourage the contractor to in-
5 vest in methods of performance that are likely to reduce
6 the overall cost of contract performance.".

7 (2) The table of contents at the beginning of such
8 chapter is amended by adding at the end the following
9 new item:

"Sec. 2333. Incentives for contract efficiency.".

10 (b) OTHER CONTRACTS.—(1) Title III of the Federal
11 Property and Administrative Services Act of 1949 is fur-
12 ther amended by adding at the end the following new sec-
13 tion:

14 **"SEC. 318. INCENTIVES FOR CONTRACT EFFICIENCY.**

15 "(a) AUTHORITY TO ENTER INTO 10-YEAR SERVICE
16 CONTRACTS.—An executive agency may enter into con-
17 tracts for the performance of services for the Government
18 for periods of not more than ten years if such contracts
19 are performance-based.

20 "(b) EXTENSIONS.—An executive agency may enter
21 into contracts for the performance of services to the Gov-
22 ernment that provide for the contract to be extended by
23 additional performance periods in instances of exceptional
24 performance by the contractor. A contract that provides
25 for such extensions shall be performance-based, and must

1 include performance parameters that can be used to meas-
2 ure performance under the contract. The entire term of
3 the contract, including the additional performance periods,
4 may not exceed ten years.

5 "(c) OTHER CONTRACTS.—An executive agency may
6 enter into a level-of-effort type contract that provides for
7 savings realized through cost efficiencies to be shared with
8 the contractor in an amount sufficient to encourage the
9 contractor to invest in methods of performance that are
10 likely to reduce the overall cost of contract performance.".

11 (2) The table of contents in section 1(b) of such Act
12 is further amended by adding at the end the following new
13 item:

"Sec. 318. Incentives for contract efficiency.".

14 TITLE IV—ACQUISITIONS OF 15 COMMERCIAL ITEMS

16 SEC. 401. PREFERENCE FOR PERFORMANCE-BASED CON- 17 TRACTING.

18 (a) IN GENERAL.—In the administration of the pref-
19 erences established by the Federal Acquisition Regulation
20 under section 821(a) of the Floyd D. Spence National De-
21 fense Authorization Act for Fiscal Year 2001 (as enacted
22 into law by Public Law 106–398; 114 Stat. 1654A–218),
23 a performance-based service contract or performance-
24 based task order may be treated as a contract for the ac-
25 quisition of commercial items if—

1 (1) the contract or task order sets forth specifi-
2 cally each task to be performed and, for each task—
3 (A) defines the task in measurable, mis-
4 sion-related terms; and
5 (B) identifies the specific end products or
6 output to be achieved; and
7 (2) the source of the services provides similar
8 services to the general public under terms and condi-
9 tions similar to those offered to the Federal Govern-
10 ment.
11 (b) INCENTIVE FOR USE OF PERFORMANCE-BASED
12 SERVICE CONTRACTS.—(1) A performance-based service
13 contract or performance-based task order of a covered
14 agency may be treated as a contract for the acquisition
15 of commercial items if—
16 (A) the contract or task order is valued at
17 $5,000,000 or less;
18 (B) the contract or task order sets forth specifi-
19 cally each task to be performed and, for each task—
20 (i) defines the task in measurable, mission-
21 related terms; and
22 (ii) identifies the specific end products or
23 output to be achieved; and
24 (C) the source of the services provides similar
25 services to the general public under terms and condi-

1 tions similar to those offered to the Federal Govern-
2 ment.
3 (2) The special simplified procedures provided in the
4 Federal Acquisition Regulation pursuant to section
5 2304(g)(1)(B) of title 10, United States Code, and section
6 303(g)(1)(B) of the Federal Property and Administrative
7 Services Act of 1949 (41 U.S.C. 253(g)(1)(B)) shall not
8 apply to a performance-based service contract or perform-
9 ance-based task order that is treated as a contract for the
10 acquisition of commercial items under subsection (a).
11 (3) Not later than 2 years after the date of the enact-
12 ment of this Act, the Comptroller General shall submit
13 a report on the implementation of this subsection to the
14 congressional defense committees, the Committee on Gov-
15 ernment Reform of the House of Representatives, and the
16 Committee on Governmental Affairs of the Senate.
17 (4) The authority under this subsection shall not
18 apply to contracts entered into or task orders issued more
19 than 3 years after the date of the enactment of this Act.
20 (c) CENTER OF EXCELLENCE IN SERVICE CON-
21 TRACTING.—Not later than 180 days after the date of the
22 enactment of this Act, the Administrator of the Office of
23 Federal Procurement Policy shall establish a center of ex-
24 cellence in contracting for services. The center of excel-
25 lence shall assist the acquisition community by identifying,

