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OVERSIGHT HEARING TO REVIEW THE FINDINGS OF THE COMMERCIAL ACTIVITIES PANEL

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND PROCUREMENT POLICY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING TO REVIEW THE FINDINGS OF THE COMMERCIAL ACTIVITIES PANEL

FRIDAY, SEPTEMBER 27, 2002

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

The subcommittee met, pursuant to notice, at 1:36 p.m., in room 2154, Rayburn House Office Building, Hon. Thomas M. Davis (chairman of the subcommittee) presiding.

Present: Representatives Davis and Turner.

Staff present: Melissa Wojciak, staff director; George Rogers, Uyen Dinh, and John Brosnan, counsels; Victoria Proctor and Teddy Kidd, professional staff members; Ryan Voccola, intern; Mark Stephenson, minority professional staff member; and Jean Gosa, minority assistant clerk.

Mr. DAVIS. Good afternoon. I want to welcome everyone to the subcommittee's oversight hearing on outsourcing. Today, we're going to examine the results and recommendations of the Commercial Activities Panel that were published in its final report, Improving the Sourcing Decisions of the Government.

We have rescheduled this hearing numerous times to accommodate the schedules of our very important members and witnesses, so I'd like to extend my thanks to all the participants for being here today and for your patience.

For almost 50 years, the executive branch has promoted the purchase of commercially available goods and service from the private sector. This policy was formalized by the Office of Management and Budget Circular A–76, which provides agencies guidance for conducting public-private cost comparisons. In fact, the 1983 revised A–76 handbook states that it has been and continues to be the general policy of the government to rely on commercial sources to supply the products and services the government needs.

But in recent years A–76 has come under fire from all sides. Federal employees are inadequately trained to write performance work statements or to perform the necessary cost comparisons. Moreover, the A–76 process is lengthy and often demoralizes—it's demoralizing to the employees whose jobs are being competed. In addition, contractors are concerned that the cost comparisons are unfair, since the public and private sector's accounting systems are not comparable.

Congress recognizes that the A–76 process is flawed. Therefore, we passed the Floyd D. Spence National Defense Authorization Act for 2001, Public Law 106–398, which mandated that the General Accounting Office convene a panel of experts to study the policies and procedures governing the transfer of the Federal Government's commercial activities from government to contractor performance. The legislation required that members of the panel represent the interests of the Federal Government, Federal labor organizations and private industry.

The Commercial Activities Panel met often over a 12-month period and conducted three public field hearings. The Panel unanimously adopted 10 sourcing principles intended to guide the Federal Government in its sourcing policy. Additionally, the Panel made three recommendations that were adopted by a supermajority; but two Federal labor union representatives and two representatives from academia cast dissenting votes.

The Panel's recommendation includes the implementation of an integrated competition process in which public-private competitions would be conducted under the Federal Acquisition Regulations with some appropriate cost comparisons provided from A–76, limited changes to circular A–76, and the creation of high-performing organizations, HPOs, by management and employees.

The HPO would be exempt for a specified period from competition for a particular function. It would then enter into a binding performance agreement for at least 5 years.

I've repeatedly stated that the Federal Government's ultimate objective in the outsourcing arena would be to pursue the best value for taxpayers. This principal is the touchstone of the FAR based-process. Therefore, I'm encouraged that the Panel's recommendations include the application of a FAR-based process.

The subcommittee requested that witnesses discuss their perspectives on the 10 sourcing principles that were unanimously approved by the Panel; their perspectives on the Panel's recommendations, including reservations they may have regarding the program's recommendations; and their views on the feasibility of implementing the recommendations.

The subcommittee will hear testimony from David M. Walker, the Comptroller General of the U.S. General Accounting Office and soon to be a constituent of mine; Angela Styles, the Director of the Office of Federal Procurement Policy, Office of Management and Budget; Joe Sikes, the Director for Competing Sourcing and Privatization, Department of Defense; Stan Soloway, the President of Professional Services Council; Colleen Kelley, President, National Treasury Employees Union; and Jacqueline Simon, the Director of Public Policy, American Federation of Government Employees.

Mark Filteau, President of Johnson Controls World Services, had a family emergency and sent Mark Wagner, who will ably represent him.

I appreciate everybody being here, and let me now yield to Mr. Turner for any opening comments he may wish to make.

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

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Opening Statement of Chairman Tom Davis
Oversight Hearing
"A Review of the Commercial Activities Panel Report"
Subcommittee on Technology and Procurement Policy
September 27, 2002 at 1:30 pm
2154 Rayburn House Office Building

Good afternoon. I would like to welcome everyone to the Subcommittee's oversight hearing on outsourcing. Today, we will examine the results and recommendations of the Commercial Activities Panel that were published in its final report, *Improving the Sourcing Decisions of the Government.* We have rescheduled this hearing numerous times to accommodate our members, witnesses, and the House voting schedule, so I would like to extend my thanks to all of the participants today for their patience.

For almost fifty years, the executive branch has promoted the purchase of commercially available goods and services from the private sector. This policy was formalized in the Office of Management and Budget Circular A-76 ("A-76"), which provides agencies guidance for conducting public-private cost comparisons. In fact, the 1983 revised A-76 handbook states that "…it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs."

But in recent years, A-76 has come under fire from all sides. Federal employees are inadequately trained to write performance work statements or to perform the necessary cost comparisons. Moreover, the A-76 process is lengthy and often demoralizing to the employees

whose jobs are being competed. In addition, contractors are concerned that the cost comparisons are unfair, since the public and private sectors' accounting systems are not comparable.

Congress recognizes the A-76 process is flawed. Therefore, we passed the Floyd D. Spence National Defense Authorization Act for 2001 (P.L. 106-398), which mandated the General Accounting Office convene a panel of experts to study the policies and procedures governing the transfer of the federal government's commercial activities from government to contractor performance. The legislation required that members of the panel represent the interests of the Federal government, Federal labor organizations, and private industry.

The Commercial Activities Panel met often over a 12-month period and conducted three public field hearings. The Panel unanimously adopted 10 sourcing principles intended to guide the federal government in its sourcing policy. Additionally, the Panel made three recommendations that were adopted by a supermajority (8-4). Two federal labor union representatives and two representatives from academia cast the dissenting votes.

The Panel's recommendations include: (1) the implementation of an integrated competition process in which public-private competitions would be conducted under the Federal Acquisition Regulation with some appropriate cost comparison provisions from A-76, (2) limited changes to circular A-76, and (3) the creation of high-performing organizations (HPO) by management and employees; the HPO would be exempt for a specified period from competition for a particular function; it would then enter into a binding performance agreement for at least five years.

I have repeatedly stated that the Federal government's ultimate objective in the outsourcing arena should be to pursue the best value for taxpayers. This principle is the

touchstone of the FAR-based processed. Therefore, I am encouraged that the Panel's recommendations include the application of a FAR-based process.

The Subcommittee requested that witnesses discuss (1) their perspectives on the ten sourcing principles that were unanimously approved by the Panel, (2) their perspectives on the Panel's recommendations, including reservations they may have regarding the panel's recommendations, and (3) their views on the feasibility of implementing the recommendations.

The Subcommittee will hear testimony from:

- David M. Walker, Comptroller General, U.S. General Accounting Office;
- Angela Styles, Director of the Office of Federal Procurement Policy, Office of Management and Budget;
- Joe Sikes, Director for Competitive Sourcing and Privatization, Department of Defense;
- Stan Z. Soloway, President, Professional Services Council;
- Colleen M. Kelley, President, National Treasury Employees Union;
- Jacqueline Simon, Director of Public Policy, American Federation of Government Employees; and
- Mark Filteau, President, Johnson Controls World Services, Inc.

Mr. TURNER. Thank you, Mr. Chairman. It's always interesting to note that we usually gather a pretty good crowd when we talk about A–76, even on a Friday afternoon; and I welcome all of our witnesses and participants today.

As we all know, A–76 is—I'll phrase it, not many people even pay much attention to it outside of Washington. I certainly would hate to poll my constituents and ask how many of them have ever heard of A–76, but it is quite a hot topic for those of us who work in this particular area, and it would—it seems to me that we need to work very hard to try to resolve the difficulties that we have had with A–76, and I look forward today to hearing from the witnesses to talk about the report issued by the GAO, which will I think provide another basis for another round of discussions which I hope will be productive in trying to deal with this very contentious area of Federal procurement policy.

Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much.

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

Statement of Rep. Jim Turner

Hearing on the Report of the Commercial Activities Panel

September 27, 2002

Thank you Mr. Chairman for holding this important hearing today on the report of the Commercial Activities Panel.

The National Defense Authorization Act of 2001 required the Comptroller General to "convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the Federal Government from Government personnel to a Federal contractor." The statute further required fair representation on the panel for the Department of Defense, the Office of Management and Budget (OMB), persons in private industry, and federal labor organizations. The Act also required the Comptroller General to submit a report to Congress on the results of the study not later than May 1, 2002, which he did.

After a number of public meetings, the panel unanimously adopted a set of ten principles which should guide sourcing decisions. These principles include, among others, recognizing that inherently governmental functions should be performed by federal workers, creating incentives and processes to foster high-performing organizations throughout the federal government, and avoiding arbitrary full-time equivalent or other arbitrary numerical goals.

A supermajority of the panel also voted for an additional set of recommendations. Perhaps the most controversial of these being the recommendation that the current A-76 process for conducting public-private competitions be integrated into the Federal Acquisition Regulations – the FAR. Unfortunately, representatives of federal employee unions were among those who dissented from these additional recommendations.

Mr. Chairman, these are difficult and contentious issues, and I look forward to hearing from our witnesses today.

Mr. DAVIS. Mr. Walker, you're our first panel. You know the policy here.

[Witness sworn.]

Mr. DAVIS. Thank you. Thanks again for being with us, and we appreciate your flexibility in meeting our different schedule needs.

STATEMENT OF DAVID M. WALKER, COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE

Mr. WALKER. I'm happy to do it, Mr. Chairman, Mr. Turner. It's a pleasure to be here. I think this is a very important topic. I know that you've tried and all of us have tried on several occasions to make this happen, and I'm pleased that it is happening.

I'm pleased to be here today to participate in this subcommittee's hearing on the report of the congressionally mandated Commercial Activities Panel. And, again, it is the Panel's report. It is not a GAO report. And I think that is very important. I'm acting in my capacity as the chairman of the Commercial Activities Panel, but obviously I'm also the Comptroller General of the United States.

In just the few months since the Panel issued its report in April, we've begun to see real progress in implementing the Panel's recommendations, at least as it relates from an administrative standpoint; and I know that Angela Styles will then be talking about that.

As you know, the Panel's work was the result of a provision contained in the fiscal year 2001 Defense Authorization Act, which called for me, in my capacity as Comptroller General of the United States, to convene a panel of experts to study and make recommendations for improving the policies and procedures governing the transfer of commercial activities for the Federal Government from government to contractor personnel. The impetus of the legislation was the growing controversy surrounding competitions conducted under OMB Circular A–76 to determine whether the government should obtain commercially available goods and services from the public or private sectors.

Importantly here, Mr. Chairman and Mr. Turner, I use the term "sourcing," not outsourcing, because, under our principles, it could go either way. While there's likely to be more activity going outside the Federal Government, there are possibilities that they could come back, and obviously I'll be happy to answer questions on that.

Controversy surrounding the use of A–76 also occurred at the time of increasing questions over the role of government and who was in the best position to provide the needed services. As I have testified on a number of occasions, given recent trends and our long-range fiscal challenges, the Federal Government needs to engage in a fundamental review, reassessment and reprioritization of what the Federal Government should do, how the Federal Government should do business and who should do the Federal Government's business.

Because of the importance of the issues to be addressed, I chose to chair the Panel rather than to delegate it, which I was allowed to do under the statute. My view was, unless you had top-level people from the different groups involved, that the hope of being able to achieve a consensus on anything was next to zero, given the nature and the controversy and complexity associated with this topic.

In establishing the Panel, a number of steps were taken to ensure representation from all major stakeholders as well as to ensure a fair and balanced process. To ensure a broad array of views on the Panel, we used the Federal Register notice to seek suggestions on the Panel's composition.

Let me note for the record, contrary to assertions by some, I received no complaints from any Panel member during the process about the composition of the Panel, no complaints from any Panel member about the composition of the Panel until after our report was issued. My view is, if you can't attack the result, you attack the process, and that's what is happening. It's the oldest game in town.

Once convened, the Panel as a group took a number of steps at the outset to guide its deliberations and ensure a full and balanced consideration of the issues. The first step was the adoption of a mission statement. The Panel also agreed that all of its findings and recommendations would require agreement of at least two-thirds supermajority of the Panel in order to be adopted. This meant that everything was in play, and you couldn't end up having factions form that would automatically result in a stalemate of the process.

The Panel further decided that each member of the Panel would have an option of having a brief statement included in the report explaining that member's position on the matters considered by the Panel. Every member did so, and we also had a Federal Register notice soliciting input on the issues.

The Panel held 11 meetings over a period of May 2001, to March 2002, including several field hearings during that period of time.

As the program began its work, it recognized the need for a set of principles that would provide a framework for sourcing decisions. Those principles, as they were debated and fleshed out, provided an important vehicle for assessing what does or does not work under the current A–76 process and provided a framework for identifying needed changes in the process.

The principles, which are outlined on page 7 of my testimony, 10 in total, were unanimously adopted by the Panel and included as an integral part of the program's recommendations. While each principle is important, no single principle stands alone, and several are interrelated. Therefore, the Panel adopted the principles and their accompanying narrative comments as a pack and then used these principles to assess the government's existing sourcing system and to develop additional Panel recommendations.

In addition to the principles, the Panel adopted a package of additional recommendations that it believed would improve significantly the government's policies and procedures for making sourcing decisions. As you noted, Mr. Chairman, this was adopted by a supermajority of the Panel by an 8 to 4 vote.

It is important to emphasize that the Panel decided to consider and adopt these vital recommendations as a package, just as we did with the principles, recognizing the diverse needs represented on the Panel and the give and take required to reach agreement among a supermajority of the panelists.

As a result, the supermajority of the Panel members recommended the adoption of three basic items: Conduct public-pri-

vate competitions under the framework of an integrated FAR-based process, make limited changes to the existing A–76 process, and encourage the development of high-performing organizations.

Many of the panel's recommendations can be accomplished administratively under current law, and OMB is taking steps to try to accomplish that. The Panel recommended that our recommendations be adopted as soon as practicable, some of which, however, may require legislation, and obviously that is one of the reasons why we are having this hearing.

Like the guiding principles, the other recommendations that we made were a result of much discussion and debate and, frankly, compromise. I was getting input from every Panel member, including individuals who I knew would vote no in a good-faith attempt to try to come up with a fair, balanced, reasoned and reasonable proposal, even if it wasn't going to make a difference on what the ultimate vote would be. All we had to have was one of the eight members vote no, and we would not have these additional recommendations.

In conclusion, I supported the adoption of the set of principles as well as the package of additional recommendations contained in the Panel's report. Overall, I believe the findings and recommendations contained in the Panel's report represent a reasoned, reasonable, fair and balanced approach to addressing the important, complex and controversial area of sourcing policy.

I hope that the Congress and the administration will continue to consider and act on this report and its recommendations. I particularly want to encourage the Congress and the administration to consider the importance of the high-performing organizations concept. Agencies should not wait until faced with the challenge of public-private competitions to seek efficiencies to retain work in-house. It is in the taxpayers' interest that we try to maximize the performance and ensure the accountability of all enterprises within government, whether or not they will ever be subject to sourcing.

The fact of the matter is, is that most government jobs will never be subject to competitions. As a result, I believe that the Panel's recommendation pertaining to high-performing organizations could be an important vehicle for fostering much-needed attention to how we can enhance the economy, efficiency and effectiveness of government and improve government's accountability in way as a complement to, not a substitute for, always, a competition.

Finally, and most importantly, in considering the Panel's package of recommendations or any other changes that may be considered by Congress and the administration, in my view, the guiding principles which were developed and unanimously agreed to by the Panel should be the foundation for any further action.

Let me also add that I appreciate the hard work of my fellow panelists and their staff who worked in a good-faith effort over a considerable amount of time in order to deliver this report.

Mr. Chairman, that—and Mr. Turner, that concludes my opening statement. I would be happy to answer any questions that you may have.

Mr. DAVIS. Thank you, Mr. Walker. I understand you're willing

to sit here while the others testify, and we can do the questions all at once.

Mr. WALKER. I would be happy to do that, Mr. Chairman.

Mr. DAVIS. That would be great.

[The prepared statement of Mr. Walker 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 1:30 p.m., EDT
Friday, September 27, 2002

COMMERCIAL ACTIVITIES PANEL

Improving the Sourcing Decisions of the Federal Government

Statement of David M. Walker
Comptroller General of the United States and
Chair of the Commercial Activities Panel

GAO-02-847T

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to participate in the subcommittee's hearing on the report of the congressionally mandated Commercial Activities Panel (the Panel). In just the few months since the Panel issued its report in April, we have begun to see real progress in implementing the Panel's recommendations. An interagency task force led by the Office and Management and Budget (OMB) has been working to revise OMB Circular A-76, and a draft for public comment is expected soon. The Department of Defense, traditionally the predominant user of the Circular, has participated in this effort and is working to revise and streamline its competitive sourcing procedures. I am hopeful that these and other efforts will result in the needed improvements envisioned by the Panel.

As you know, the Panel's work was the result of a provision contained in the Fiscal Year 2001 Defense Authorization Act, which called for me, in my capacity as the Comptroller General, to convene a panel of experts to study, and make recommendations for improving, the policies and procedures governing the transfer of commercial activities for the federal government from government to contractor personnel. The impetus for this legislation was the growing controversy surrounding competitions conducted under OMB Circular A-76 to determine whether the government should obtain commercially available goods and services from the public or private sectors.[1] As noted in the introduction to the Panel's report, the use of cost comparison studies under A-76 was under fire from all sides. All parties concerned—federal managers, employees, and industry representatives—were expressing growing frustration with the process, and many believed the process needed significant reform. The Panel's report was published on April 30, 2002, and is available on GAO's Web page at: www.gao.gov under the "Commercial Activities Panel" link.

Controversy surrounding the use of A-76 also occurred at a time of increasing questions over the role of government and who is in the best position to provide needed services. Specifically, should the work of government be performed by government employees, contractors, or a combination of both, possibly through a partnership agreement?

[1] Examples of commercial functions typically subject to the competitive sourcing process at the Department of Defense include transportation services, computer services, education and training, and food services.

As I have testified on a number of occasions, given recent trends and our long-range fiscal challenges, the federal government needs to engage in a fundamental review, reassessment, and reprioritization of what the government does, how the government does business, and who does the government's business. This is essential in order to increase fiscal flexibility and improve how the government works in the modern world. This drives the need to evaluate and revise the current approach to acquiring commercial services to ensure that it achieves the maximum benefit for the taxpayers and a reasonable balance among a variety of competing interests.

Because of the importance of the issues to be addressed, I chose to chair the Panel rather than to designate someone else, as permitted in the legislation. In my opinion, the Panel's report presents a reasoned, reasonable, and balanced set of recommendations, which, if implemented, will significantly improve the government's sourcing processes and practices. My testimony today provides some context to the Panel's work and then focuses on (1) the processes used to select Panel members and other actions taken to ensure a fair and balanced process; (2) the guiding principles, findings, and recommendations of the Panel; and (3) the next steps needed to implement the Panel's recommendations.

Background

Since 1955, the executive branch has encouraged federal agencies to obtain commercially available goods and services from the private sector when the agencies determine that such action is cost-effective. OMB formalized the policy in its Circular A-76, issued in 1966. In 1979, OMB supplemented the circular with a handbook that included procedures for competitively determining whether commercial activities should be performed in-house, by another federal agency through an interservice support agreement, or by the private sector. OMB has updated this handbook several times.

Under A-76, commercial activities may be converted to or from contractor performance either by direct conversion or by cost comparison. Under direct conversion, specific conditions allow commercial activities to be moved from government or contract performance without a cost comparison study (e.g., for activities involving 10 or fewer civilians).[2]

[2] For functions performed by Defense Department employees, a number of additional requirements, reports, and certifications are addressed in chapter 146 of title 10, United States Code, and in recurring provisions in the Department's annual appropriations.

Generally, however, commercial functions are to be converted to or from contract performance by cost comparison, where the estimated cost of government performance of a commercial activity is compared with the cost of contractor performance in accordance with the principles and procedures set forth in Circular A-76 and the revised supplemental handbook. As part of this process, the government identifies the work to be performed (described in the performance work statement), prepares an in-house cost estimate on the basis of its most efficient organization,[3] and compares it with the winning offer from the private sector.

According to A-76 guidance, an activity should not be moved from one sector to the other (whether public to private or vice versa) unless doing so would save at least $10 million or 10 percent of the personnel costs of the in-house performance (whichever is less). OMB established this minimum cost differential to ensure that the government would not convert performance for marginal savings.

The handbook also provides an administrative appeals process. An eligible appellant[4] must submit an appeal to the agency in writing within 20 days of the date that all supporting documentation is made publicly available. Appeals are supposed to be adjudicated within 30 days after they are received. Private-sector offerors who believe that the agency has not complied with applicable procedures have additional avenues of appeal. They may file a bid protest with GAO or file an action in court.[5]

Circular A-76 requires agencies to maintain annual inventories of commercial activities performed in-house. A similar requirement was included in the Federal Activities Inventory Reform (FAIR) Act of 1998, which directs agencies to develop annual inventories of their positions

[3] The most efficient organization is the government's in-house plan to perform a commercial activity. It may include a mix of federal employees and contract support. It is the basis for all government costs entered on the cost comparison form. It is the product of the management plan and is based upon the performance work statement.

[4] An eligible appellant is defined as (1) federal employees (or their representatives) and existing federal contractors affected by a tentative decision to waive a cost comparison; (2) federal employees (or their representatives) and contractors who have submitted formal bids or offers and who would be affected by a tentative decision; or (3) agencies that have submitted formal offers to compete for the right to provide services through an interservice support agreement.

[5] Federal employees do not have standing to file a protest with GAO and have generally been denied standing to sue in court.

that are not inherently governmental.[6] The fiscal year 2001 inventory identified approximately 841,000 full-time equivalent commercial-type positions governmentwide, of which approximately 413,000 were in the Department of Defense (DOD).[7]

DOD has been the leader among federal agencies in recent years in its use of OMB Circular A-76; the circular's use by other agencies has been very limited. However, in 2001, OMB signaled its intention to direct greater use of the circular on a government-wide basis. In a March 9, 2001, memorandum, OMB directed agencies to take action in fiscal year 2002 to directly convert or complete public-private competitions of not less than 5 percent of the full-time equivalent positions listed in their FAIR Act inventories. Subsequent guidance expanded the requirement to 15 percent by fiscal year 2003, with the ultimate goal of competing at least 50 percent.

Although comprising a relatively small portion of the government's overall service contracting activity, competitive sourcing under Circular A-76 has been the subject of much controversy because of concerns about the process raised both by the public and private sectors. Federal managers and others have been concerned about the organizational turbulence that typically follows the announcement of A-76 studies. Government workers have been concerned about the impact of competition on their jobs, the opportunity for input into the process, and the lack of parity with industry offerors to protest A-76 decisions. Industry representatives have complained about unfairness in the process and the lack of a level playing field between the government and the private sector in accounting for costs. Concerns have also been raised about the adequacy of the oversight of subsequent performance, whether the work is being performed by the public or private sector.

Amid these concerns over the A-76 process, the Congress enacted section 832 of the National Defense Authorization Act, Fiscal Year 2001. The act required the Comptroller General to convene a panel of experts to study

[6] Section 5 of P.L. 105-270, codified at 31 U.S.C. 501 note (1998), defines an inherently governmental function as a "function that is so intimately related to the public interest as to require performance by Federal Government employees."

[7] Guidance implementing the FAIR Act permitted agencies to exempt many commercial activities from competitive sourcing consideration on the basis of legislative restrictions, national security considerations, and other factors. Accordingly, DOD's fiscal year 2001 inventory of positions it considered to be potentially subject to competition was reduced t approximately 241,000.

the policies and procedures governing the transfer of commercial activities for the federal government from government to contactor personnel. The act also required the Comptroller General to appoint highly qualified and knowledgeable persons to serve on the panel and ensure that the following entities received fair representation on the panel:

- DOD
- Persons in private industry
- Federal labor organizations
- OMB

Appendix I lists the names of the Panel members. The legislation mandating the Panel's creation required that the Panel complete its work and report the results of its study to the Congress no later than May 1, 2002. The Panel's report was published on April 30, 2002.

Steps Taken to Ensure a Representative Panel and a Fair and Balanced Process

In establishing the Panel, a number of steps were taken to ensure representation from all major stakeholders as well as to ensure a fair and balanced process. This began with my selection of Panel members, which was then followed by the Panel's establishment of a process to guide its work.

To ensure a broad array of views on the Panel, we used a *Federal Register* notice to seek suggestions on the Panel's composition.[8] On the basis of the suggestions received in response to that notice, as well as the need to include the broad representation outlined in legislation, I personally interviewed potential panel members. I believe that we selected a group of outstanding individuals representative of diverse interest groups from the public and private sectors, labor unions, and academia with experience in dealing with sourcing decisions at both the federal and local government levels.

[8] A *Federal Register* notice was also used to solicit public input on issues the Panel should address.

Once convened, the Panel, as a group, took a number of steps at the outset to guide its deliberations and ensure a full and balanced consideration of the issues. The first step was the adoption of the following mission statement:

Mission of the Commercial Activities Panel

The mission of the Commercial Activities Panel is to improve the current sourcing framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns.

The Panel also agreed that all of its findings and recommendations would require the agreement of at least a two-thirds supermajority of the Panel in order to be adopted. The Panel further decided that each Panel member would have the option of having a brief statement included in the report explaining the member's position on the matters considered by the Panel. In addition to the *Federal Register* notice soliciting input on issues to be considered by the Panel, the Panel held 11 meetings over the period of May 2001 to March 2002. Three of these were public hearings in Washington, D.C.; Indianapolis, Indiana; and San Antonio, Texas. In the public hearings, Panel members heard testimony from scores of representatives of the public and private sectors, state and local governments, unions, contractors, academia, and others. Panelists heard first-hand about the current process, primarily the cost comparison process conducted under OMB Circular A-76, as well as alternatives to that process. Appendix II provides more detail on the topics and concerns raised at the public hearings. The Panel also maintained an E-mail account to receive written comments from any source.

After the completion of the field hearings, the Panel members met in executive session several times, augmented between meetings by the work of staff to help them (1) gather background information on sourcing trends and challenges, (2) identify sourcing principles and criteria, (3) consider A-76 and other sourcing processes to assess what works and what does not, and (4) assess alternatives to the current sourcing processes.

Principles, Findings, and Recommendations

As the Panel began its work, it recognized the need for a set of principles that would provide a framework for sourcing decisions. Those principles, as they were debated and fleshed out, provided an important vehicle for assessing what does or does not work in the current A-76 process, and provided a framework for identifying needed changes in the process.

Guiding Principles

The Panel coalesced around a set of sourcing principles. The principles helped frame the Panel's deliberations and became a reference point for the Panel's work. Moreover, the principles were unanimously adopted by the Panel and included as part of the Panel's recommendations. While each principle is important, no single principle stands alone, and several are interrelated. Therefore, the Panel adopted the principles and their accompanying narrative comments as a package and then used these principles to assess the government's existing sourcing system and to develop additional Panel recommendations.

Guiding Principles for Sourcing Policy

The Panel believes that federal sourcing policy should:

1. Support agency missions, goals, and objectives.
2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.
3. Recognize that inherently governmental and certain other functions should be performed by federal workers.
4. Create incentives and processes to foster high-performing, efficient, and effective organizations throughout the federal government.
5. Be based on a clear, transparent, and consistently applied process.
6. Avoid arbitrary full-time equivalent or other arbitrary numerical goals.
7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
9. Ensure that competitions involve a process that considers both quality and cost factors.
10. Provide for accountability in connection with all sourcing decisions.

Findings

During our deliberations, the Panel noted that there are some advantages to the current A-76 system. First, A-76 cost comparisons are conducted under an established set of rules, the purpose of which is to ensure that sourcing decisions are based on uniform, transparent, and consistently applied criteria. Second, the A-76 process has enabled federal managers to make cost comparisons between sectors that have vastly different approaches to cost accounting. Third, the current A-76 process has been used to achieve significant savings and efficiencies for the government. Savings result regardless of whether the public or the private sector wins the cost comparison. This is because competitive pressures have served to promote efficiency and improve the performance of the activity studied.

Despite these advantages, the Panel also heard frequent criticisms of the A-76 process. The Panel's report noted that both federal employees and private firms complain that the A-76 competition process does not meet the principles' standard of a clear, transparent, and consistently applied process. For example, some Federal employees have complained that A-76 cost comparisons have included functions that were inherently governmental and should not have been subject to a cost comparison at all. While OMB guidance exists to help define what functions should be considered inherently governmental, the Panel's third principle recognized that making such determinations remains difficult. Also, others have expressed concern that some government officials in a position to affect contracting decisions may subsequently take positions with winning contractors. In this regard, various legislative provisions exist that place restrictions on former government employees taking positions with winning contractors. Time did not permit the Panel to explore the extent to which additional legislation may be needed in this area.

Since January 1999, GAO has issued 25 decisions on protests involving A-76 cost comparisons. Of these decisions, GAO sustained 11 and denied 14. "Sustaining" a protest means that GAO found that the agency had violated procurement statutes or regulations in a way that prejudiced the protester. Protests involving A-76 represent a very small percentage of the many hundreds of bid protest decisions that GAO issued in the past 3 years. They do, however, indicate an unusually high percentage of sustained protests. In protest decisions covering all procurements, GAO has sustained about one-fifth of the protests, while in A-76 protests GAO has sustained almost half. (It should be kept in mind, though, that most A-76 decisions are not protested, just as most contract award decisions are not protested.) These sustained protests generally reflect only the errors made in favor of the government's most efficient organization since only the private-sector offeror has the right to protest to GAO.

In addition, while any public-private competition is, by nature, challenging and open to some of the concerns that have been raised regarding the A-76 process, the high rate of successful A-76 protests suggests that agencies have a more difficult time applying the A-76 rules than they do applying the normal (i.e., Federal Acquisition Regulation) acquisition rules. At least in part, this may be because the Federal Acquisition Regulation (FAR) rules are so much better known. While training could help overcome this lack of familiarity (and many agencies, particularly those in DOD, have been working on A-76 training), the Panel noted that the FAR acquisition and source selection processes are already better known and better understood; they, in a sense, serve as a "common language" for procurements and source selections.

In the Panel's view, the most serious shortcoming of the A-76 process is that it has been stretched beyond its original purpose, which was to determine the low-cost provider of a defined set of services. Circular A-76 has not worked well as the basis for competitions that seek to identify the best provider in terms of quality, innovation, flexibility, and reliability. This is particularly true in today's environment, where solutions are increasingly driven by technology and may focus on more critical, complex, and interrelated services than previously studied under A-76. In the federal procurement system today, there is common recognition that a cost-only focus does not necessarily deliver the best quality or performance for the government or the taxpayers. Thus, while cost is always a factor, and often the most important factor, it is not the only factor that may need to be considered. In this sense, the A-76 process may no longer be as effective a tool, since its principal focus is on cost.

During its year-long study, the Panel identified several key characteristics of a successful sourcing policy. First, the Panel heard repeatedly about the importance of competition and its central role in fostering economy, efficiency, high performance, and continuous performance improvement. The means by which the government utilizes competition for sourcing its commercial functions was at the center of the Panel's discussions and work. The Panel strongly supported a continued emphasis on competition as a means to improve economy, efficiency, and effectiveness of the government. The Panel also believed that whenever the government is considering converting work from one sector to another, public-private competitions should be the norm. Direct conversions generally should occur only where the number of affected positions is so small that the costs of conducting a public-private competition clearly would outweigh any expected savings. Moreover, there should be adequate safeguards to

ensure that activities, entities, or functions are not improperly separated to reduce the number of affected positions and avoid competition.

A second theme identified by the Panel and consistently cited at the public hearings was the need for a broader approach to sourcing decisions, rather than an approach that relies on the use of arbitrary quotas or that is unduly constrained by personnel ceilings. Critical to adopting a broader perspective is having an enterprisewide perspective on service contract expenditures, yet the federal government lacks timely and reliable information about exactly how, where, and for what purposes, in the aggregate, taxpayer dollars are spent for both in-house and contracted services. The Panel was consistently reminded about, and fully agreed with, the importance of ensuring accountability throughout the sourcing process, providing the workforce with adequate training and technical support in developing proposals for improving performance, and assisting those workers who may be adversely affected by sourcing decisions. Improved accountability extends to better monitoring of performance and results after competitions are completed—regardless of the winner.

The Panel heard about several successful undertakings involving other approaches to sourcing decisions. Some involved business process reengineering and public-private partnerships, and emphasized labor-management cooperation in accomplishing agency missions. For example, in Indianapolis, Indiana, on August 8, 2001, the Panel heard from representatives from several organizations that had taken different approaches to the sourcing issue. Among them were the Naval Surface Warfare Center in Crane, Indiana, which reengineered its business processes to reduce costs and gain workshare, and the city of Indianapolis, which effectively used competition to greatly improve the delivery of essential services. In doing so, the city also provided certain technical and financial assistance to help city workers successfully compete for work. These entities endeavored to become "most efficient organizations." It was from these examples and others that the Panel decided that all federal agencies should strive to become "high-performing organizations."

Third, sourcing policy is inextricably linked to the government's human capital policies. This linkage has many levels, each of which is important. It is particularly important that sourcing strategies support, not inhibit, the government's efforts to attract, motivate, and retain a high-performing in-house workforce, as well as support its efforts to access and collaborate with high-performance, private-sector providers. Properly addressed, these policies should be complementary, not conflicting.

Panel Recommendations

In addition to the principles discussed earlier, the Panel adopted a package of additional recommendations it believed would improve significantly the government's policies and procedures for making sourcing decisions. It is important to emphasize that the Panel decided to consider and adopt these latter recommendations as a package, recognizing the diverse interests represented on the Panel and the give and take required to reach agreement among a supermajority of the Panelists. As a result, a supermajority of the Panel members recommended the adoption of the following actions:

- *Conduct public-private competitions under the framework of an integrated FAR-based process.* The government already has an established mechanism that has been shown to work as a means to identify high-value service providers: the negotiated procurement process of the Federal Acquisition Regulation. The Panel believed that in order to promote a more level playing field on which to conduct public-private competitions, the government needed to shift, as rapidly as possible, to a FAR-type process under which all parties would compete under the same set of rules. Although some changes in the process would be necessary to accommodate the public-sector proposal, the same basic rights and responsibilities would apply to both the private and the public sectors, including accountability for performance and the right to protest. This and perhaps other aspects of the integrated competition process could require changes to current law or regulation (e.g., requirements in title 10 of the U.S. Code that DOD competitive sourcing decisions be based on low cost).

- *Make limited changes to the existing A-76 process.* The development of an integrated FAR-type process will require some time to be implemented. In the meantime, the Panel expected current A-76 activities would continue, and therefore believed some modifications to the existing process could and should be made. Accordingly, the Panel recommended a number of limited changes to OMB Circular A-76. These changes would, among other things, strengthen conflict-of-interest rules, improve auditing and cost accounting, and provide for binding performance agreements.

- *Encourage the development of high-performing organizations (HPOs).* The Panel recommended that the government take steps to encourage HPOs and continuous improvement throughout the federal government, independent of the use of public-private competitions. In particular, the Panel recommended that the Administration develop a process to select a limited number of functions currently performed by federal employees to become HPOs, and then evaluate their performance. Then, the authorized HPOs would be exempt from competitive sourcing studies for a designated

period of time. Overall, however, the HPO process is intended to be used in conjunction with, not in lieu of, public-private competitions. The successful implementation of the HPO concept will require a high degree of cooperation between labor and management, as well as a firm commitment by agencies to provide sufficient resources for training and technical assistance. In addition, a portion of any savings realized by the HPO should be available to reinvest in continuing reengineering efforts and for further training or incentive purposes.

Let me speak specifically to the creation of HPOs. Many organizations in the past, for various reasons, have found it difficult to become high-performing organizations. Moreover, the federal government continues to face new challenges in making spending decisions for both the long and near term because of federal budget constraints, rapid advances in technology, the impending human capital crisis, and new security challenges brought on by the events of September 11, 2001. Such a transformation will require that each organization reverse decades of underinvestment and lack of sustained attention to maintaining and enhancing its capacity to perform effectively.

The Panel recognized that incentives are necessary to encourage both management and employees to promote the creation of HPOs. It envisioned that agencies would have access to a range of financial and consulting resources to develop their plans, with the costs offset by the savings realized. The Panel's report focused primarily on HPOs in the context of commercial activities, given its legislative charter. However, there is no reason why the concept could not be applied to all functions, since much of the government's work will never be subject to competition.

HPOs may require some additional flexibility coupled with appropriate safeguards to prevent abuse. The Panel also envisioned the use of performance agreements and periodic performance reviews to ensure appropriate transparency and accountability.

Although a minority of the Panel did not support the package with the three additional recommendations noted above, some of them indicated that they supported one or more elements of the package. Importantly, there was a good faith effort, even at the last minute of the report's preparation, to maximize agreement and minimize differences among Panelists. In fact, changes were made even when it was clear that some Panelists seeking changes were highly unlikely to vote for the supplemental package of recommendations. As a result, on the basis of Panel meetings and my personal discussions with Panel members at the

end of our deliberative process, the major differences among Panelists were few in number and philosophical in nature. Specifically, disagreement centered primarily on (1) the recommendation related to the role of cost in the new FAR-type process and (2) the number of times the Congress should be required to act on the new integrated process, including whether the Congress should specifically authorize a pilot program that tests that process for a specific time period.

Implementation Strategy

Many of the Panel's recommendations can be accomplished administratively under existing law, and the Panel recommended that they be implemented as soon as practical. The Panel also recognized that some of its recommendations could require changes in statutes or regulations and that making the necessary changes would take some time. Any legislative changes should be approached in a comprehensive and considered manner rather than a piecemeal fashion in order for a reasonable balance to be achieved. Like the guiding principles, the other recommendations were the result of much discussion and compromise and should be considered as a whole.

Moreover, although the Panel viewed the use of a FAR-type process for conducting public-private competitions as the end state, the Panel also recognized that some elements of its recommendations represent a shift in current procedures for the federal government. Therefore, the Panel's report outlined the following phased implementation strategy that would allow the federal government to demonstrate and then refine its sourcing policy on the basis of experience:

- A-76 studies currently under way or initiated during the near term should continue under the current framework. Subsequent studies should be conducted in accordance with the improvements listed in the report. OMB should develop and oversee the implementation of a FAR-type, integrated competition process. In order to permit this to move forward expeditiously, it may be advisable to limit the new process initially to civilian agencies, where its use would not require legislation. Statutory provisions applying only to DOD agencies may require repeal or amendment before the new process could be used effectively at DOD, and the Panel recommended that any legislation needed to accommodate the integrated process in DOD be enacted as soon as possible. As part of a phased implementation and evaluation process, the Panel recommended that the integrated competition process be used in a variety of agencies and in meaningful numbers across a broad range of activities, including work currently performed by federal employees, work currently performed by contractors, and new work.

- Within 1 year of initial implementation of the new process, and again 1 year later, the Director of OMB should submit a detailed report to the Congress identifying the costs of implementing the new process, any savings expected to be achieved, the expected gains in efficiency or effectiveness of agency programs, the impact on affected federal employees, and any lessons learned as a result of the use of this process together with any recommendations for appropriate legislation.