1 and serving as a clearinghouse for, best practices in con-
2 tracting for services in the public and private sectors.
3 (d) DEFINITIONS.—In this section:
4 (1) The term "performance-based", with re-
5 spect to a contract, a task order, or contracting,
6 means that the contract, task order, or contracting,
7 respectively, includes the use of performance work
8 statements that set forth contract requirements in
9 clear, specific, and objective terms with measurable
10 outcomes.
11 (2) The term "commercial item" has the mean-
12 ing given the term in section 4(12) of the Office of
13 Federal Procurement Policy Act (41 U.S.C.
14 403(12)).
15 (3) The term "covered agency" means an exec-
16 utive agency to which title III of the Federal Prop-
17 erty and Administrative Services Act of 1949 applies
18 under section 302(a) of that Act (41 U.S.C. 252(a)).
19 **SEC. 402. AUTHORIZATION OF ADDITIONAL CONTRACT**
20 **TYPES IN FAR PART 12.**
21 Section 8002(d) of the Federal Acquisition and
22 Streamlining Act of 1994 (Public Law 103–355; 41
23 U.S.C. 264 note) is amended—
24 (1) in paragraph (1), by striking "and";

1 (2) by redesignating paragraph (2) as para-
2 graph (3); and
3 (3) by inserting after paragraph (1) the fol-
4 lowing new paragraph (2):
5 "(2) a provision which allows use of time and
6 material, labor-hour or similar contract types, for
7 services in appropriate circumstances;".

8 **SEC. 403. CLARIFICATION OF COMMERCIAL SERVICES DEF-**
9 **INITION.**

10 Paragraph 12 of section 4 of the Office of Federal
11 Procurement Policy Act (41 U.S.C. 403) is amended—
12 (1) in subparagraphs (A), (B), and (C), by in-
13 serting "or service" after "item";
14 (2) in subparagraph (D), by inserting "or serv-
15 ices" after "items"; and
16 (3) by striking subparagraph (F) and redesig-
17 nating the subsequent subparagraphs accordingly.

18 **SEC. 404. DESIGNATION OF COMMERCIAL BUSINESS ENTI-**
19 **TIES.**

20 (a) IN GENERAL.—Section 4 of the Office of Federal
21 Procurement Policy Act (41 U.S.C. 403) is amended—
22 (1) by adding at the end of paragraph (12) the
23 following new subparagraph:
24 "(H) Products or services produced or pro-
25 vided by a commercial entity."; and

1 (2) by adding at the end the following new
2 paragraph:
3 "(16) The term 'commercial entity' means any
4 enterprise whose primary customers are other than
5 the United States Federal Government. In order to
6 qualify as a commercial entity, at least 85 percent
7 (in dollars) of the sales of the enterprise over the
8 past three business years must have been made to
9 nongovernment entities or under part 12 of the Fed-
10 eral Acquisition Regulation.".
11 (b) COMPTROLLER GENERAL REVIEW.—The Comp-
12 troller General shall review the implementation of the
13 amendments made by subsection (a) to determine the suc-
14 cess of such implementation.

15 **SEC. 405. CONTINUATION OF ELIGIBILITY OF CONTRACTOR**
16 **FOR AWARD OF INFORMATION TECHNOLOGY**
17 **CONTRACT AFTER PROVIDING DESIGN AND**
18 **ENGINEERING SERVICES.**

19 (a) IN GENERAL.—Notwithstanding any other provi-
20 sion of law, a contractor that provides architectural design
21 and engineering services for an information system under
22 an information technology program of an executive agency
23 is not, solely by reason of having provided services, ineli-
24 gible for award of a contract for acquisition of information