- GAO would review each of these OMB reports and provide its independent assessment to the Congress. The Panel anticipated that OMB would use the results of its reviews to make any needed "mid-course corrections." On the basis of the results generated during the demonstration period, and on the reports submitted by OMB and GAO, the Congress will then be in a position to determine the need for any additional legislation.

Conclusions

The federal government is in a time of transition, and we face a range of challenges in the 21st century. This will require the federal government to transform what it does, the way that it does business, and who does the government's business. This may require changes in many areas, including human capital and sourcing strategies. On the basis of the statutory mandate, the Commercial Activities Panel primarily focused on the sourcing aspects of this needed transformation.

I supported the adoption of the set of principles as well as the package of additional recommendations contained in the Panel's report. Overall, I believe that the findings and recommendations contained in the Panel's report represent a reasoned, reasonable, fair, and balanced approach to addressing this important, complex, and controversial area. I hope that the Congress and the Administration will continue to consider and act on this report and its recommendations. I particularly want to urge the Congress and the Administration to consider the importance of encouraging agencies to become high-performing organizations on an ongoing basis. Agencies should not wait until faced with the challenge of public-private competitions to seek efficiencies to retain work in-house. In addition, most of the government's workers will never be subject to competitions. As a result, I believe that the Panel's recommendation pertaining to high-performing organizations could be an important vehicle for fostering much needed attention to how we enhance the economy, efficiency, and effectiveness of the federal government in ways other than through competition.

Finally and most importantly, in considering the Panel's package of recommendations or any other changes that may be considered by the Congress and the Administration, the guiding principles, developed and unanimously agreed upon by the Panel, should be the foundation for any future action.

Let me also add that I appreciate the hard work of my fellow Panelists and their willingness to engage one another on such a tough issue—one where we found much common ground despite a range of divergent views. I also want to thank the GAO staff and the other support staff who contributed to this effort.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions that you or other members of the subcommittee may have.

Appendix I: Members of the Commercial Activities Panel

David M. Walker, Chairman
Comptroller General of the United States

E. C. "Pete" Aldridge, Jr.
Under Secretary of Defense for Acquisition, Technology and Logistics

Frank A. Camm, Jr.
Senior Analyst, RAND

Mark C. Filteau
President, Johnson Controls World Services, Inc.

Stephen Goldsmith
Senior Vice President, Affiliated Computer Services

Bobby L. Harnage, Sr.
National President, American Federation of Government Employees, AFL-CIO

Kay Coles James
Director, U.S. Office of Personnel Management

Colleen M. Kelley
National President, National Treasury Employees Union

The Honorable David Pryor
Director, Institute of Politics, Harvard University

Stan Z. Soloway
President, Professional Services Council

Angela B. Styles[1]
Administrator, Office of
Federal Procurement Policy

Robert M. Tobias
Distinguished Adjunct Professor,
American University

[1] Angela Styles replaced Sean O'Keefe on the Commercial Activities Panel in December 2001 after he was confirmed as the Administrator of the National Aeronautics and Space Administration.

Appendix II: Summary of Commercial Activities Panel Public Hearings

Washington, D.C., June 11, 2001
"Outsourcing Principles and Criteria"

Key Points

- Status quo is not acceptable to anyone.
- Sourcing decisions require a strategic approach.
- Federal workers should perform core government functions.
- Need for MEOs throughout the government.
- Government needs clear, transparent, and consistently applied sourcing criteria.
- Avoid arbitrary FTE goals.
- Objective should be to provide quality services at reasonable cost.
- Provide for fair and efficient competition between the public and private sectors.
- Sourcing decisions require appropriate accountability.

Indianapolis, Indiana, August 8, 2001
"Alternatives to A-76"

Key Points

- Crane Naval Surface Warfare Center's reengineering process led to significant efficiencies and reduced workforce trauma.
- Employees must be involved with any reform effort. Secrecy is counterproductive.
- Committed leadership, effective implementation, and well-planned workforce transition strategies are key to any reform effort.
- Privatization-in-place was used effectively at Indianapolis Naval Air Warfare Center to avert a traditional Base Realignment and Closure action.
- The city of Indianapolis provided certain technical and financial assistance to help workers successfully compete for the work.
- Certain technology upgrades in Monterey, California, via a public–private partnership led to efficiencies and increased effectiveness.
- Measuring performance is critical.
- A-76 is only one of many efficiency tools available to federal managers.
- Other tools include
  - Bid to goal, which helps units become efficient and thus avoid A-76,
  - Transitional Benefit Corporation, a concept that promotes the transfer of government assets to the private sector and provides transition strategies for employees, and

- ESOP, under which employees own a piece of the organization that employs them. ESOPs have been established in a few federal organizations.

San Antonio, Texas, August 15, 2001
"A-76: What's Working and What's Not"

Key Points

- A-76 process is too long and too costly.
- Cost of studies can greatly reduce government savings.
- Cost to industry in both dollars and uncertainty.
- Demoralized workers quit. But successful contractors need these workers.
- Larger A-76 studies can yield greater savings, but these studies become much more complex.
- Lack of impetus for savings without competition.
- One-step bidding process should be used.
- MEO and contractors should
  - Compete together in one procurement action,
  - Be evaluated against the same solicitation requirements using the same criteria, and
  - Be awarded contracts based on best value.
- Provide more training for MEO and A-76 officials.
- MEOs should have legal status to protest and appeal awards and obtain bid information.
- A-76 rules should be more clear and applied consistently through a centralized management structure.
- For bid and monitoring purposes, government costs should be collected and allocated consistent with industry (e.g., activity-based costing).
- Need to eliminate any suggestion of conflicts of interest.
- Need incentives for agencies and workers (e.g., share-in-savings).
- Provide soft landings for workers.
- Allow workers to form public-sector organizations for bidding.

Appendix III: Sourcing Principles[1]

Based on public input, a review of previous studies and other relevant literature, and many hours of deliberation, the Panel developed and unanimously adopted a set of principles that it believes should guide sourcing policy for the federal government. While each principle is important, no single principle stands alone. As such, the Panel adopted the principles as a package. The Panel believes that federal sourcing policy should:

1. Support agency missions, goals, and objectives.

Commentary: This principle highlights the need for a link between the missions, goals, and objectives of federal agencies and related sourcing policies.

2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal workforce.

Commentary: This principle underscores the importance of considering human capital concerns in connection with the sourcing process. While it does not mean that agencies should refrain from outsourcing due to its impact on the affected employees, it does mean that the federal government's sourcing policies and practices should consider the potential impact on the government's ability to attract, motivate, retain, and reward a high-performing workforce both now and in the future. Regardless of the result of specific sourcing decisions, it is important for the workforce to know and believe that they will be viewed and treated as valuable assets. It is also important that the workforce receive adequate training to be effective in their current jobs and to be a valuable resource in the future.

3. Recognize that inherently governmental and certain other functions should be performed by federal workers.

Commentary: Recognizing the difficulty of precisely defining "inherently governmental" and "certain other functions," there is widespread consensus that federal employees should perform certain types of work. Office of Management and Budget (OMB) Directive 92-1 provides a framework for defining work that is clearly "inherently governmental" and

[1] The sourcing principles were taken in their entirety from *Commercial Activities Panel, Improving the Sourcing Decisions of Government: Final Report* (Washington, D.C.: April 2002).

the Federal Activities Inventory Reform (FAIR) Act has helped to identify commercial work currently being performed by the government. It is clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policymaking functions, and the government may need to retain an in-house capability even in functions that are largely outsourced. Certain other capabilities, such as adequate acquisition skills to manage costs, quality, and performance and to be smart buyers of products and services, or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.

4. Create incentives and processes to foster high-performing, efficient, and effective organizations throughout the federal government.

Commentary: This principle recognizes that, historically, it has primarily been when a government entity goes through a public-private competition that the government creates a "most efficient organization" (MEO). Since such efforts can lead to significant savings and improved performance, they should not be limited to public-private competitions. Instead, the federal government needs to provide incentives for its employees, its managers, and its contractors to constantly seek to improve the economy, efficiency, and effectiveness of the delivery of government services through a variety of means, including competition, public-private partnerships, and enhanced worker-management cooperation.

5. Be based on a clear, transparent, and consistently applied process.

Commentary: The use of a clear, transparent, and consistently applied process is key to ensuring the integrity of the process as well as to creating trust in the process on the part of those it most affects: federal managers, users of the services, federal employees, the private sector, and the taxpayers.

6. Avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals.

Commentary: This principle reflects an overall concern about arbitrary numbers driving sourcing policy or specific sourcing decisions. The success of government programs should be measured by the results achieved in terms of providing value to the taxpayer, not the size of the in-house or contractor workforce. Any FTE or other numerical goals should be based on considered research and analysis. The use of arbitrary percentage or numerical targets can be counterproductive.

7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.

Commentary: Competitions, including public-private competitions, have been shown to produce significant cost savings for the government, regardless of whether a public or a private entity is selected. Competition also may encourage innovation and is key to improving the quality of service delivery. While the government should not be required to conduct a competition open to both sectors merely because a service could be performed by either public or private sources, federal sourcing policies should reflect the potential benefits of competition, including competition between and within sectors. Criteria would need to be developed, consistent with these principles, to determine when sources in either sector will participate in competitions.

8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.

Commentary: This principle addresses key criteria for conducting competitions. Ineffective or inefficient competitions can undermine trust in the process. The result may be, for private firms (especially smaller businesses), an unwillingness to participate in expensive, drawn-out competitions; for federal workers, harm to morale from overly long competitions; for federal managers, reluctance to compete functions under their control; and for the users of services, lower performance levels and higher costs than necessary. Fairness is critical to protecting the integrity of the process and to creating and maintaining the trust of those most affected. Fairness requires that competing parties, both public and private, or their representatives, receive comparable treatment throughout the competition regarding, for example, access to relevant information and legal standing to challenge the way a competition has been conducted at all appropriate forums, including the General Accounting Office and the United States Court of Federal Claims.

9. Ensure that competitions involve a process that considers both quality and cost factors.

Commentary: In making source selection decisions in public-private competitions: (a) cost must always be considered; (b) selection should be based on cost if offers are equivalent in terms of non-cost factors (for

example, if they offer the same level of performance and quality); but (c) the government should not buy whatever services are least expensive, regardless of quality. Instead, public-private competitions should be structured to take into account the government's need for high-quality, reliable, and sustained performance, as well as cost efficiencies.

10. Provide for accountability in connection with all sourcing decisions.

Commentary: Accountability serves to assure federal workers, the private sector, and the taxpayers that the sourcing process is efficient and effective. Accountability also protects the government's interest by ensuring that agencies receive what they are promised, in terms of both quality and cost, whether the work is performed by federal employees or by contractors. Accountability requires defined objectives, processes, and controls for achieving those objectives; methods to track success or deviation from objectives; feedback to affected parties; and enforcement mechanisms to align desired objectives with actual performance. For example, accountability requires that all service providers, irrespective of whether the functions are performed by federal workers or by contractors, adhere to procedures designed to track and control costs, including, where applicable, the Cost Accounting Standards. Accountability also would require strict enforcement of the Service Contract Act, including timely updates to wage determinations.

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Mr. DAVIS. If I could have the other witnesses come up, and before you sit down, just raise your right hand.

Ms. Kelley is not here, right? We'll get her when she gets in.

[Witnesses sworn.]

Mr. DAVIS. Thank you very much.

Why don't we start with Ms. Styles and move straight on down. Angela, thanks for being with us.

STATEMENTS OF ANGELA STYLES, DIRECTOR, OFFICE OF FEDERAL PROCUREMENT POLICY, U.S. OFFICE OF MANAGEMENT AND BUDGET; JOSEPH SIKES, DIRECTOR OF COMPETITIVE SOURCING AND PRIVATIZATION, U.S. DEPARTMENT OF DEFENSE; STAN SOLOWAY, PRESIDENT, PROFESSIONAL SERVICES COUNCIL; COLLEEN KELLEY, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; JACQUELINE SIMON, DIRECTOR OF PUBLIC POLICY, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; AND MARK WAGNER, ON BEHALF OF MARK FILTEAU, PRESIDENT, JOHNSON CONTROLS WORLD SERVICES, INC.

Ms. STYLES. Thank you very much. I really appreciate the opportunity to be here today to discuss the administration's competitive sourcing initiative, the final report of the Commercial Activities Panel and the administration's pending changes to OMB Circular A–76. In particular, Mr. Chairman, I want to thank you for your continued interest in these difficult but very important issues.

First, I think I have to start off by thanking General Walker and his staff at the GAO. They devoted a tremendous amount of personal time and effort to this panel into creating a fair report. We had a healthy and I think productive exchange of ideas, and I think ultimately, through Mr. Walker's efforts, we were able to achieve consensus on the 10 principles. I think that's a truly astounding feat, given the diversity of the Panel. And while we were not able to achieve consensus on the ultimate recommendations, I think Mr. Walker went above and beyond what would normally be expected in these circumstances to ensure that the views of all Panel members were represented to the maximum extent possible.

I must also commend Mr. Walker for providing an avenue for the administration to work and develop lasting relationships with key players in both industry and the Federal employee unions. The Panel gave us and the administration a firm foundation to ensure that there was an open, full and fair dialog and continue to have one as we move forward with addressing these many difficult issues.

The issues related to this report, public-private competition and to the administration's competitive sourcing initiative are complex, challenging, intellectual and, in many respects, highly politicized.

Competitive sourcing asks people to make very hard management choices, choices that affect very real jobs held by real, dedicated and loyal career civil servants. In many respects, it comes down, I think, to one simple reality. Very few people, whether you're working in the private sector or the public sector, like to work under the pressure of knowing that their job is on the line if they don't figure out how to do it more efficiently and effectively. But the fact that public-private competition and our initiative re-

quire hard choices and a lot of hard work makes it one that can affect fundamental, real and lasting changes in the way we manage the Federal Government. And the clincher here from our perspective is that it's a taxpayer—this initiative strives to focus the Federal Government on its mission, delivering high-quality services to our citizens at the lowest possible cost.

We have civilian agencies for what I submit is the first time taking a very hard look at how they fulfill their mission. What are their employees doing that is inherently governmental? What are they doing that's commercial? Is this the right mix for mission success? They're also asking what private contractors are doing and whether the agency is managing its private contractors well, whether public employees could do it better and cheaper or whether a different private sector company could do it better. These are fundamental questions but ones that must be asked if we're going to have any chance of doing a better job of managing the Federal Government.

Competitive sourcing is about a commitment to better management. It's a commitment to ensuring that our citizens are receiving the highest quality service from their government without regard to whether that job is being done by dedicated Federal employees or the private sector.

What we care about is competition and the provision of government service by those best able to do so, be that the private sector or the government itself. We care about costs, quality and the availability of service, not who provides it.

The Panel's report is a significant step forward and in many regards an important guide as this administration moves forward with overhauling the current process for public-private competition.

I look forward to continuing to work with this committee and assessing and making changes to the process.

This concludes my prepared statement, but I look forward to answering any questions.

Mr. DAVIS. Thank you, Ms. Styles.

[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

SEPTEMBER 27, 2002

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to be here today to discuss the competitive sourcing initiative, the final report of the Commercial Activities Panel, and the pending release of the revised OMB Circular A-76.

As you know, the Administration is committed to making fundamental changes to the way we manage the federal government. These changes are guided by a firm belief that the federal government should be results-oriented, citizen-centered, and market-based. Whether reducing purchase card fraud, expanding e-government, linking agency performance with results, or competing commercial jobs with the private sector, we are making progress on management issues.

Progress is particularly notable on each of the five government-wide initiatives included in the President's Management Agenda: (1) strategic management of human capital; (2) competitive sourcing; (3) improved financial performance; (4) expanded electronic government; and (5) budget and performance integration. To ensure transparency and accountability for performance and results, we have employed a simple "traffic light" grading system. In the FY 2003 budget, 26 departments and agencies received baseline evaluations. Reflective of the fact

that the chosen government-wide initiatives targeted areas with the most apparent deficiencies -- and the greatest opportunities for improved performance -- the initial baseline evaluation showed a lot of poor scores.

After eighteen months of hard work by the departments and agencies in each of these areas, I am heartened by the progress I am starting to see. The competitive sourcing scores for progress included in OMB's Mid-Session review tell a different story from that revealed by the initial baseline. The initial sea of red has been replaced by thirteen green, four yellow and four red progress scores. Departments have begun to effectively use competitive sourcing as a tool to manage. Agencies are taking a very hard look at how they fulfill their missions and they are asking the right questions: what are employees doing that is inherently governmental? What are they doing that is commercial? Is this mix right for mission success? They are also asking what their private contractors are doing for the agency and whether the agency is managing those contracts well. These questions are rather fundamental, but ones that must be asked if we are to have any chance of doing a better job of managing our most important federal resources – people and dollars.

The Competitive Sourcing Initiative

Each time I testify or give a speech, I like to begin the discussion with some of the basics to ensure we all have the benefit of the same historical perspectives. Competitive sourcing is a government-wide initiative to encourage competition for the performance of government activities that are commercial in nature. Using Office of Management and Budget (OMB) Circular No. A-76 ("Circular A-76") departments and agencies have been asked to "determine whether commercial activities should be performed under contract with commercial sources or

in-house using Government facilities and personnel." Competitive sourcing is a means to an end, with the means being competition (generally public-private competition) and the end being better management of our government and better service for our citizens.

As of June 2000, there were 850,000 people in the federal government performing jobs that are commercial in nature – jobs that people also perform in the private sector. Despite the fact that many of these jobs are as basic as mowing the lawn or serving food, few if any of these 850,000 jobs have been exposed to the rigors of competition. Frankly, the federal government has not spent much time managing resources to determine if the same or a higher quality service can be provided to our citizens at a lower cost.

The competitive sourcing initiative asks agencies to manage resources by building the infrastructure necessary to institutionalize public-private competition. Competitive sourcing asks agencies to make some difficult choices. These choices affect real jobs, held by dedicated and loyal career civil servants. In many respects, this initiative comes down to one simple reality: very few people, whether they are working in the private sector or the public sector, like to work under the pressure of knowing that their work is on the line if they do not figure out how to perform it more efficiently and effectively. But, the fact that this initiative requires hard choices and a lot of hard work makes it an initiative that can bring about fundamental and lasting improvements to the way the federal government is managed.

Key to the success of any private sector company is the regular evaluation of whether necessary services should be provided in-house by company employees or by another company. A number of different factors are part of this determination, including the mission of the company, cost differential, performance, continuity of service, and the potential for quality improvements. As many technology companies have realized over the past decade, the decision

to "buy" rather than "make" has meant that company employees are truly focused on the mission of the company -- in the case of technology companies -- making the next generation technology. Mirroring the sourcing decisions of the private sector, the competitive sourcing initiative strives to focus the federal government on mission -- delivering high quality services to citizens at the lowest possible cost.

Our Goals

The aggregate government-wide goal, established at the outset of the initiative, envisions the competition of 425,000 full-time equivalent employees (FTEs) -- i.e., 50 percent of commercial FTEs. Recognizing the need for significant analysis and review to establish individual agency competition plans, no timeframe has been established for the achievement of this long-term goal. Instead, OMB established a two-year ramp-up goal to compete 127,500 jobs (15 percent of commercial FTEs).

Let me be clear about the application of this aggregate government-wide goal. It is not intended as an arbitrary quota, such as the ones that were put into effect through most of the 1990's when the workforce was reduced by 324,580 FTEs. In fact, the President's Management Agenda includes an important Human Capital initiative to encourage agencies to address the dual challenges of arbitrary cuts already taken and the looming wave of retirements government-wide.

Like you, Mr. Chairman, I have always opposed arbitrary FTE cuts and caps. As this Subcommittee has heard me say before, competitive sourcing is not about outsourcing or downsizing the workforce. To the contrary, it is about creating incentives and opportunities for efficiency and innovation through competition. This initiative has one main bottom line: to

ensure that government service is provided by those best able to perform in terms of cost and quality, be that the private sector or the government itself.

Thus, as we work with agencies and evaluate their progress, the real issue is whether an agency's plan first builds an infrastructure for public-private competition and then implements competitions over the long-term. While OMB will presume that an agency has built such an infrastructure if it competes 15 percent of its commercial FTEs, we have been careful not to apply this goal in a rigid or arbitrary manner. Indeed, after extensive review of agency competition plans and significant agency consultation, OMB approved agency plans for less than 15 percent competition, focusing on agencies that had experienced significant FTE cuts or high service contracting to FTE ratios. As part of this process, OMB also asked several agencies to consider appropriate opportunities for in-house organizations to compete for work currently under contract with the private sector. As a matter of reality, many agencies will have built an infrastructure well before 15 percent of commercial FTEs have been competed.

Improving the Public-Private Competition Process

Conducting a public-private competition is not easy and the current process has its share of detractors. We are the first to acknowledge that OMB Circular A-76 needs an overhaul. The Circular is virtually unreadable, internally inconsistent, repetitive, vague, lengthy, and universally disliked. It should be no surprise that there is a cottage industry of people and groups trying to translate the Circular into English. Since I was confirmed in May 2001, I have spent an extensive amount of time studying potential process improvements, including participation on the Commercial Activities Panel.

There are two key aspects of the Commercial Activities Panel Report (the "Report"). First, the Report is fair. Second, the Report confirms what we knew all along: public-private competition improves government performance and saves taxpayer dollars over the long term. The Report also recognized that there are no silver bullets. If we want a fair, equitable, and transparent decision process, we must have checks and balances and accountability on all sides.

In June, I established an interagency working group to consider specific changes for improving the Circular -- changes will be published for agency and public comment in the Federal Register. At this point, I can assure you that the Circular will be shorter, consistent and understandable. I do not want to publish a new Circular that takes a team of experts to understand, and an industry of consultants to implement. Achieving consensus among the key stakeholders will remain a challenge, but the Administration is committed to working with agency managers, federal employees, federal employee unions, and the private sector to make significant and lasting process improvements. While maintaining equity, fairness and transparency, we must do a better (and faster) job of making sourcing decisions.

Rest assured, we will not institute an immediate wholesale replacement of the existing competition procedures. The new system will need to be tested and there will be trial and error. We will try to take the best elements of private/private source selections and the best elements of the current A-76 process. Among other things, this means:

- **Reducing time to complete competitions:** Currently A-76 competitions take 2-4 years to complete. Managers should be held accountable for lengthy competitions that hurt morale and scare off non-government bidders. The interagency working group has discussed setting caps on the length of time the government and the private sector have to participate in competitions.

- **Giving managers flexibility to achieve best value for the taxpayer:** The interagency working group has developed a "one-step" integrated approach for certain functions, including information technology, that follows the existing FAR Part 15 rules, including the use of cost/technical tradeoffs.
- **Demanding accountability:** We must find ways to make the in-house winners of competitions more accountable to perform over time as promised.
- **Centralizing oversight responsibility and providing training:** We need to encourage greater use of centralized and trained management teams to conduct A-76 competitions.
- **Eliminating the appearance of all conflicts of interest:** We must ensure that there is not even an appearance of a conflict of interest in the conduct of A-76 competitions.
- **Helping agencies with costing analysis:** The DoD costing model "Compare" is being made available to all agencies

Conclusion

Federal employees are some of the Nation's most highly trained and dedicated employees. At the same time, I applaud the service and support that federal contractors and their employees provide to our citizens. We could not meet current requirements and the many challenges we face in fighting terrorism and protecting our nation without the creativity and innovation that the private sector brings to the table. Our task is to ensure that we take full advantage of the best capabilities that each sector has to offer in each specific situation.

Working with you and members of Congress, we are asking federal agencies to reconsider how they accomplish their missions. We are also asking them to test assumptions

about the best provider through the competitive process. Mr. Chairman, competitive sourcing is laying the groundwork for improved mission performance through quality service at the lowest possible cost. Like any other effort that seeks to fundamentally transform the way we do business, this initiative has its challenges. If we are steadfast in our commitment to competition, which lies at the heart of competitive sourcing and the recommendations of the Commercial Activities Panel Report, we will no doubt deliver the quality service our taxpayers deserve.

This concludes my prepared statement. I would be pleased to respond to any questions that you might have.

Mr. DAVIS. Mr. Sikes.

Mr. SIKES. Chairman Davis, Mr. Turner, I'm pleased to be here today to discuss the results of the Panel, Commercial Activities Panel, with this subcommittee.

I attended all the Panel meetings as a second chair to Under Secretary Pete Aldridge and also represented the Department in the field hearing in San Antonio. I found the Panel discussions to be open and constructive, with all sides of a difficult issue being heard.

Frankly, at the beginning of it, I was skeptical that we would reach meaningful consensus. I believe it is a testament to Comptroller General Walker that the Panel reached the conclusions and recommendations that you have before you today.

The Department of Defense fully supports the objectives of the Panel's recommendations, especially the set of fundamental principles that were adopted as a framework. Let me emphasize that these principles were adopted as a framework and not intended to be applied independently. I've been at a number of conferences since the Panel's report was issued and find that the individual principles are often focused on—to support a specific point of view.

As the report clearly states, the principles are intricate and extricably linked with one another, and no individual principle is meant to stand alone.

The current A–76 process is lengthy, complex and frustrating for everyone. That frustration is an outgrowth of attempts over time to address legitimate concerns of all participants, while establishing a level playing field.

The Panel's integrated competition process is a promising method to improve fairness and reduce the lengthy time required, and it is clearly consistent with the framework provided by the principles adopted by the Panel.

The Department is working closely with OMB to help develop this new process. I think it is important to keep in mind that the new process will still be a public-private competition and many of the difficulties inherent in such a competition will remain. Drafting an accurate work statement, costing the government proposal will still be challenging, and the Department is working hard to continue to improve our ability to do these tasks.

As the Panel report notes, the Department of Defense has by far the most Federal experience in public-private competitions and, as recommended, we are working already with other Federal agencies to show the methodologies that we've developed over a number of years.

As we work toward this new integrated process, we are also continuing to review our ongoing competitions and apply lessons learned from those to improve the ongoing processes. While the current A–76 competition process is far from perfect, it does provide a standardized process to determine whether commercial functions are better performed by DOD employees or by the private sector. And as difficult as the process can be, the history of the competitive sourcing program shows that it consistently generates savings and efficiencies. That is the power of competition.

My own personal hope for the new process, in addition to the improvements we expect to see, is that it will at least get us out of

the negative attitude everybody has toward the old process; and that as much as anything should help speed up figuring out what the right way to source things in the Department of Defense are.

I support and look forward to improved public-private competitive processes as a result of the Panel's findings, and I stand ready to answer any questions you may have. Thank you, sir.

Mr. DAVIS. Thank you very much.

[The prepared statement of Mr. Sikes follows:]

MR. JOSEPH K. SIKES

DIRECTOR, COMPETITIVE SOURCING & PRIVATIZATION

OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR

INSTALLATIONS & ENVIRONMENT

ACQUISITIONS, TECHNOLOGY AND LOGISTICS

BEFORE THE

TECHNOLOGY AND PROCUREMENT POLICY SUBCOMMITTEE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

SECOND SESSION, 107TH CONGRESS

ON COMMERCIAL ACTIVITIES PANEL, "IMPROVING THE SOURCING

DECISIONS OF THE GOVERNMENT"

SEPTEMBER 27, 2002

NOT FOR PUBLICATION UNTIL RELEASED BY THE

HOUSE OF REPRESENTATIVES

COMMITTEE ON GOVERNMENT REFORM

Chairman Davis and distinguished members of the committee; I am pleased to have this opportunity to appear before you today to discuss the recommendations of the Commercial Activities Panel and the Department of Defense's Competitive Sourcing Program.

First I would like to commend the efforts of the Commercial Activities Panel (CAP) over the last year for their endeavors in developing recommendations to improve the process used to source federal functions. The discussions of the Panel were open and constructive bringing all sides of the difficult issue to the table for consideration. The Department fully supports the objectives of the Panel's report recommendation, and especially so for the set of fundamental "principles" that should be inherent in any public-private partnerships and public-private competitions. The principles were adopted as a package therefore we should address them within those parameters. The emphasis on speed, fairness and innovation to this competitive process is welcome.

The public-private competitive process is not easy; in fact, it is often lengthy, complex and frustrating for all involved. That very frustration is, in part, an outgrowth of a process which has evolved over time to address legitimate concerns for establishing a level playing field which will protect the interests of all participants: the government employee, the private sector competitors, management and the taxpayer. The Panel's integrated competition process is a promising method to improve fairness and reduce the lengthy time currently required. And it is consistent with the framework provided by the principles adopted by the Panel. The Department has been working closely with the

Office of Management and Budget to help develop the integrated process which is one of the panel's recommendations.

The Department of Defense is committed to improving efficiency and ensuring its resources are allocated to support our highest priority activities. Mr. Pete Aldridge, the Department's representative on the Panel also chairs the Department's Business Initiative Council or BIC, which is charged with changing our business processes to improve mission effectiveness and reduce costs. The BIC is currently reviewing all of our missions to identify what is non-core to allow us to pursue a number of tools including competitive sourcing, reengineering, divestiture, privatization, public-private competition, and public-private partnerships in addition to our A-76 competitions. The principles identified by the CAP are very relevant and applicable to this review.

From both the public and the private sector, there have been complaints that the A-76 cost comparison process is fundamentally flawed. Both federal employees and private firms criticize the A-76 competition process as unequal and therefore unfair. The sectors should not generally be treated unequally; however, there may be situations in which unequal treatment does not equate to unfairness. In particular, the special rules used to calculate the cost of in-house performance, while substantially different from the cost and pricing rules that apply to private-sector competitors, are not unfair. Instead, they reflect a reasoned effort to calculate (in the context of often inadequate systems for tracking government direct and indirect costs) the total cost of performing work with federal employees.

We have, by far, the most A-76 experience in the federal government. We now have a considerable number of A-76 competitions not only started, but also completed. During the Fiscal Years 1997 through 2001, we completed over 782 A-76 competitions with over 46,000 positions and we are scheduled to complete A-76 competitions on an additional 45,000 positions by FY03. Whereas budget estimates were based on programmatic assumptions, we now have collected data in our Commercial Activities Management Information System (CAMIS) telling us the actual results of these A-76 Competitions. The 782 completed A-76 competitions have resulted in either a contract or in-house decision that will generate over 5 billion dollars in savings (cost avoidance) over the life of those contracts, normally about 5 years. This is the power of competition and can be expected to be duplicated when the remainders of our in progress A-76 competitions containing approximately 49,000 positions are completed between now and FY03.

A-76 competitions take an average of two years to complete. This includes all the normal procurement requirements of drafting a performance work statement, issuing a solicitation, evaluating proposals and selecting a private sector offeror. The additional steps required in an A-76 process competition are performed concurrently with these procurement requirements in an attempt to level the playing field before selecting contractor or government performance. The entire process is frustrating for all concerned: Government employees who are in limbo about their jobs, contractors who have tied-up considerable bid and proposal investments, and the Government activity that is managing the process while simultaneously performing their day to day mission. This

process is complex and lengthy and the recommendations made by the CAP report should begin to address the need to simplify and expedite the process.

There has been concern about inconsistent application of the Circular, the Panel notes that the Office of the Secretary of Defense has made considerable progress providing consistent guidance across DoD to supplement the Circular. We will assist OMB when they modify OMB Circular A-76, to address recommendations made by the Panel to improve the current framework and processes. I agree these changes are needed so they reflect a balance among taxpayer interests, government needs, employee rights and contractor concerns. However, we have not been standing still. As we identify systemic problems, we have been proactive in streamlining our implementing procedures for A-76 competition. While the A-76 competition process is far from perfect it provides the government with a standardized process that is necessary to determine when DoD should outsource functions performed by DoD employees or in-source contracted activities. Therefore, we continue to seek process improvements, from lessons learned and best practices to standardize the process and make the competitions less adversarial. However, if problems arise, processes are in-place to address disputes between interested parties. Since FY97, of the 782 A-76 competition decisions, only 30 were disputed and only 6 original decisions were reversed.

Although the Department is still pursuing a number of A-76 competitions, we believe the Department's future interests are best served by employing a wide range of business tools of which A-76 competition is one. Resulting savings would be available to invest in higher priority programs within the Department.

The high-performing organization (HPO) concept recommended by the Panel falls in line with the Business Initiatives Council effort for internal reengineering. However, it would be premature to discuss any specific DoD procedures at this time. Success will rest with allowing each agency to develop their agency's implementation based on what works best for their agency rather than dictating a one-size fits all approach. This recommendation is based on OSD's history of developing implementation policies and procedures for various programs for over 25 DoD Components (4 military services, 16 defense agencies, and 7 defense field activities).

We will need congressional assistance in removing the barriers we presently have in order to implement the Commercial Activities Panels' recommendations. We have made a top priority of finding efficiencies and savings within the Defense Department to enable us to improve our efficiency and effectiveness. As we work through the process for implementation, we will be better able to identify legislative proposals which will facilitate a better public-private competitive process. Recent proposals in Congress do not help this cause. These proposals would increase Department cost by requiring public-private competitions for new functions and for previously contracted work already subject to extensive market competition. In addition to adding competition cost, this would adversely affect mission effectiveness by delaying contract awards with little likelihood of achieving the positive results seen in our current competitive sourcing program.

I support and look forward to an improved public-private competitive process as a result of the Panel's findings. Additionally, I strongly urge Congress to allow these

changes to be implemented without further legislative constraints levied upon DoD. I would like to see these improvements made in an expeditious manner.

I stand ready to answer any questions you may have.

Mr. DAVIS. Mr. Soloway.

Mr. SOLOWAY. Thank you, Mr. Chairman, Mr. Turner. I appreciate the opportunity to testify today.

Let me start by joining the chorus of gratitude for the Comptroller General. It's true that, without his efforts, the Panel would not have made as much progress as it did, and he's to be both congratulated and thanked for his work and his fair and balanced leadership.

Much has been written and said about the CAP report. In too many cases, people have drawn the conclusion that the Panel was hopelessly divided in its views, but such is not the case. As the Comptroller General has correctly stated, the Panel reached unanimous agreement on 10 overarching principles that are balanced and that actually address the major concerns of each of the stakeholder communities involved.

The logic, common sense and fundamental fairness of these principles is, I believe, clear to any objective observer. The principles recognize that competition is the principle driver of improved efficiency and performance. They recognize the critical importance of both cost and noncost factors in a SMART source selection. They recognize that all offerers must be subject to the same evaluation criteria, the same post-award performance measurement and the same appeal and protest rights. They recognize that sourcing is a strategic process that must take into account a variety of factors including mission requirements, human capital, budget realities and more.

The principles explicitly state that a public-private competition must not be mandated merely because both public and private sectors are able to perform their work, but, rather, that such decisions must be based on a broader set of criteria.

These principles also represent a stinging rebuke to the so-called TRAC Act; and, taken as a whole, the message of the principles is, to paraphrase a slogan of the Federal employee unions, let them compete in a fair, transparent and strategic process.

Today, the A–76 process fails to align in almost any way with these principles, but the Federal Acquisition Regulations, which are built on the tentative equal rights and equal responsibility, match up quite well. Thus, the recommendation of the Panel to eliminate the fatally flawed A–76 and replace it with an integrated FAR-based process was a logical extension of the principles to which all panelists agreed.

Unfortunately, since the issuance of the report, too much of the discussion has been dominated by hyperbole and uninformed rhetoric. We hear repeatedly the best value, for instance, is a—the best value accounting is akin to some kind of unconstrained bazaar. In truth, it is nothing of the sort but is, rather, a process that affords great flexibility within the construct of clearly defined and accountable boundaries. It may not be perfect, after all. Nothing is, but I would suggest that it is a far sight preferable to the bad old days of low-balling and cost shootouts and that it is a process available to virtually all Federal procurements except those conducted under A–76.

We also hear repeatedly that the FAR-based process is so new it must be rolled out at a snail's pace. But, as the report states,

the FAR already is the common language of Federal procurement and already is better understood and more effectively implemented than A–76. Thus, we start the implementation of the new process several steps ahead of where we are today.

We eagerly await OMB's proposed changes to the current process and hope they will align with the 10 principles agreed to by the Panel. Time and quality are of the essence, and I know OMB has been working hard on those changes. It has been 5 months since the Panel's report was delivered, and during those months we have seen a clear trend in which some government activities, particularly at DOD, have canceled or significantly slowed their competition activities. This is partially due to understandable antipathy toward A–76 and a concurrent hope that OMB's proposed revisions will create a far more effective means of conducting these competitions.

There are six basic questions I think regarding the administration's implementation that need to be considered.

One, does the policy clearly define the government entity that is submitting a bid? This is a critical and often overlooked element, but it's essential, since it is the bidder that must submit a proposal and, if successful, enter into a binding performance agreement or contract. It is that bidder who is responsible for performance, and it is that bidder and only that bidder that can be afforded appeal and protest rights.

Second, are all bidders, public and private, responding to the same solicitation and being evaluated on the same criteria?

Third, since GAO and others have made clear that the government does not know the cost of its own internal activities, what steps are being taken to ensure that the government is being held to cost realism standards equal to those required of the private sector which today is subject to a much wider array of cost accounting principles, audits and more?

Does the policy establish clear and appropriate conflict of interest rules? The GAO has recommended in its most recent ruling on A–76 cases that the same rules that apply to general procurements be applied to public-private competitions, and we would agree.

Five, does the policy create a construct for public entities to enter into binding performance agreements that, to the maximum extent possible, mirror a contract?

And, finally, does the policy create a clear and equitable protest process? Does it define a process of checks and balances, for instance, for public entities similar to those faced by companies so as to avoid a universe bogged down by frivilous protests on every aspect of every procurement?

Only by being able to answer in the affirmative these basic questions will any implementation achieve the outcomes envisioned by the Panel's unanimously agreed-to principles. The bottom line is that the government is the stakeholder that matters the most, and we have to cut through all of the parochial rhetoric on all sides and focus only on the government's best interest.

The Commercial Activities Panel and, indeed, most objective observers agree that we are at a moment in time when real change is both possible and essential. The degree to which the recommendations of the Panel are implemented will have an enor-

mous impact on the government's interests which are best served by a competition process that is strategically sound, fair and transparent. In so doing, the government will be taking a major step toward optimizing performance and efficiency on behalf of the American people. The time to act is now.

Thank you, Mr. Chairman. I'll be happy to answer any questions.

Mr. DAVIS. Thank you very much.

[The prepared statement of Mr. Soloway follows:]

TESTIMONY

by Stan Soloway
President
Professional Services Council and
Member of the Commercial Activities Panel

before the

Committee on Government Reform
Subcommittee on Technology and Procurement Policy

U.S. House of Representatives

September 27, 2002

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Mr. Chairman, members of the committee, thank you for the invitation to testify today. As President of the Professional Services Council and a member of the GAO Commercial Activities Panel, I appreciate the opportunity to share my views on the Panel's work and the challenges of the federal government's sourcing policies.

Let me start by expressing my gratitude to the Comptroller General for his commitment and his leadership. Without his efforts, the Panel would not have made as much progress as it did, and he is to be both congratulated and thanked for his work.

Much has been written and said about the CAP Report, and in too many cases people have drawn the conclusion that the Panel was very divided in its views. But such is not the case. Indeed, we reached unanimous agreement on a set of ten sourcing principles. The Comptroller General has correctly stated that these principles, and the remainder of the recommendations, are balanced, and address the major concerns of each of the stakeholder communities involved. These principles set the stage for government sourcing policies that are fair, transparent, and, most importantly, hold the greatest hope for the government to get the outcomes it seeks from the sourcing process.