1 technology under that program or for a subcontract under
2 such a contract.
3 (b) DEFINITIONS.—In this section:
4 (1) The term "architectural design and engi-
5 neering services" includes, but is not limited to,
6 business process reengineering, determining speci-
7 fications, developing work statements, determining
8 parameters, identifying and resolving interface prob-
9 lems, developing test requirements, evaluating test
10 data, designing, and supervising design activities.
11 (2) The term "information system" has the
12 meaning given that term in section 5002 of the
13 Clinger-Cohen Act of 1996 (40 U.S.C. 1401).
14 **SEC. 406. COMMERCIAL LIABILITY.**
15 (a) LIMITATION.—The Office of Federal Procure-
16 ment Policy Act (41 U.S.C. 403 et seq.) is further amend-
17 ed by inserting after section 29 the following new section:
18 **"SEC. 29A. LIMITATION OF CONTRACTOR LIABILITY.**
19 "The Federal Acquisition Regulation shall provide
20 that an executive agency shall include in all contracts and
21 solicitations for contracts for the acquisition of property
22 or services a provision that—
23 "(1) bars payment of consequential damages in
24 cases of contractor liability with respect to the con-
25 tract; and

1 "(2) places a cap on payment of direct damages
2 in cases of contractor liability with respect to the
3 contract that does not exceed the cost of the service
4 that was not performed or of the product that was
5 not delivered.".
6 (b) CONFORMING AMENDMENT.—The table of con-
7 tents of such Act is amended by inserting after the item
8 relating to section 29 the following new item:

"Sec. 29A. Limitation of contractor liability.".

9 TITLE V—TECHNOLOGY ACCESS 10 IN A COMMERCIAL ENVIRON- 11 MENT

12 SEC. 501. TRADE AGREEMENTS ACT OF 1979 EXEMPTION 13 FOR INFORMATION TECHNOLOGY COMMER- 14 CIAL ITEMS.

15 (a) IN GENERAL.—Notwithstanding any other provi-
16 sion of law, in order to promote Government access to
17 commercial information technology, the restriction on pur-
18 chasing nondomestic products set forth in the Buy Amer-
19 ican Act (41 U.S.C. 10a) and the prohibition on acquiring
20 noneligible foreign products under section 302(a)(1) of the
21 Trade Agreements Act of 1979 (Public Law 96–39; 19
22 U.S.C. 2512(a)(1)), shall not apply to the Federal Govern-
23 ment's acquisition of commercial item information tech-
24 nology (as those terms are defined in section 5002 of the
25 Clinger-Cohen Act of 1996 (40 U.S.C. 1401)).

1 (b) DEFINITION.—Section 5002(3)(B) of the Clinger-
2 Cohen Act of 1996 (40 U.S.C. 1401(3)(B)) is amended
3 by inserting "(including imaging peripherals, input, out-
4 put, and storage devices necessary for security and surveil-
5 lance)" after "ancillary equipment".

6 **SEC. 502. AUTHORIZATION FOR ACQUISITION OF INFORMA-**
7 **TION TECHNOLOGY BY STATE AND LOCAL**
8 **GOVERNMENTS THROUGH FEDERAL SUPPLY**
9 **SCHEDULES.**

10 (a) AUTHORITY TO USE CERTAIN SUPPLY SCHED-
11 ULES.—Section 201(b) of the Federal Property and Ad-
12 ministrative Services Act of 1949 (40 U.S.C. 481(b)) is
13 amended by adding at the end the following new para-
14 graph:

15 "(4)(A) The Administrator may provide for the use
16 by State or local governments of Federal supply schedules
17 of the General Services Administration for automated data
18 processing equipment (including firmware), software, sup-
19 plies, support equipment, and services (as contained in
20 Federal supply classification code group 70).

21 "(B) In any case of the use by a State or local gov-
22 ernment of a Federal supply schedule pursuant to sub-
23 paragraph (A), participation by a firm that sells to the
24 Federal Government through the supply schedule shall be

1 voluntary with respect to a sale to the State or local gov-
2 ernment through such supply schedule.
3 "(C) As used in this paragraph, the term 'State or
4 local government' includes any State, local, regional, or
5 tribal government, or any instrumentality thereof (includ-
6 ing any accredited public school district or public edu-
7 cational institution).".
8 (b) PROCEDURES.—Not later than 30 days after the
9 date of the enactment of this Act, the Administrator of
10 General Services shall establish procedures to implement
11 section 201(b)(4) of the Federal Property and Administra-
12 tive Services Act of 1949 (as added by subsection (a)).
13 (c) REPORT.—Not later than December 31, 2004, the
14 Administrator shall submit to the Committee on Govern-
15 ment Reform of the House of Representatives and the
16 Committee on Governmental Affairs of the Senate a report
17 on the implementation and effects of the amendment made
18 by subsection (a).