We should not lose sight of the fact that the government is the stakeholder that matters most. We do not believe it is appropriate, nor in the nation's best interests, for the government to compete with the private sector for work that is commercial in nature. We believe the government's and the nation's best interests are served when the government focuses its energies on its core competencies. While the private sector is certainly interested in expanding its opportunities to perform work on behalf of the government, we believe that such expanded opportunities represent a win-win situation for both the private sector and the government. However, we accept for the short-term the reality that public/private competitions for commercial work currently performed by federal employees will continue to occur in appropriate circumstances.

The federal employee unions have similar self interests—indeed, with the coming federal employee retirement wave, the unions naturally are concerned with their "market." Their tactics, including the Truthfulness, Responsibility and Accountability in Contracting (TRAC) Act, are simply reflections of those long-term market concerns. It is also one explanation for the fact that three of the four votes against several of the Panel's recommendations came from that stakeholder community.

But our respective concerns and points of view are far less important than the government's ability to effectively and efficiently execute its mission. The ten principles agreed to unanimously by the Panel lay the foundation for achieving that most critical goal.

The report is clear in its endorsement of a government sourcing policy based on a strategic process; it clearly rebukes the use of arbitrary full-time equivalent (FTE) ceilings unrelated to agency mission, recognizing that such limits can drive sub-optimal management decision-making. It also identifies the inextricable link between a strategic approach to sourcing and key related factors such as human capital capabilities; obtaining contemporary and effective

solutions for the government; providing all offerors the same rights and same responsibilities; and more. This is both sound management practice and in the best interests of the taxpayer.

Unfortunately, the current A-76 process is anything but strategic; it is, at its most basic level, a cost shoot out and head counting exercise that all too often not only disadvantages one party or another, but also disadvantages the government in its search for the best solutions to its mission requirements.

It is important to note at the outset that, as explicitly provided for in the final report, the Panel's recommendations must be taken as a whole. "Cherry picking" from the recommendations, or even sub-elements of recommendations, is fundamentally contrary to the Panel's stated position and would substantially change the careful balance of interest we sought to achieve.

The Panel's recommendations clearly establish that government sourcing processes must allow for fair participation of either public or private bidders. While the federal employee unions seek to require public-private competitions for all work, regardless of whether it is currently being performed by federal employees, the Panel recognized that such a mandate is inconsistent with smart, performance-based management, not to mention the sourcing principles the Panel unanimously agreed upon. There are circumstances involving work currently being performed by federal employees in which the government might appropriately opt not to compete, particularly when the activities involved require skill sets, resources, or technology that the government simply does not have and would not be expected to acquire.

Similarly, for new work or already-contracted work, the Panel recognized that the government should compete for such work only if there is a compelling strategic reason to do so, and if the government has the existing capacity, resources, skills, and performance history to justify doing so. To do otherwise would be a waste of taxpayer dollars. That recognition is contained in the language surrounding principle number seven, which states: "...the government should not be required to conduct a competition open to both sectors (public and private) merely because a service could be performed by either." The report goes on to state that that the circumstances under which a public-private competition is conducted should be "consistent with these principles."

The Panel also recognized that the mere addition of a government bidder to the process does not create competition, except in those rare circumstances where competition is not otherwise available. Competition for federal service contracts already is robust; over 75 percent of all service contracts are competitively awarded today. As such, the inclusion of a government bidder should not be viewed as necessary to ensure competition and should occur only when consistent with the principles unanimously adopted by the Panel, including when competition is unavailable and/or the circumstances I mentioned above arise. To paraphrase the federal employee unions, what the Panel is saying in its unanimously agreed to principles is: "Let them compete"—with the "them" being all qualified and capable

parties, including, where appropriate and consistent with the principles, the federal government.

Further, the unanimously supported principles themselves are a clear and sharp rebuke to radical legislation such as the TRAC Act, and no amount of rhetoric can change that fact.

From industry's perspective, the most important contribution of the Panel is its recognition that competition is essential to driving performance, and must be the centerpiece of the government's management agenda. The Panel also unanimously determined in its principles that fair, best-value competition must form the foundation of any competition process. As the Panel report stated, the A-76 process clearly is a process for another era, as it inhibits both optimal innovation and a fair and equitable assessment of competitors. Today, few companies remain willing to participate in A-76 competitions. Increasing numbers of cost comparisons attract no bidders, particularly those competitions that involve a significant degree of complexity and technology. Supplanting the current A-76 mechanism with a process based on the well-understood, time-proven, fundamentally fair, and widely credible Federal Acquisition Regulation represents a significant positive step.

The principles also include an explicit recognition that in making its sourcing decisions, the government must consider both cost AND non-cost factors. This not only is common sense, but also serves as the basis on which more than 90 percent of the federal government's traditional procurements are conducted. Only in the case of A-76 competitions are such critical factors as past performance and technical quality not considered uniformly, if at all, for all parties.

The principles further recognize the importance of a competition in which all participants are given the same rights and assigned the same responsibilities. Here, too, A-76 is completely out of alignment with fundamental fairness since it by design treats public and private offerors inequitably.

In fact, if you take the ten unanimously agreed upon principles and measure them against the current A-76 process, you will find that A-76 fails to align in almost every way. But if you align the principles against the current Federal Acquisition Regulations, you will find that the FAR much more closely mirrors those principles in every material respect. Hence, the Panel's recommendation to replace the A-76 process with an integrated, FAR-based process was a logical and clear application of the principles we agreed to.

We need to recognize as well that the proposed integrated FAR-based process combines well-known and understood techniques. As the CAP report states, the FAR already is the common language of federal procurement and is better understood and applied than A-76. While it should be phased in to allow for appropriate adjustments as it is used, it can and should be implemented and made widely available quickly. Our failure to do that would result in a continuing disadvantage to the government, since many solutions will remain inaccessible, as fewer and fewer companies are willing to accept the risks and absurdities of the existing A-76 process.

We also must recognize that current A-76 evaluations are only cost comparisons, not true competitions. Therein lie two critical weaknesses of their continued use. First, the cost comparison studies do not adequately assess important non-cost factors. Second, since it is well established by GAO and others that the government does not know the costs of its own functions, A-76 evaluations today do not fairly compare the public and private sector offerors.

We should demand a process that drives and supports real, fair, transparent, and accountable competition. A-76 does not achieve that goal, but an integrated FAR-based process would bring us much closer to that end. Under the FAR, ALL parties, public and private, must meet certain basic, common sense requirements: they must all submit a proposal responding to the same solicitation and be evaluated on the same basis. The winner is required to enter into a formal contract or, in the case of a government entity, a binding performance agreement that, to the maximum extent possible, mirrors a contract; and they must be held equally accountable for cost realism in their proposals and performance and cost expenditures post-award.

It is only in the context of a FAR-based process that the Panel recommended the extension of protest rights for a government bidder. But we specifically and intentionally did not support extending such rights in a vacuum. The Panel specifically did not recommend granting such rights under the current A-76 process, or even under the recommendations for interim modifications to the A-76 process, because neither of those processes treat all offerors equally, nor place on the government the responsibilities undertaken by private sector bidders.

Protest rights for the federal workforce bidder would be an element of the new FAR-based process because, for the first time, the government would be required to assume the responsibilities of a bidder, and thus would obtain the rights of a bidder. We must carefully define the entity that would be granted the protest rights and determine how to construct a fair and reasonable process in which the government, in effect, sues itself. Those rights should be extended to the legally defined entity submitting the proposal, since neither a right of individual private action nor granting standing to a labor union are legally or logically justifiable. To grant such rights to individuals runs contrary to decades of federal labor law practices and virtually ensures that the process will become bottlenecked by protests over every procurement decision, from the issuance of a request for proposals to the award of the contract. In addition, protest rights are specifically not extended to employees in the contractor community, and thus, granting it to federal employees as individuals would upset a delicate balance. It also would be inappropriate to grant standing to federal employee unions because the very premise of "standing," as defined in law and supported by the courts, is that it is available only to the entity responsible for both the bid submitted and for the performance of the work. The unions meet neither of these criteria. They may choose to support or finance a protest, but granting standing to them is inappropriate and would represent a seminal change to longstanding federal labor and civil service laws, as well as federal procurement policies and procedures.

Finally, any protest process for government entities must be constructed under a careful process of checks and balances similar to the cost benefit analyses every company conducts before deciding whether to challenge an agency action. Given the high costs associated with protests, companies typically will file them only if they believe their case is strong and they have a reasonable chance of winning both the protest and the contract in question. Similar checks and balances must be identified and put into place on the public side. For instance, consideration might given to the creation within the government of an independent evaluating body that can determine whether the grounds for protest by the government bidder has merit and will result in a material change to the outcome of the competition.

It is disheartening to hear the federal employee unions continue to demand that protest rights be granted under the existing A-76 process, let alone to suggest that doing so is consistent with the Panel's report. Indeed, doing so without addressing the full scope of issues identified in the Panel report violates the concepts of equal rights and equal responsibilities that are the foundation of the Panel's unanimously agreed upon principles and the FAR. I also find it difficult to comprehend the union opposition to a procurement process that assures all competitors equal rights and equal responsibilities under the well-understood FAR-based procurement process. What could be fairer?

Despite the logic of the Panel's recommendations and the clear need for change, some have attempted to misrepresent the Panel's recommendations and their impacts.

For example, some claim that the FAR-based process should be subject to a limited pilot program. However, the Panel specifically did not endorse a pilot program because the process is neither radical nor extraordinary. The acquisition community understands the FAR. I have spoken to dozens of federal agency acquisition professionals, and almost all of them have expressed the belief that a FAR-based process for public-private competitions is achievable and will deliver better results. Indeed, there have been many public-private competitions for federal work conducted under processes other than A-76 that more closely mirror the FAR. Furthermore, A-76 has been used for decades, and while it is less well understood than the FAR processes, there is more than enough experience to assist in identifying those limited elements of A-76 that should be migrated into a FAR-based system to accommodate a public bidder.

Moreover, it is interesting to note that in procurements conducted under the FAR, the sustain rate for protests is less than half of the sustain rate for protests conducted under A-76. What does that say about the relative understanding and credibility of the two processes?

The integrated process recommended by the Panel will take time to develop, and there will be a need to phase it in and allow for mid-course corrections even after it is implemented. But it is not an entirely new process.

Some have claimed that the only thing standing between the Panel and a unanimous report was the issue of the pace of change, but the truth is that all Panelists agreed that the integrated competition process should be phased in with appropriate opportunities for review and mid-course corrections. But the so-called compromise proposal set forth by Panelists who sought a pilot program also included the key ingredients of the TRAC Act; this legislation runs directly counter to the fundamental elements of the Panel's unanimously agreed upon sourcing principles, and for obvious reasons, was rejected by a supermajority of the Panel.

Some have also argued that the advent of best value source selections for public-private competitions is dangerous and irresponsible. They suggest that this proven approach to buying is akin to some kind of undisciplined bazaar. I, and the supermajority of the Panel, could not disagree more. Nor could anyone with a significant working knowledge of acquisition agree with such an allegation.

As I noted earlier, most federal procurement is now conducted in a best value environment. In fact, only A-76 competitions are prohibited from using best value.

Best value contracting is more flexible than a simple low-cost evaluation, and enables the government to consider other vital factors in a source selection. However, its flexibilities are tightly and appropriately bounded; all factors to be considered and their relative weights during the source selection process must be identified in advance. In addition, the government must have unalterable numeric values internally assigned to each evaluation factor.

Best value enables the government to adopt an acquisition strategy appropriate for each individual source selection decision, from a low cost/technically acceptable decision to a decision in which factors other than cost are dominant. But regardless of where a given procurement falls on that spectrum, cost always is a factor, and the subjectivity available to the government always is limited.

Finally, some have criticized the Panel for adopting what they call a "one size fits all" approach to sourcing. Unfortunately, such allegations also reflect a lack of understanding of the federal procurement process. The truth is that the FAR is anything but one size fits all. The FAR embodies a broad array of acquisition strategies and options that enable smart acquisition strategies tied to the agency requirements involved. Ironically, it is A-76 that is, by design, a one size fits all process, as it limits smart acquisition planning and alternative implementation strategies. Joining a virtual unanimous chorus, the Defense Acquisition University just released a new study that also concluded that the A-76 process is far too limiting in its scope and fails to deliver the kind of optimal outcomes needed—and the taxpayers rightfully demand.

The Commercial Activities Panel's recommendations are balanced, address the principal concerns raised by virtually every stakeholder, and are designed to deliver better performance for the taxpayer. The Panel clearly recognized the importance of

accountability—for both contracted work and work performed in-house—as well as the fundamental role competition plays in driving performance and efficiency.

These are worthy and important goals serving no single interest's political agenda, but rather, serving the best interests of the taxpayer.

We eagerly await OMB's proposed changes to the current process and hope they will align with the ten principles agreed to by the Panel. Time and quality are of the essence. It has been five months since the Panel's report was delivered, and during those months we have seen a clear trend in which government activities, particularly at DoD, have cancelled or significantly slowed their competition activities. This is partially due to understandable antipathy towards the A-76 process and a concurrent hope that OMB's proposed revisions will create a far more effective means of conducting public/private competitions.

There are six basic questions regarding the Administration's implementation action that need to be considered:

1) Does the policy clearly define the government "entity" that is submitting the bid? This is a critical and often overlooked element, but is essential, since it is that bidder that must submit a proposal, and if successful, enter into a binding performance agreement or contract; and it is that bidder, and only that bidder, that can be afforded appeal and protest rights.
2) Are all bidders, public and private, responding to the same solicitation and being evaluated on the same criteria?
3) Since the GAO and others have made clear that the government does not know the costs of its own, internal activities, what steps are being taken to ensure that government entities are held to cost realism standards equal to those required of the private sector, which today is subject to a much wider array of cost accounting principles, audits, and more?
4) Does the policy establish clear and appropriate conflict of interest rules? Under the current A-76 process, conflicts of interest are extremely difficult to avoid, and GAO has recommended in its most recent rulings that the same rules that apply to general procurements be applied to public-private competitions.
5) Does the policy create a construct for public entities to enter into a binding performance agreement that, to the maximum extent possible, mirrors a contract?
6) Does the policy create a clear and equitable protest process? Does it define a process of checks and balances for public entities, similar to those faced by companies, so as to avoid a universe bogged down by frivolous protests on every aspect of every procurement?

Only by being able to answer in the affirmative these basic questions will any implementation guidance achieve the outcomes envisioned by the Panel's unanimously agreed to principles.

The bottom line is that the government is the stakeholder that matters most, and we must cut through the parochial rhetoric and focus on the government's best interest. The Commercial Activities Panel, and, indeed, almost all objective observers, agree that we are at a moment in time when real change is both possible and essential. The degree to which the recommendations of the Panel are implemented will have an enormous impact on the government's interests, which are best served by a competition process that is strategically sound, fair, and transparent. In so doing, you will be helping the government take a major step forward toward optimizing performance and efficiency on behalf of the American people. The time to act is now.

Mr. Chairman, I compliment you and the Committee for continuing to maintain an interest in the conduct of the government's commercial functions. I urge you to cut through the uninformed rhetoric and to focus on and support the key messages of the Commercial Activities Panel. In so doing, you will be helping the government take a major step forward toward optimizing performance and efficiency on behalf of the American people.

I thank you again for the invitation and look forward to answering any questions you have.

Mr. DAVIS. Ms. Kelley, thank you for being here.

I'm going to need to swear you in. I've sworn everybody else in. If you'd just rise with me.

[Witness sworn.]

Mr. DAVIS. Thank you. Thanks for being with us today. You're here on time. It's no problem. Just glad to have you here.

Ms. KELLEY. Chairman Davis, Ranking Member Turner, I really appreciate the opportunity to testify before you today.

Unfortunately, I am here to urge you to reject the package of changes by the Commercial Activities Panel, as they fail to improve sourcing policy for Federal employees or for the taxpayers. The Panel's recommendations should not even begin to be evaluated until the administration puts the brakes on their quota-driven outsourcing initiative.

On that subject, I want to thank both you, Chairman Davis, and you, Congressman Turner, for voting for the Moran-Wolf-Morella amendment that rejected the administration's approach to contracting out.

A consistent theme echoed at the Panel hearings was the need for reliability systems to track the work of government contractors. The importance of better contractor oversight was reinforced last summer when the Panel learned that Mellon Bank, a contractor hired by the IRS, had lost, shredded and removed 70,000 taxpayer checks worth $1.2 billion. Unfortunately, none of the CAP recommendations would prevent a Mellon-Bank-like contracting fiasco from happening again.

Despite the lack of oversight of contractors, OMB continues to force agencies to comply with their arbitrary outsourcing quotas to open up 425,000 Federal jobs to contractors. OMB continues to enforce these reckless quotas, even though the Panel voted unanimously that sourcing policies should, "avoid arbitrary FTE or other arbitrary numerical goals."

To date, the administration still has not articulated its justification for either the 5 percent, the 10 percent or the 50 percent quotas that they have imposed on agencies. Where is the data that shows that any quota, that any number for contracting out Federal employee jobs, with or without competition, are the right numbers and will lead to savings and to improved agency performance? Agencies should have the discretion to determine how best to balance their workloads with their budgets.

I opposed the final CAP report because of my concerns about what was missing from the report and because of my concerns about the risks and the dangers posed by actually implementing the report's package of recommendations.

For example, in addition to failing to recommend the implementation of contractor oversight systems, the report does not ensure Federal employees will be given an opportunity to prove they can do their jobs more efficiently and at a lower cost than contractors. Nor does the OMB outsourcing directive. And the report, again consistent with the OMB outsourcing quota's directive, ignores the benefits that would be gained by the taxpayers if Federal employees and their union representatives had legal standing to protest faulty contract decisions.

The recommendations to combine a modified FAR part 15 cost technical tradeoff process, which sounds very complicated, with a modified A–76 public-private competition process into a new integrated process while simultaneously forcing agencies to meet their outsourcing quotas is very, very risky. It's more complicated than A–76, and it will likely leave taxpayers picking up the tab to pay contractors for costly services that they do not need.

Any new government sourcing program or process ought to be tested on a limited basis, independently reviewed and modified based on lessons learned. Then if Congress sees the alternative as superior to A–76, Congress should determine whether or not it should be authorized governmentwide.

The risks involved in this untested A–76 plus FAR recommendation are particularly high in light of the administration's contracting out quotas. The quotas are driving many agencies to contract out the work to contractors without first conducting public-private competitions, and some agencies have hired outside contractors to administer the A–76 competitions since they have this experience.

The only thing OMB has made clear to agencies about competitive sourcing is that they have to get to 15 percent by the end of fiscal year 2003 and ultimately get to 50 percent.

Now that OMB is moving ahead to implement one of the CAP's recommendations, agencies are even more confused on how to meet the outsourcing quotas. On the one hand, the administration has told agencies to meet their quotas, either through privatization without competition or through A–76 competitions. On the other hand, OMB is saying that A–76 does not work, it should be put through a shredder, and agencies should now use a new, untested process. Which one is it?

With or without competitive sourcing, I believe that the most important action that Congress can take to put some teeth in the unanimously adopted principles of the Commercial Activities Panel would be to approve H.R. 721, the TRAC Act. This would give the taxpayers the accountability that they need and they expect.

Most importantly, before contracting out any more work, Congress and the administration should make the necessary investments in increased agency staffing, resources and better training. Because when supported with the tools and the resources that they need to do their jobs, there is no one, absolutely no one, who can do the work of the Federal Government better than Federal employees.

Thank you.

Mr. DAVIS. Thank you very much.

[The prepared statement of Ms. Kelley follows:]

Testimony
Of
Colleen M. Kelley
National President
National Treasury Employees Union

"NTEU Views on the Recommendations of the Commercial Activities Panel"

September 27, 2002

Subcommittee on Technology and Procurement Policy
Committee on Government Reform
2154 Rayburn House Office Building

Chairman Davis, Ranking Member Turner, and other distinguished Members of this subcommittee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union. I was one of the twelve members of the Commercial Activities Panel (CAP). As you know, NTEU represents 150,000 federal employees in 25 federal agencies and departments. Any change in government sourcing policies and procedures will have a major impact on the federal workforce, and therefore I appreciate you giving me the opportunity to testify today.

When the Panel held its first meeting over a year ago, I was optimistic that the Panel could reach unanimous agreement on a set of recommendations for improving the federal government's sourcing processes. While I knew that a majority of the Panel members came in with strongly held views in support of moving more government work to the private sector, what I heard from the Panel on that first day was a willingness to be flexible in the interests of finding common ground. Unfortunately, in the end, the CAP recommendations fail to improve current sourcing policies for federal employees or the taxpayers and as a result I am here today to urge you to reject them.

It is hard to imagine that the CAP recommendations or any proposed changes to the government's sourcing policies can be fairly implemented and utilized by any agency in the chaotic environment created by the Administration's aggressive quota-driven contracting out initiative. The Panel's recommendations should not even begin to be evaluated until the Administration puts the brakes on this reckless initiative to open up 425,000 federal employee jobs to the private sector.

Chairman Davis, Ranking Member Turner, Congresswoman JoAnn Davis, Congressman Ose, Congressman Kanjorski, and Congresswoman Mink, thank you for voting with an overwhelming majority of your House colleagues on July 24 to reject the Administration's contracting out initiative. This bipartisan vote on the Moran/Wolf/Morella amendment, coupled with an identical provision pending in the Senate to block the Administration's plans, is a clear repudiation by Congress of the flawed approach to contracting out undertaken by this Administration. The amendment would not stop contracting out; rather it would allow agencies to base contracting decisions on what is needed to deliver reliable, high quality, and low-cost services to the taxpayers.

The Administration's position on outsourcing is very clear: it does not matter whether agencies use a flawed outsourcing process or one that works, as long as agencies aggressively move government jobs to the private sector. Even while senior Administration officials were deliberating on the CAP and telling federal employees and the press that A-76 is a flawed process, the Administration has never let up in enforcing the contracting out quotas they imposed on every federal agency. But never before has their position on contracting out been so transparent before last week. Despite their claims that A-76 is broken, and despite the House and Senate's repudiation of the Administration's quota approach to contracting out some 425,000 federal employee jobs, the Administration now intends to **double** their quotas and contract out **all** of the jobs listed on the FAIR Act inventories – 850,000 federal employee jobs – instead of their original 50% quota. With policy pronouncements like that, it is hard for federal employees

or any other American taxpayer not to believe that this Administration cares more about contracting out as many jobs as possible than delivering high quality government services to the taxpayers.

A consistent theme echoed at the Panel hearings and among many of the panelists was the need for the government to implement reliable accountability and reporting systems to track the work of government contractors. Even though agencies continue to contract out more and more government work to private sector contractors, agencies still are unable to determine whether contracting out is saving the taxpayers money or improving the delivery of government services. Agencies simply do not have the staffing or systems in place to monitor the work of contractors.

As a result, it seems that once a contractor gets a contract, that work is out the door and rarely - if ever - scrutinized again. For example, last summer, the Panel learned that Mellon Bank, a contractor hired by the Internal Revenue Service, lost, shredded, and removed 70,000 taxpayer checks worth $1.2 billion in revenues for the U.S. Treasury. The Panel shared my outrage when learning of this contractor abuse and as a result I was hopeful this case would lead the Panel to recommend better contractor oversight to ensure that a Mellon Bank-like case would never happen again. Why did it take so long for the government to detect a problem with this contractor's failure to deliver the promised services? If agencies had better tracking systems and more contract oversight staff, the fraud – and the losses to the taxpayers – resulting from the Mellon contracting fiasco could have been halted much sooner.

Unfortunately, none of the recommendations in the CAP report would prevent such a waste of taxpayer dollars from happening again. It is a disservice to the taxpayers for agencies to continue to head down the path of contracting out more and more government work before we even have systems in place to know if contracting out is saving money or improving the delivery of services. The CAP's failure to recommend a meaningful contractor oversight system is what I feel was the ripest opportunity missed by the Panel.

NTEU is very troubled that despite the lack of oversight of contractors, OMB continues to force agencies to comply with their arbitrary outsourcing quotas. Even though the Panel was divided on most of its recommendations, the one area where there was unanimous agreement was on the ten principles that should guide sourcing policy. One of the principles was that federal sourcing policies and practices should "Avoid arbitrary full time equivalent (FTE) or other arbitrary numerical goals." The supporting commentary stated that there is "an overall concern about arbitrary numbers driving sourcing policy or specific sourcing decisions.... Any FTE or other numerical goals should be based on considered research and analysis. The use of arbitrary percentage or numerical targets can be counterproductive."

OMB surprisingly supported this principle, and in fact they now claim they are flexible in how they enforce their quotas. Recently, OMB has made statements indicating the quotas are no longer being applied "in a rigid or arbitrary manner." This subcommittee should not be misled by OMB's empty words.

Based on what I am hearing from the 150,000 employees in the 25 different federal agencies NTEU represents, agencies are being vigorously policed by OMB to meet the outsourcing quotas. For example, OMB is not allowing for any flexibility for an agency like the IRS, which is in the middle of a sweeping reorganization aimed at better serving the American taxpayers, or agencies working under heightened security as a result of the tragedy of September 11. If OMB no longer intends to force agencies to comply with the 15% or 50% quotas for outsourcing, then it would seem logical that the Administration would be willing to put an end to their outsourcing quotas.

While the Administration claims the outsourcing quotas are not arbitrary, to date the Administration still has not articulated its justification for how they came up with the specific quotas of 5%, 15%, and 50% they have imposed on agencies. Where is the data that shows that a 5% quota, a 15% quota, or a 50% quota for contracting out federal employee jobs with or without competition are the right numbers and will lead to savings and improved agency performance? Where is the data that shows that these arbitrarily chosen numbers for outsourcing will improve operations at homeland security agencies?

OMB will respond that "competition improves efficiency" yet their directive allows for contracting out without competition. OMB will respond that they are now approving agency contracting out plans that come under the 15% and 50% quotas, yet those numbers continue to be the benchmarks, and behind the scenes OMB continues to bully the agencies to meet those unjustified numbers. Nowhere has OMB ever given a good justification on why 15% and 50% are the right size quotas for agencies as diverse as the IRS, the Department of Health and Human Services, or the Department of Energy. Agencies should have the discretion to determine how best to balance their workloads with their budgets.

Instead of using quotas to contract out federal jobs, Congress and the Administration should act on the recommendations contained in the CORE Proposal. The CORE Proposal is a set of recommendations I advocated before the Panel that would track the true costs of contracting activities, ensure full and fair public-private competition, improve the integrity of the sourcing system, and most importantly put the interests of the taxpayers ahead of anything else. The CORE Proposal can be found on NTEU's website at www.nteu.org.

The CORE Proposal fixes many of the problems contained in the final CAP package of recommendations, and addresses many of the critical issues missing from the report. What issues does the CAP report fail to address? In addition to failing to recommend the implementation of contractor oversight systems, the CAP report does not ensure federal employees will be given an opportunity to prove they can do their jobs more efficiently and at a lower cost than contractors: nor does the OMB outsourcing directive. And consistent with the OMB outsourcing directive, the report fails to give federal employees real opportunities to compete for new government work or for some of the government jobs being performed by contractors.

The CAP report, again consistent with the OMB outsourcing quotas directive, ignores the benefits that would be gained by the taxpayers if federal employees and their union representatives had legal standing to protest faulty contract decisions outside of their agency.

While the report gives some lip service to giving the "public sector" rights to protest flawed sourcing decisions, it fails to recommend that those rights be granted specifically to federal employees and their unions, their duly elected legal representatives. The fact that federal employees and their union representatives do not have standing to challenge sourcing decisions outside of their agencies is an injustice to federal employees, the taxpayers, and our very democracy.

In addition to my concerns about what is missing from the CAP Report, I believe the final package of recommendations actually in the report, if implemented, would be a step backward for the government's sourcing policies and procedures. As you know, I did support the principles and I think they laid a good foundation for what could have been meaningful changes to the government's sourcing decision-making process. I also feel very strongly that when federal employees are provided with the tools and resources they need, they can do the government's work better than anyone else, and thus the report's High Performing Organization concept is one that needs to be looked at more closely. And I believe that many of the limited changes to OMB Circular A-76 recommended by the Panel are worthy of implementation.

However, my opposition to the final recommendations was driven primarily by the recommendation to combine a modified FAR Part 15 cost/technical tradeoff process with a modified A-76 public/private competition process into a new "Integrated Competition Process." I believe that implementing this broad recommendation while simultaneously forcing agencies to meet their outsourcing quotas is very risky, more complicated than A-76, and will likely leave the taxpayers picking up the tab to pay contractors for costly services they do not need.

There is simply no evidence that indicates this new source selection process will be any more efficient, cost effective or expeditious. Any new revolutionary government service delivery system that will determine the expenditure of hundreds of billions of taxpayer dollars ought to be tested on a limited basis, independently reviewed, and modified based on lessons learned. Then if Congress sees the alternative as superior to A-76, Congress should determine whether or not it should be authorized government-wide. Unfortunately, the CAP Report sets this untested program in autopilot mode, with a very limited role for Congress.

Since the CAP report was released, my staff and I have had an opportunity to hear the reactions to the CAP recommendations of contract officers and other experts. Over and over, we hear the words "confusing," "time-consuming," "expensive." The risks involved in implementing this untested recommendation are particularly high in light of the contracting out quotas.

The quotas are driving many civilian agencies to simply convert the work to private sector performance without first conducting public-private competitions, because agencies have been so overwhelmed with other management initiatives and meeting their mission requirements. Other agencies have opted to hire outside contractors to administer the A-76 public-private competitions since they have no experience in administering fair public-private competitions.

Unfortunately, there are still many agencies trying to meet OMB's quotas that just cannot seem to get their act together. For example, recently the Administrator of the Food and Nutrition

Service at the Department of Agriculture, sent out a memorandum to all employees, which provided employees with misleading information about competition success rates, gave conflicting information about what source selection process would be utilized, and proposed opening up to private sector contractors not just "commercial jobs," but "inherently governmental" jobs as well.

The FNS case is another example of how agencies are struggling to comply with the Administration's arbitrary outsourcing quotas and why this OMB initiative is so counterproductive. The only thing OMB has made clear to agencies about Competitive Sourcing is that they have to get to 15 percent by the end of FY 03, and ultimately get to 50 percent. How to get there has been a wide-open and constantly changing message from OMB.

Now that OMB is moving ahead to implement one of the CAP's recommendations, agencies are even more confused on how to meet the outsourcing quotas. On one hand, the Administration has told agencies to meet the quotas to open up 425,000 federal employee jobs to the private sector either through privatization without competition or through A-76 competitions. On the other hand, OMB is saying publicly that A-76 does not work, it should be put through a shredder, and agencies should now use a new untested process.

With all these mixed signals coming from OMB, at the end of the day, the only agencies that will meet their quotas and get a passing grade from OMB will be those doing direct conversions. And for those conducting A-76 public-private competitions, or considering conducting A-76 competitions, they will likely stop what they are doing, do direct conversions to meet the 2003 quotas, and wait for the OMB regulations implementing this new system merging a modified FAR Part 15 cost/technical tradeoff process with a modified A-76 public-private competition process. You talk about a human capital crisis: who would want to be a government procurement official in this environment?

With or without competitive sourcing, I believe the most important action Congress can take to put some teeth in the unanimously adopted principles of the CAP report would be to approve H.R. 721, the TRAC Act. Among other things, the TRAC Act would require agencies to implement reliable systems to track whether contracting efforts are saving money, whether contractors are delivering services on-time and as promised, and that when contractors are not living up to their end of the deal, the government work is being brought back in-house.

After spending a year on the Panel listening to the concerns about contracting out from people who deal with this day in and day out, and seeing the negative impact the Administration's outsourcing initiative is having on agencies, I am even more convinced of the need to enact the taxpayer-friendly TRAC Act. The Panel heard over and over about the need for more contractor oversight, more accountability from contractors, and fair competition. The TRAC Act would give the taxpayers the accountability they need and expect. Now, I am well aware that there are those who are opposed to the bill's contracting suspension provisions. On this point, I would just say that the goal of the TRAC Act is not to stop all government contracting; the goal is to start having some accountability for contracting. NTEU is willing to accept passage of the TRAC Act without H.R. 721's suspension provisions, as long as there is another reliable mechanism to ensure agencies comply with the requirements laid out in the bill.

Instead of rushing to contract out more government work, Congress and the Administration should make the necessary investments today in increased agency staffing, resources, and better training, so that the taxpayers can get government services delivered by federal employees at even lower costs and increased efficiency tomorrow. When supported with the tools and resources they need to do their jobs, there is no one who is more reliable and who can do the work of the federal government better than federal employees.

Thank you for holding this important hearing today and for giving me the opportunity to testify.

Mr. DAVIS. Ms. Simon, thanks for being with us.

Ms. SIMON. Thank you.

My name is Jacqueline Simon, and I'm the Public Policy Director of the——

Mr. DAVIS. Push the button there. There we go.

Ms. SIMON. My name is Jackie Simon, and I'm the Public Policy Director of the American Federation of Government Employees. On behalf of the 600,000 Federal employees represented by AFGE, I thank you, Chairman Davis, for the opportunity to discuss our concerns about the serious and long-standing problems in Federal service contracting.

Before I get started, I want to thank both you and Representative Turner for supporting the Moran-Wolf-Morella amendment that frees agencies from OMB's privatization quotas. AFGE National President Harnage asked me to thank you in particular, Chairman Davis, for your outspoken leadership and support.

Given that our written statement provides a detailed critique of the Commercial Activities Panel's report, please allow me to briefly summarize our views.

The Panel allowed contractors disproportionate representation. So, naturally, it served up recommendations to further contractor's interests. The procontractor faction was unable to make a case for doing away with OMB Circular A–76, and it failed to make any case at all for replacing it with a controversial, unproven and subjective FAR-based best value public-private competition process, which even its advocates acknowledge may be slower than A–76 and which by all estimates will result in contracts that are more costly for taxpayers but, of course, more profitable for contractors.

The Panel's procontractor faction has overplayed the fact that one part of the CAP report received unanimous support from the Panel, the principles. But there's much less to this unanimity than meets the eye. On the one hand, many of the principles are so bland that they are almost meaningless. On the other hand, the Panel felt free to either ignore or contradict the Panel's—its principles and recommendations. But the Panel is over; and in the real world, the facts are that the Bush administration has already shown that it will continue to defy the principles that its representatives on the Panel endorsed.

For example, Pentagon officials have told the Congress in no uncertain terms that their objective is to, "divest," all work they classify as noncore, involving hundreds of thousands of jobs. Divestiture was defined earlier this year by a DOD official to mean the, "transfer of assets to the private sector and the employees as well."

At the readiness hearing on the CAP report, the DOD witness explicitly repudiated the unanimously agreed principle that ensures Federal employees should have the opportunity to compete for new work and work that has already been contracted out.

Another example is high-performing organizations investing in work force training and encouraging labor management cooperation in order to improve an agency's delivery of services. Although the panelists from the Bush administration voted in favor of the recommendation that included a call for the establishment of HPOs, don't expect them to see them at any agency near you any time soon.

OMB's privatization of quotas are another stark example. Rather than repudiate them per the Panel's principles, OMB officials are attempting to rationalize them, claiming they're revising their criteria for success. And of course contractors assailed Representative Moran for leading the fight to free agencies from the OMB privatization quotas.

Whatever it might have been, whatever we might want it to be, the CAP report has become irrelevant. While some clearly have a stake in burnishing its legacy, it cannot be denied that the CAP report has not aged very well. OMB is doing what it wants to do, irrespective of the Panel's principles and recommendations; DOD is doing what it wants to do, irrespective of the Panel's principles and recommendations; and contractors are doing what they want to do, irrespective of the Panel's principles and recommendations.

And AFGE is going to do what we think is best, continue to work to ensure that agencies start to track contractor costs, require public-private competition before work is contracted out and ensure that Federal employees have chances to compete for new work and contracted work.

We're pleased, actually, that the focus of our grassroots efforts on the Senate side have paid off so well. Since they released the CAP report, we've significantly increased TRAC cosponsorships and come within one vote of adding a TRAC-like amendment to the defense authorization bill.

What is relevant, of course, is the OMB rewrite of the public-private competition process. Although they disagree on most issues, President Harnage appreciates the willingness of Administrator Styles to maintain a frank and open dialog, and we look forward to offering a detailed and well-reasoned critique whenever OMB's rewrite is made available.

What's also relevant and even more timely are the now infamous OMB privatization quotas. OMB officials sometimes insist that the quotas are merely goals, with the implication that they're not in force, that they just reflect the administration's wishes. Recently, however, it was brought to our attention that the OMB privatization quotas are, in fact, mandatory quotas, not goals.

According to a Coast Guard memo, "during a governmentwide conference on competitive sourcing held recently in Washington, DC, OMB representatives noted that two agencies received force reductions in FTE during the latest round of budget submissions. These reductions were directly linked to agency noncompliance with the President's competitive sourcing goals."

If the congressional effort to free agencies from privatization quotas is successful, OMB officials have threatened to retaliate by forcing agencies to review for privatization their entire FAIR Act commercial inventories. As President Harnage responded, "those comments are nothing more than blackmail, a desperate attempt to stave off a bipartisan effort in Congress to abolish the quotas by threatening to privatize almost a million Federal employee jobs."

I would add that the OMB threat shows exactly why the Moran amendment and the TRAC Act need to be enacted into law as soon as possible.

Thank you for the opportunity to represent AFGE before your subcommittee, Chairman Davis. I look forward to attempting to answer any questions you may have.

Mr. DAVIS. Jackie, thank you very much.

[The prepared statement of Ms. Simon follows:]

STATEMENT BY

JACQUELINE SIMON
PUBLIC POLICY DIRECTOR
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE SUBCOMMITTEE ON
TECHNOLOGY AND PROCUREMENT POLICY

HOUSE COMMITTEE ON GOVERNMENT REFORM

REGARDING

IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT

SEPTEMBER 27, 2002

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I. INTRODUCTION

My name is Jacqueline Simon, and I am the Director of Public Policy of the American Federation of Government Employees (AFGE), AFL-CIO. On behalf of the 600,000 federal employees represented by AFGE who serve the American people across the nation and around the world, I thank you, Mr. Chairman, for the opportunity to discuss our concerns about the ongoing crisis in federal service contracting with you, Ranking Member Turner, and other distinguished members of the House Government Reform Subcommittee on Technology and Procurement Policy.

I want to take this opportunity to thank you, Mr. Chairman, as well as you, Ranking Member Turner, for supporting the Moran-Wolf-Morella Amendment to the House Treasury-Postal Appropriations Bill that would free agencies from the numerical privatization quotas imposed by the Office of Management and Budget (OMB).

II. THE COMMERCIAL ACTIVITIES PANEL

a. Stacking the Panel

Would anyone be surprised if a bunch of contractors and their friends in the Bush Administration got together and came up with a recommendation for making the service contracting process even more biased in favor of contractors? Of course not.

And that's exactly what happened. The Commercial Activities Panel (CAP), with a solid majority of pro-contractor representatives, quite naturally served up a recommendation that would benefit contractors, switching from an objective, cost-based public-private competition process to an explicitly subjective one based on the Federal Acquisition Regulation (FAR), known as "best value." The members of the pro-contractor majority were unable to change the mind of any panelist that did not join the panel sharing their point of view. Of course, that won't stop some from touting the pro-contractor panel's pro-contractor recommendation as one that would "offer a path to the development of sound sourcing policies for the federal government."