19 **SEC. 503. CERTAIN RESEARCH AND DEVELOPMENT BY CI-**
20 **VILIAN AGENCIES.**

21 (a) AUTHORITY.—Title III of the Federal Property
22 and Administrative Services Act of 1949 (41 U.S.C. 251
23 et seq.) is further amended by adding at the end the fol-
24 lowing new section:

1 **"SEC. 319. RESEARCH AND DEVELOPMENT TO FACILITATE**
2 **DEFENSE AGAINST, OR RECOVERY FROM,**
3 **TERRORISM OR NUCLEAR, BIOLOGICAL,**
4 **CHEMICAL, RADIOLOGICAL, OR TECHNO-**
5 **LOGICAL ATTACK.**

6 "(a) AUTHORITY.—(1) The head of an executive
7 agency may engage in basic research, applied research, ad-
8 vanced research, and development projects that—

9 "(A) are necessary to the responsibilities of
10 such official's executive agency in the field of re-
11 search and development; and

12 "(B) have the potential to facilitate defense
13 against, or recovery from, terrorism or nuclear, bio-
14 logical, chemical, radiological, or technological at-
15 tack.

16 "(2) To engage in projects authorized under para-
17 graph (1), the head of an executive agency may exercise
18 the same authority (subject to the same restrictions and
19 conditions) as the Secretary of Defense may exercise
20 under sections 2358 and 2371 of title 10, United States
21 Code, except for subsections (b), (f), and (g) of such sec-
22 tion 2371.

23 "(3) The head of an executive agency may exercise
24 authority under this subsection only if authorized by the
25 Director of the Office of Management and Budget to do
26 so.

1 "(b) ANNUAL REPORT.—The annual report of the
2 head of an executive agency that is required under sub-
3 section (h) of section 2371 of title 10, United States Code,
4 as applied to the head of an executive agency by subsection
5 (a), shall be submitted to the Committee on Governmental
6 Affairs of the Senate and the Committee on Government
7 Reform of the House of Representatives.
8 "(c) REGULATIONS.—The Director of the Office of
9 Management and Budget shall prescribe regulations to
10 carry out this section.".
11 (b) CLERICAL AMENDMENT.—The table of contents
12 in section 1(b) of such Act is further amended by adding
13 at the end the following new item:

"Sec. 319. Research and development to facilitate defense against, or recovery from, terrorism or nuclear, biological, chemical, or radiological, or technological attack.".

14 **SEC. 504. AUTHORITY FOR CARRYING OUT CERTAIN PRO-**
15 **TOTYPE PROJECTS.**
16 (a) IN GENERAL.—The head of an executive agency
17 designated by the Director of the Office of Management
18 and Budget to do so may, under the authority of section
19 319 of the Federal Property and Administrative Services
20 Act of 1949 (as added by section 503), carry out prototype
21 projects that meet the requirements of subparagraphs (A)
22 and (B) of subsection (a)(1) of such section in accordance
23 with the same requirements and conditions as are provided
24 for carrying out prototype projects under section 845 of

1 the National Defense Authorization Act for Fiscal Year
2 1994 (Public Law 103–160; 10 U.S.C. 2371 note).
3 (b) CONFORMING AUTHORITY.—In the application of
4 the requirements and conditions of section 845 of the Na-
5 tional Defense Authorization Act for Fiscal Year 1994
6 (Public Law 103–160; 10 U.S.C. 2371 note) to the admin-
7 istration of authority under subsection (a)—
8 (1) subsection (c) of such section shall apply
9 with respect to prototype projects carried out under
10 this subsection; and
11 (2) the Director of the Office of Management
12 and Budget shall perform the function of the Sec-
13 retary of Defense under subsection (d) of such sec-
14 tion.

15 # TITLE VI—INFLATIONARY
16 # ADJUSTMENTS

17 **SEC. 601. SIMPLIFIED ACQUISITION THRESHOLD INFLA-**
18 **TION ADJUSTMENT.**

19 The Administrator of the Office of Federal Procure-
20 ment Policy may adjust the simplified acquisition thresh-
21 old (as defined in section 4(11) of the Office of Federal
22 Procurement Policy Act (41 U.S.C. 403(11))) every three
23 years to account for changes in inflation.