Well, they have their work cut out for them. After all of that time and all of that money, the panel did little more than dust off a FAR-based best value proposal that has been on contractor wish-lists for years, one which had even been categorically rejected by the Clinton Administration just four years ago when contractors strove, unsuccessfully, to attach it to the defense authorization bill. Anyone who has watched the crisis in federal service contracting grow over the last ten years knows that the Clinton Administration was aggressively pro-contractor, and that its officials were completely possessed by the spirit of "acquisition reform." However, even Clinton Administration officials, as eager as they were to cater to contractors and experiment with procurement procedures, wanted nothing, absolutely nothing, to do with FAR-based public-private competitions, and FAR-based best value public-private competitions in particular.

b. The Panel's Strange Origins

The establishment of a panel that equitably took into account the interests of warfighters, taxpayers, customers, federal employees and their unions, as well as contractors, instead of *just* contractors, might have been useful *before* the crisis in federal service contracting that resulted from the failed "acquisition reform" effort.

It was clearly not necessary, however, to establish a panel to correct the serious and longstanding problems in federal service contracting policy. The two worst problems—1) the absence of mechanisms to track the cost of service contracting and, 2) the refusal to permit federal employees to compete in defense of their own jobs, for new work, and for contractor work—are obvious, and their solutions don't require the intervention of a panel.

Rather, the time to establish a panel to look at outsourcing was when the failed "acquisition reform" effort was first undertaken, not after the damage had been done: the creation of the "human capital crisis," audits of service contracts so bad they left the DoD Inspector General (IG) "startled," almost no public-private competition before work is given to contractors, and levels of private-private competition so low that even Bush Administration officials are alarmed; the finding that more than one-tenth of the federal contractor workforce makes poverty-level wages and that less than one-third of the federal contractor workforce is covered by prevailing wage laws, etc.

Of course, one need not be jaded or cynical to understand that the motivation for the establishment of the panel was to divert attention from the growing support for the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act (H.R. 721, S. 1152). I am pleased to report that since the release of the CAP report six senators—Evan Bayh (D-IN), Jean Carnahan (D-MO), Hillary Clinton (D-NY), Max Cleland (D-GA), Jack Reed (D-RI), and Jay Rockefeller (D-WV)—have become proud cosponsors of the Senate version of this much-needed service contracting reform legislation. Moreover, a modified, Department of Defense-specific version of the legislation recently came within just a single vote of being added to the Senate defense authorization bill, despite unprecedented lobbying by powerful contractors and their partners in the Bush Administration who vigorously oppose public-private competition and accountability to taxpayers. Despite the fervent hopes of competition-averse contractors, I am pleased to report that the TRAC Act is alive and well. In fact, the TRAC Act, with its emphasis on competition and accountability provides a welcome alternative to the pro-contractor, anti-taxpayer prescription included in the CAP report.[i]

Because the panel disproportionately represented contractor interests, AFGE National President Harnage would not have even joined had Senate Armed Services Committee Chairman Carl Levin not assured him that his committee would not take up any recommendation from the panel that did not represent a

consensus of views. True to his word, Chairman Levin has already declared his opposition to the panel's recommendation. In fact, Chairman Levin has even said that he would support efforts to prevent the recommendation of the panel from being applied to non-DoD agencies. I am confident that all fair-minded lawmakers will emulate his example. Important public policy issues should not be decided on the basis of a popularity contest, particularly when one faction is given an unfair advantage at the polling booth.

Mr. Harnage was quite surprised by the contention made in the House Readiness Subcommittee's hearing on the CAP report that the panel did not disproportionately represent pro-contractor interests. Only three members of the panel were specifically dictated for membership by the statute which established the CAP: the Comptroller General or his designee, a DoD official, and an OMB official. The other nine panelists were chosen at the discretion of the Chair.

Panelists from the Bush Administration (4)
E.C. Pete Aldridge, DoD (required appointment)
Kay Coles James, Office of Personnel Management (discretionary appointment)
Angela Styles, OMB (required appointment)
Stephen Goldsmith (discretionary appointment)

The Bush Administration has, of course, established policies that make it, unquestionably, the most pro-contractor in our nation's history. Under the direction of the OMB, agencies have been directed to privatize, convert, or compete at least 425,000 federal employee jobs by the end of 2004. Under the direction of the Pentagon, DoD is attempting to "divest", i.e., give to contractors without public-private competition any work classified as non-core. It is obvious to all concerned that the Administration appointees would aggressively represent pro-contractor interests and vote as a bloc.

Interestingly, Stephen Goldsmith, another discretionary appointment, is identified on the CAP report's inside cover as being the Senior Vice President of Affiliated Computer Services. Not until the Appendix J is it revealed that Mr. Goldsmith "served as chief domestic policy advisor to the George W. Bush presidential campaign." The truth is, actually, a little more interesting. Mr. Goldsmith, an accomplished conservative political operative, has been frequently mentioned as an appointee to a senior position in the Bush Administration, often the deputy director for management at OMB, which is responsible for outsourcing policy. In fact, Mr. Goldsmith, as a Bush campaign official, was the principle designer of the outsourcing policy currently being pursued by the Bush Administration. Moreover, as the Mayor of Indianapolis, Mr. Goldsmith privatized nearly 70 public services, and was a fervent supporter of the anti-taxpayer policy of privatization-in-place, which has even been criticized by the GAO. While still mayor, Mr. Goldsmith testified in favor of the Freedom From Government Competition Act, a measure so replete with pro-contractor pork-barrel that it was eventually emphatically rejected by Republicans and Democrats, conservatives and liberals.

Therefore, it can be said that Mr. Walker actually picked four representatives from the pro-contractor Bush Administration, only two of them required by statute.

Panelists from the Contractors (2)
Stan Soloway, Professional Services Council
Marc Filteau, Johnson Controls

We trust it won't be disputed that both of those discretionary appointees aggressively represent pro-contractor interests.

Additional Pro-Contractor Panelist (1)
Frank Camm, Rand Corporation

Mr. Camm, as discussed in his own biography in Appendix J, is an employee of the Rand Corporation, known informally as "DoD's Think Tank," and has advised DoD for most of the last quarter-century about how "to improve services acquisition policy." For example, in his Rand monograph "Expanding Private Production of Defense Services," Camm opines that "Current DoD contracting practice severely limits DoD's ability to follow the commercial move toward increased outsourcing. Contracting reform could help DoD overcome a number of important barriers to expanded outsourcing." Interestingly, in the comprehensive 55-page pro-contractor paper, Camm wrote virtually nothing at all about public-private competition. When he did mention the prospect of allowing DoD civilian employees to compete in defense of their jobs, however briefly, he quickly dismissed public-private competition as "a tricky game (which) often fails."

Mr. Chairman, AFGE has never contended that the 7 pro-contractor panelists appointed by Mr. Walker to the twelve member-CAP, only two of whom were specifically required by statute, were unqualified, failed to conduct themselves honorably, or neglected to aggressively represent pro-contractor interests. Nor has AFGE contended that Mr. Walker was prevented by statute from exercising his discretion to impose a pro-contractor majority on the panel. Reasonable people can disagree about whether the use of discretion was consistent with the statute's requirement to ensure "fair representation." There is, however, one point on which reasonable people absolutely cannot disagree: that discretion was used to impose a pro-contractor majority on the panel. Consequently, nobody should be surprised that the CAP produced a pro-contractor recommendation. Too much time was wasted at the Readiness hearing denying this obvious and indisputable point.

We will take this opportunity to address several points in GAO's recent testimony before the House Readiness Subcommittee on the CAP report, based on the transcript produced by Congressional Quarterly.

The testimony insisted that there were only two "primary differences" between his pro-contractor faction and the pro-taxpayer minority. Of the two mentioned, one is misstated and the other is minimized. As for all of the differences omitted, more later.

1st "Primary Difference": "...the recommendation as to whether or not cost should be the driver for all competitive sourcing decisions. The cost is important, but cost is not everything."

This is not now nor has it ever been the position of the pro-taxpayer minority, and we are disappointed that our position continues to be misrepresented. Any well managed cost-based competitive process, including OMB Circular A-76, explicitly takes into account quality and reliability. AFGE has contended that agencies should be able to decide what services they want, determine whether the offerors can provide the services they want, and then decide in favor of the offeror who can do that work for the least cost to the taxpayers. This allows agencies to secure the highest quality services at the lowest possible prices. It is not making "cost everything."

2nd "Primary Difference": "And, secondly, the number of times that Congress should be required to act in order to deal with this issue."

This is a misleading reference to the fact that the pro-taxpayer minority insisted that any alternatives to the traditional public-private competition process be tested and evaluated before being implemented, preferably with the involvement of the Congress. The pro-contractor faction demanded that the controversial and unprecedented FAR-based best value process be implemented "immediately" for every single agency other than DoD—without any involvement on the part of the Congress—and that the Congress "immediately" pass legislation for DoD to implement a FAR-based best value process, which has been repeatedly rejected by Republican and Democratic Administrations as well as Republicans and Democratic Congresses.

That's a rather significant difference. And that difference could not be in any way more stark. On the one side stand AFGE and the other members of the pro-taxpayer faction: in favor of Congressional involvement and careful testing and evaluation. On the other side stands the pro-contractor faction: in favor of making drastic changes to the public-private competition process with little involvement of the Congress and evaluating the potentially calamitous consequences of these changes only after "immediate" and comprehensive implementation by an Administration that is determined to outsource at least one-quarter of the federal employee workforce, many of them with no public-private competition, by the end of 2004.

We would also like to take the opportunity to review the proposals formally submitted by AFGE during the panel's deliberations.

1. Ensure the rigorous application of cost accounting standards. Result: Included in Principles, but not the Recommendation.

2. Allow agencies to use capital budgeting, like businesses and many state governments. Result: Rejected.

3. Forbid the use of privatization-in-place, a controversial mechanism that has even been criticized by GAO. Result: Rejected.

4. Expand the Army contractor inventory to include all of DoD, given the Principle ostensibly designed to ensure that inherently governmental work is performed by federal employees. Result: Rejected.

5. Ensure the viability of an effective in-house workforce, using the 50/50 depot maintenance safeguard as a precedent, given the failure to prevent DoD from managing its workforce with arbitrary personnel ceilings, which has resulted in what GAO calls a "human capital crisis." Result: Rejected.

6. End the abuse of arbitrary personnel ceilings. Result: Included in Principles, but not the Recommendation.

7. End the Native American direct conversion authority, given the pro-contractor faction's ostensible opposition to contracting out without competition. Result: Rejected.

8. Actually treat agencies like businesses and allow federal employees to bargain over wages and benefits. Result: Rejected.

9. Strengthen the requirement to consult with bargaining unit employees during a competition, conversion, or privatization situation. Result: Accepted, but only in the context of a competition, despite the fact that most contracting out occurs without the work being competed.

10. Enforce the law requiring DoD to consider bringing work back in-house. Result: Rejected, even though "it's the law" and GAO, as part of its "high risk" series, has acknowledged that "DoD has avoided competition when acquiring services, and the DoD Inspector General found that DoD had not adequately performed many basic management tasks, including market research, price analyses, and contractor surveillance. Consequently, DoD seriously undermined its ability to ensure that it gets the best services at the best prices."

11. Repudiate the use of the OMB outsourcing quotas. Result: Accepted in Principles, but not the Recommendation; already repudiated by the Bush Administration and its contractor allies.

12. Eliminate the use of direct conversions. Result: Rejected, notwithstanding much rhetoric about the importance of public-private competition.

13. Strengthen the civilian acquisition workforce. Result: Rejected, despite the fact that GAO, as part of its "high risk" series, has said that "DoD will need a strategic approach to training its acquisition workforce on new practices, to include the provision of the customized training targeted to specific needs" and that the DoD Inspector General has issued repeated warnings about the consequences of excessive downsizing of the acquisition workforce.

14. Ensure that contractors are as accountable to the American people as federal employees (e.g., Freedom of Information Act). Result: Rejected.

15. Borrow the TRAC Act's comprehensive and reliable cost-tracking processes, given GAO's assertion, as part of its "high risk" series, that "DoD continues to experience significant challenges relating to contract management, including improving oversight and accountability in the acquisition of services..." Result: Rejected.

16. Fix the holes in the Service Contract Act, which have nothing to do with its enforcement, that leave more than two-thirds of the federal contractor workforce unprotected. Result: Rejected.

17. Provide federal employees and their unions with standing, just like contractors. Result: Explicitly accepted only for federal employees, not their unions.

18. Exclude wages and benefits from the competition process so that it concentrates on staffing levels and delivery methods. Result: Rejected.

In summary, 13 of AFGE's common-sense recommendations were rejected, period. Two AFGE recommendations were accepted, albeit very incompletely. Two other recommendations were included only in the Principles, but not the report's all-important Recommendation. And one recommendation was included in the Principles, but not the report's Recommendation, and has already been repudiated by the Bush Administration and the contractors. Needless to say, when the members of the pro-contractor faction minimize the differences between the two sides, they are leaving out many areas of profound disagreement that were ignored in order to focus almost exclusively on replacing A-76 with a more pro-contractor public-private competition process.

It was said by the GAO witness at the Readiness hearing that "the one thing I can tell you for sure is that the A-76 process does not meet the principles agreed to by the panel. It does not meet it."

While AFGE's testimony deals with this in much greater detail later on, we are compelled to correct this contention in an abbreviated fashion at this point of our testimony. First, the pro-contractor faction claimed that A-76 was too complicated. However, as proof, they could only point to a higher sustain rate for A-76 proposal protest decisions than for proposal protests generally. Unfortunately, that conveniently ignores the fact that the circular, as an objective process, is eminently easier to litigate against than the FAR because the latter process' subjectivity places most agencies' decision-making beyond judicial review.

Then the members of the pro-contractor faction contended that A-76 was unequal and unfair. Again, however, they could only point to one example of the circular being inequitable and then admitted that the problem, to the extent it actually was one, could easily be corrected, and, indeed, included such a fix in the report's recommendation.

Finally, they turned their attention to A-76's best value process. Unable to produce even a single example of how the circular's best value process had kept an agency from improving the quality of its services, the faction nonetheless insisted that the process was an utter abomination because it had been litigated—even though the replacement process it was recommending had also been litigated. So, after giving the pro-contractor faction its best shot and making the one minor change included in the report, A-76 does in fact meet the principles because it easily qualifies as a "clear, transparent, and consistently applied process."

During the Readiness hearing, the argument in favor of a FAR-based best value process was summed up as follows: "You've got to have a process that everybody knows what the rules of the ballgame are before you get started, including what the weighting is going to be on various factors. And, you need to have appropriate appeals processes to qualified, independent third parties who don't have a vested interest in the result. Now, the panel recommendation, in conjunction with the integrated FAR-based process, among other things, would say that since federal employees would be competing heads up with private sector entities that they should have, not only know what the rules are up-front, know what the criteria up-front, they should have the right to appeal the GAO if for some reason they believe they have been harmed. Now, we are a qualified independent third party. They don't have that right now."

Although the problems with the FAR-based best value process are dealt with later in AFGE's testimony, we are compelled to offer several corrections to the contentions made in those remarks. Offerors do not in fact "know the rules of the

ballgame" when the offers are submitted. That's not the way the FAR-based best value process works. Moreover, litigation cannot control the subjectivity inherent in the FAR-based best value process.

1. By its very nature, the FAR-based best value is an improvisational process. Judges need not decide on the specific weights of the technical / cost factors until after the offerors have submitted their proposals. That is, while they do have to reveal whether cost or technical factors will predominate, they do not have to reveal how much more important technical (or cost) factors will count, or how much specific technical (or cost) factors will count until after proposals have been submitted. Moreover, the judges are not obligated to reveal all subfactors related to the solicitation if they can argue that the offerors should have known of their existence.

2. By its very nature, the FAR-based best value process is a subjective process and judges include explicitly subjective and even unnecessary factors. Moreover, the FAR-based best value process includes no rules, standards, or guidelines for the use of subjective factors.

3. By its very nature, the FAR-based best value process encourages doubt and uncertainty as to what the agency is attempting to buy until after the offers have been submitted. In fact, judges actually award points to offerors for exceeding the requirements set forth in the solicitation, which is why a FAR-based best value process has historically been a burden on taxpayers.

4. By its very nature, the FAR-based best value process gives judges extensive discretion over the process, from beginning to end, and the standards of review established by the Comptroller General are difficult to overcome. That's the principle reason why the GAO's docket has been more than halved in less than a decade. Consequently, litigation cannot control the subjectivity in the FAR-based best value process. Moreover, the CAP report explicitly endorsed standing only for federal employees, not their unions. It is preposterous to think that the working and middle class Americans who make up the federal employee workforce could pool sufficient resources to take on the service contracting corporate behemoths, without the coordination of their unions.

c. Not Waiting for the Panel

While the panel's pro-contractor majority prepared its report, pro-contractor lawmakers used the panel's existence as a rationale for blocking much-needed and long-overdue reforms of federal service contracting. In fact, it was expected that federal employees and their unions wait patiently for the issuance of the panel's report. Did contractors and their friends in the Bush Administration wait patiently for the panel's report? No, they did not. Here are just a few examples of how they pushed ahead:

1. OMB officials have committed the Bush Administration to privatizing, converting to contractor performance without public-private competition or subjecting to public-private competition at least 425,000 federal employee jobs by the end of 2004.

2. As part of that scheme, agencies were required to convert or compete at least 5% of the jobs (42,500) listed on their Federal Activities Inventory Reform (FAIR) Act inventories during Fiscal Year 2002.

3. During Fiscal Year 2003, the quota is at least 10% of the jobs (85,000) on the FAIR Act inventories.

4. In FY03, agencies will be encouraged to use privatizations to hit their arbitrary quotas.

5. OMB has pressured agencies to contract out jobs that senior agency managers have always insisted be performed by reliable and experienced federal employees by requiring that agencies publish lists of their inherently governmental jobs. This constitutes a unilateral expansion of the FAIR Act beyond its carefully delineated boundaries.

6. OMB sent out guidance on July 11, 2001, that instructed DoD to consider contracting out work that has historically been performed by federal employees, including "Installation Services; Other Nonmanufacturing Operations, Real Property Management, Operations and Maintenance; Intermediate, direct or General Repair Work; and Education and Training."

7. OMB has proposed a dramatic change in OMB Circular A-76 with respect to interservice support agreements (ISSAs), contracts for services between agencies that may ultimately be performed by civilian employees or contractors, proposing that all ISSAs, old and new, be competed, usually at least every three to five years.

8. In its own package of recommendations for last year's defense authorization bill, DoD asked for authority to directly convert to contractor performance without public-private competition work performed by civilian employees, contract out depot maintenance work, and privatize the commissaries. In this year's package, DoD is attempting to contract out the work performed by security guards.

9. In last year's defense authorization bill, the Congress moved forward on a range of service contracting issues, ranging from a Base Realignment and Closure process that institutionalizes the controversial privatization-in-place mechanism to a recovery audit mandate with an inadequate public-private competition requirement to an extension of streamlined procedures for commercial items with values less than $5 million.

10. The Service Acquisition Reform Act (SARA) (H.R. 3832) deals explicitly with issues affecting federal service contracting—particularly Section 301, which would allow all agencies to enter into share-in-savings (SIS) contracts. According to a *GovExec.com* posting, on April 5, a contractor lobbyist, "whose group helped write the (SARA) bill," insisted that support for the SIS provision will be forthcoming "once OMB realizes how share-in-savings contracts can support its competitive sourcing agenda," i.e., outsource as many as 425,000 federal employee jobs by the end of 2004.

The Administration has not waited for the panel's report, the Pentagon hasn't waited for the panel's report, the contractors haven't waited for the panel's report, and the Congress hasn't waited for the panel's report. Only federal employees and their unions were supposed to wait for the panel's report—and wait not just for any panel's report: rather, we were told to wait for a report from a panel stacked in favor of contractor interests. While contractors and the Administration continued to attack federal employees, we were told to lay down our arms until *they* got some reinforcements. Even by inside-the-Beltway standards, the insistence that federal employees and their unions wait for the panel's report racked up a level of disingenuousness that takes one's breath away.

d. Picking & Choosing

With the release of the panel's report, the Bush Administration and its contractor allies are carefully picking and choosing which parts of the pro-contractor's faction recommendation to implement.

For example, Pentagon officials have told the Congress in no uncertain terms that their objective is to "divest" all work that they classify as "non-core," involving hundreds of thousands of jobs. "Divestiture" was defined earlier this year by a DoD official to mean the "transfer (of) assets to the private sector...and the employees as well." Even the panel's pro-contractor faction stopped short of endorsing such a manifestly anti-taxpayer, anti-warfighter, anti-federal employee policy. In response to aggressive questioning by Representative Tom Allen at the recent Readiness hearing, the DoD witness was unable to identify any instance in which "divestiture" was endorsed by the panel.

At the Readiness hearing, the DoD panelist explicitly repudiated the unanimously-agreed Principle that ensures federal employees should have opportunities to compete for new work and contractor work.

OMB's arbitrary outsourcing quotas are another example. Rather than repudiate them, per the report's unmistakable recommendation, OMB officials are attempting to rationalize them, claiming they are "revising (their) criteria for success." In an exchange with Representative Neil Abercrombie at the recent Readiness hearing, the OMB witness, in a style that would have made Madison Avenue proud, insisted that the quotas were actually flexible "goals." With that

"new and improved" advertising sleight-of-hand, OMB contends that black is really white and that its privatization quotas were not in fact repudiated by the panel. Recently, however, it was brought to our attention that the OMB privatization quotas are in fact privatization quotas, not privatization goals. According to a Coast Guard memo, "(D)uring a government wide conference on competitive sourcing held recently in Washington, DC, OMB representatives noted that two agencies received forced reductions in FTE during the latest round of budget submissions. These reductions were directly linked to agency non-compliance with the President's competitive sourcing goals." OMB's determination to sell off large chunks of the federal government to politically-connected contractors is so strong that it would force agencies—regardless of their unique needs, missions, and responsibilities—to cut their workforces to make sure that the privatization quotas are enforced.

Contractors assailed Representative Jim Moran (D-VA) for leading the successful fight to include anti-outsourcing quotas language in this year's House Treasury-Postal Appropriations Bill. We were surprised to see Mr. Walker thrust himself into that debate in answering a journalist's question after an earlier attempt to hold this hearing. According to GovExec.com, "Comptroller General David Walker...said that while he opposes the administration's quotas for job competitions, he believes the Moran amendment would too severely restrict outsourcing efforts. `My understanding is [the amendment] would undermine the ability of agencies to engage in a considered analysis of commercial functions based on their mission,' Walker said." In a subsequent letter, Mr. Walker wrote, "(A)ny blanket prohibition on the use of goals, even those based on considered research and sound analysis, would be inconsistent with the Panel's recommended principles. In this regard, the Congress may wish to consider incorporating the word `arbitrary' in any legislation that might ultimately be enacted. Doing so would help to ensure consistency with the Panel's recommendations."

Unfortunately, Mr. Walker's assessment of the Moran amendment was inaccurate both at first blush and upon further reflection. The Moran amendment does not in any way constitute a "blanket prohibition on the use of goals." In fact, the amendment prohibits only the use of "numerical" privatization goals. By its very terms, the Moran amendment is not a "blanket prohibition," and we are disappointed that Mr. Walker mischaracterized represented it as such. It is also untrue that the Moran amendment would prevent agencies from conducting "research and analysis" in determining their sourcing policies. The numerical privatization quotas imposed by OMB are not based on "research and analysis." Their inspiration is, of course, wholly political. In contrast, the Moran amendment allows agencies to use "research and analysis" to make individual sourcing decisions. In fact, given that it forbids OMB's numerical quotas, the Moran amendment actually encourages agencies to more carefully consider their sourcing decisions, on a case-by-case basis. Mr. Walker's ostensible effort at a compromise would do nothing less than sabotage the Moran amendment by

making it unenforceable because OMB would insist, as it does now, that all of its privatization quotas are not "arbitrary."

The success of the Moran-Wolf-Morella amendment as well as identical language already included in the Senate Treasury Appropriations Bill has inspired some strange reactions. If the Congressional effort to free agencies from the privatization quotas is successful, OMB officials have threatened to retaliate by forcing agencies to review for privatization their entire FAIR Act commercial inventories. As AFGE National President Harnage commented, "Those comments are nothing more than blackmail, a desperate attempt to stave off a bipartisan effort in Congress to abolish the OMB privatization quotas by threatening to privatize almost one million federal employee jobs." I would add that the OMB threat shows exactly why the Moran amendment and the TRAC Act need to be promptly enacted into law.

Another example is High Performing Organizations (HPO's): investing in workforce training and encouraging labor-management cooperation in order to improve an agency's delivery of services. Although the panelists from the Bush Administration voted in favor of the recommendation that included a call for the establishment of HPO's, don't expect to see them at an agency near you. Neither the DoD nor the Office of Personnel Management (OPM) panelists mentioned HPO's in their additional remarks. The OMB panelist did—but only to denounce them.

Quite simply, the Bush Administration is going to do what it wants to do with respect to federal service contracting policy. If part of the panel's recommendation coincides with an Administration objective—like junking OMB Circular A-76 in favor of a FAR-based best value process—then the Administration will follow the report. If part of the panel's recommendation is in conflict with an Administration objective, then the Administration will defy the report. If the Administration wishes to pursue an objective that failed to attract the support of even the panel's pro-contractor faction, it will not hesitate to do so.

In fact, it would not be at all melodramatic to say that the blatant hypocrisy of the Bush Administration—carrying out the controversial part of the panel's recommendation with respect to a FAR-based best value process but opposing efforts to repudiate the OMB outsourcing quotas, which were unanimously repudiated—has made copies of the CAP report into little more than expensive coasters, doorstops, and fish-wrappings.

Summary: The panel has proven to be little more than an elaborate public relations exercise, something to give the Administration's effort to gut the civil service and replace hundreds of thousands of reliable and experienced federal employees with politically well-connected contractors a patina of respectability. Packing the panel to ensure a pro-contractor recommendation was just the beginning. Now, OMB and DoD officials can decide which parts of the panel's

pro-contractor recommendation to implement and which parts to ignore for being insufficiently pro-contractor. Moreover, they are also free to pursue other pro-contractor objectives, like wholesale divestiture, that were too outlandish to be recommended by the panel. To say that the deck is stacked in favor of contractors is to engage in understatement on a colossal scale.

III. THE PRO-CONTRACTOR FACTION'S CASE AGAINST OMB CIRCULAR A-76

The essence of the CAP report is the recommendation that OMB Circular A-76 be replaced by an unprecedented FAR-based best value public-private competition process. Rather than make an enthusiastic case *for* a FAR-based best value process, or to address the multitude of criticisms that have been leveled against the FAR-based best value process (because of how it has been used and abused in private-private competitions), the panel's pro-contractor faction contented itself with merely bashing A-76.

As the OMB witness noted at the Readiness hearing, "There needs to be some recognition that there are problems in the private-private system for competition and FAR based competitions. It's not a perfect system and we may be exacerbating some of the problems when we try to apply the FAR based system private-private competitions to public-private competition."

This blinkered approach was obviously to the advantage of the pro-contractor faction. Although the essentially unchecked subjectivity that is intrinsic to the FAR-based best value process has been as documented as it has been criticized, that process has not been used for public-private competitions.

Such cannot be said of OMB Circular A-76. Of course, any public-private competition process would be a lightning rod for criticism because so much is at stake with respect to federal employee jobs and contractor profits, whether it is called A-76, Z-67, or best value.

Blaming OMB Circular A-76 for the controversy that has been created by the indiscriminate downsizing and wholesale contracting out over the last several years demonstrates profound ignorance. It also serves to conceal ulterior motives on the part of many of those critics who seek either to replace OMB Circular A-76 with a more pro-contractor process, or to eliminate public-private competition entirely. Indeed, Mr. Stan Soloway, in his additional remarks to the report, insists that "it is difficult to envision a government agency seeking to perform <u>any</u> work that is not core to its mission and / or inherently governmental." (Emphasis original)

Federal employees and their unions also have concerns about OMB Circular A-76, including the absence of comprehensive and reliable systems to track the costs of contracting out, the reliance on wages and benefits in the cost comparison process, the abuse of discretion by agencies not to use the circular

to allow federal employees to compete for new work and contractor work, the absence of legal standing for the in-house workforce, the loopholes in the circular which allow for much work to be directly converted without any public-private competition, the failure of agencies to develop in-house expertise with respect to conducting public-private competitions, and the heavy-handed way in which the circular has been used in DoD during the Clinton Administration and in all federal agencies during the Bush Administration because of the use of numerical privatization quotas. But the panel refused to take real action on any of these issues.

And, of course, none of those flaws is intrinsic to OMB Circular A-76. That is, the circular and the law could be changed to address the concerns listed above. At the same time, it should be noted that federal employees and their unions are not wedded to OMB Circular A-76. It would be entirely possible to devise another cost-based public-private competition process that takes into account those concerns.

Let us examine the criticisms, one by one, leveled against OMB Circular A-76 by the panel's pro-contractor faction.

1. "Complicated Process"

The pro-contractor faction insists that A-76 is an unduly complicated process. Only one "fact" is offered in support of this assertion: although the vast majority of A-76 decisions are not protested, the GAO's sustain rate for the handful of A-76 decisions that are actually contested is higher than the GAO's sustain rate for protests overall.

However, that is an apples-to-oranges comparison. Because it is an intrinsically subjective process, it is difficult to successfully challenge agencies' decisions in the context of the FAR. As noted by Mr. Marshall Doke, Jr., the distinguished conservative legal scholar,

> "The discretion granted to agencies in the selection process precludes an effective policing system. The Comptroller General, for example, generally reviews agency decisions in the source selection process only to see if they have any reasonable basis and are consistent with the solicitation. This standard of review applies to determining requirements, minimum needs, evaluation of proposals, cost/technical tradeoffs, the source selection decision, and conflicts of interest. The Comptroller General's standards of review are even more difficult to overcome in decisions involving other issues..."

GAO has a higher sustain rate for A-76 proposal protests because it is a more objective process, and, thus more accountable to offerors—as long as you're a

contractor, of course. (Contractors, and only contractors, have rights to appeal A-76 decisions; as mentioned earlier, this isn't a flaw intrinsic to A-76.)

After offering that misleading comparison, the pro-contractor faction insists that the FAR would be an improvement on A-76 because the former constitutes a "common language." But then the pro-contractor faction acknowledges that several significant chunks of A-76 would have to be added to the FAR in order to allow this unprecedented regulatory hybrid to actually work. That must mean that the FAR is not such a "common language" after all, or that A-76 is more of a "common language" than the pro-contractor faction is willing to admit. Either way, the pro-contractor faction's argument clearly cannot withstand scrutiny.

There is, however, no question that agencies need to do a better job of conducting public-private competitions. There are two ways to make sure that happens: a) ensure that public-private competition before work is given to contractors actually occurs, instead, of leaving it as an option, so that agencies have an institutional investment in developing the capacities to conduct efficient, effective, and expeditious competitions; and b) provide agencies' acquisition workforces with sufficient staff and training to better manage their competitions.

Unfortunately, the pro-contractor faction refused to close loopholes allowing work to be contracted out without any public-private competition, even the notorious loophole that allows for the direct conversions of hundreds of jobs at a time without public-private competition to any firm claiming to be 51% Native American owned. Moreover, the pro-contractor faction stubbornly opposed efforts to strengthen the federal government's acquisition workforce. That is, when presented with opportunities to undertake measures that would actually improve sourcing practices, the pro-contractor faction ran in the other direction.

2. "Inconsistent Application"
This is nothing more than a shorter version of the first point. In fact, the first sentence in the first point asks whether A-76 is a "consistently applied process." Owing to the flimsiness of its arguments, perhaps the pro-contractor faction felt the need to pad its case by making some of its points more than once.

3. "Unequal and Unfair"
After acknowledging that differences are not necessarily inequities, the pro-contractor faction insists that in some A-76 competitions one set of evaluators reviews the private-sector offerors while another set of evaluators reviews the in-house proposal, and that this might result in the inequitable application of standards.

The pro-contractor faction offers no evidence to suggest that a protest is more likely to be sustained when two different sets of evaluators are used on an A-76 competition. Therefore, it cannot even be said that this difference is actually an inequity. Moreover, GAO has not required agencies to use the same evaluators

to review both proposals and on more than one occasion specifically upheld the use of different evaluators (in the absence of a showing that any of the evaluators' conclusions were unreasonable or inconsistent with the solicitation).

Among the pro-contractor faction's recommendations for reforming A-76 is one that calls for ensuring that "at least one individual" review "both the MEO (Most Efficient Organization) and private-sector proposals." That is, correcting the single example identified by the panel's pro-contractor faction of how A-76 is "unfair and unequal"—although in truth it can't be said that it is an inequity at all—is that simple.

4. "Inadequate Support for Employees"
In shedding crocodile tears for the plight of employees forced to fend for themselves in an acquisition process that is designed by past and future contractors for the benefit of current contractors, the pro-contractor faction takes disingenuousness to new and heretofore unimaginable depths. That DoD civilians feel beleaguered has nothing to do with the circular and everything to do with the Pentagon being staffed by officials who are determined to divest hundreds of thousands of their jobs, regardless of the cost and regardless of the impact on military readiness. Even worse, the pro-contractor faction's manufactured sympathy for federal employees is being used to justify replacing A-76 with an even more pro-contractor process. Thanks for the support—but you can keep it.

5. "Conflicts of Interest"
This point is almost as disingenuous as the previous point. Here's a news flash for our friends who make up the panel's pro-contractor faction: conflict of interest is a part of federal service contracting, period. To single out OMB Circular A-76 for criticism because there is a possibility for conflicts of interest is like saying that only politicians from Idaho like to hear the sound of their own voices, or that only journalists from the print media prefer colorful controversy to complicated substance.

GAO attorneys know this very well, as the Comptroller General has had to adjudicate conflict of interest cases in the FAR involving, among other issues, the composition of evaluation boards, bias, and bad faith. To his credit, even Mr. Mark Filteau, a member of the pro-contractor faction, acknowledged, in his additional remarks, that "Public-private competitions under a FAR-type process, that allow for negotiated best value decisions open new dangers for conflicts of interest for source selection personnel."

In contrast, the only conflict of interest scenario cited by the pro-contractor faction in the panel's report specific to OMB Circular A-76, where employees whose positions were under study were also participating in the evaluation process, has, according to the pro-contractor faction, already been corrected.

If only it were so easy to fix the conflict of interest problems that are intrinsic to the FAR. Because government agencies enjoy broad discretion in the selection of evaluation factors and in the determination of the relative weight of those evaluation factors and in the use of subjective and unnecessary evaluation factors, and because, as noted earlier, the intrinsic subjectivity of the FAR leaves agencies' broad discretion beyond judicial review, the possibility for conflicts of interest are dramatically multiplied.

AFGE National President Harnage divides up the conflict of interest cases that AFGE members bring to his attention into two types: 1) actually awarding contracts for reasons other than merit and 2) establishing policies and procedures that allow for the awarding of contracts for reasons other than merit.

Perhaps the most vivid and entertaining example of the first type is the tale from three years ago of Rear Admiral John Scudi who was relieved of his command and then forced to retire at reduced rank after having been accused of steering training contracts worth more than $150,000 to his girlfriend over a four-year period.

At the time charges were brought against him, Scudi served as director of the Navy's offices of privatization and base management and was one of the Pentagon's most enthusiastic champions of outsourcing tens of thousands of federal employee jobs. Scudi had reportedly been rigging contracts for his girlfriend during previous assignments at the Pentagon and in San Diego. According to *The Washington Times*, the Admiral's contractor girlfriend told Navy investigators that "the scheme grew grander when he moved to Washington, made admiral and became director of outsourcing and privatization on the staff of the chief of the naval operations...The ultimate plan called for Admiral Scudi to retire and become a partner in the business to which he had funneled contracts, she said."

So how did this story finally become public? Was it because the Pentagon's surveillance of its contract administration system is so thorough and comprehensive that no official—no matter how shrewd, crafty, or diabolical—could long escape detection? No, it's because the Admiral's private-sector sweetheart turned him in after finding out that the married contracting out kingpin actually had a second girlfriend.

Although less colorful, the second problem is even more insidious: contractors being appointed to senior acquisition positions and using their offices to establish policies and procedures to benefit contractors. Nowhere is this more of a problem than at the Pentagon. The "human capital crisis" in DoD didn't just happen. Senior DoD officials made the decision to stop hiring federal employees and to impose rigid personnel ceilings, contrary to the law, and then contract out the work that could no longer be performed by a drastically downsized civilian workforce. 10 U.S.C. 129a, which requires DoD to shift work back and forth between the contractor, military, and civilian workforces for reasons of cost, has

not been ignored by accident. The reason why DoD doesn't know how much is even being spent on its service contracts is not a mystery. These and other derelictions are part of a larger effort to systematically replace—divest, if you will—the civilian workforce with contractors, irrespective of the impact on costs or readiness. And it couldn't have happened without deliberately blurring—and in the case of some appointees, who came directly from contractor associations and subsequently returned directly to contractor associations, destroying—the boundaries between public office and private interest, by making conflicts of interest almost breathtakingly routine.

Those are the conflict of interest problems that should have commanded the panel's attention, as several members of the Readiness panel made clear at the recent hearing. However, our efforts to raise these problems fell on deaf ears. Instead, the panel falsely singled out OMB Circular A-76 for conflict of interest problems, even though the only problem identified by the pro-contractor faction had, by its own admission, already been corrected.

6. Cost / Technical Tradeoffs

The pro-contractor faction insists, repeatedly and stridently, that agencies cannot make qualitative improvements in services without resorting to a FAR-based best value process. Interestingly, in the report itself and in the additional remarks of all eight members of the pro-contractor faction, no instances were cited where an agency was deprived of the opportunity to make the qualitative improvements it sought—as opposed to those being touted by contractors' salespersons—because of OMB Circular A-76.

Even in the shameful absence of a reliable and comprehensive system to track the cost and quality of individual contracting efforts, we all know of service contracts that have gone horribly wrong, through poor performance or increased costs. The absence of even a single A-76 quality "horror story," despite the combined propaganda resources of OMB, DoD, and the contractors leaves the objective reader to draw just one conclusion: the shift to a FAR-based best value process is based on the pro-contractor faction's determination to impose a more pro-contractor process, rather than an effort to improve the quality of government services.

OMB Circular A-76 has its own best value process, of course, one which was fiercely defended, even by the pro-contractor Clinton Administration. This process allows agencies to secure the higher quality services at lower prices, i.e., the best of both worlds for taxpayers and agencies. In the typical A-76 best value situation, the in-house workforce provides the agency with a lower cost and more responsive offer. The contractor's proposal costs more but offers additional services. The agency must determine whether these additional services are necessary and desirable. If so, the solicitation is, in effect, changed to include those additional services, and the in-house workforce is required to revise its original response. If the in-house workforce can accommodate its response to

the changed solicitation, then the competition continues on the basis of costs. That is, the agency gets what it wants in terms of quality, but at lower costs. Contractors gripe, unpersuasively, that this gives the in-house workforce two bites of the same apple. Clearly, continuing with the contractors' fruity metaphor, in the A-76 best value scenario, there are two different apples because the original solicitation was changed.

The only documented objection to the A-76 best value process included in the report by the pro-contractor faction was that "GAO has sustained protests where it was alleged that an agency failed to implement it fairly (or at all)." (Indeed, in Appendix D, a review of recent A-76 litigation, a handful of cases were identified in which GAO sustained a protest against the use of the A-76 best value process. In other words, the errors were rectified in the few instances when the A-76 best value process was used incorrectly.) This is a particularly weak and unenlightening criticism. Unlike in the first point, the pro-contractor faction is not contending that the sustain rate for A-76 best value proposal protests is higher than the GAO's sustain rate for proposal protests overall. For all we know, the use of A-76 best value may better withstand appellate scrutiny than the FAR, which would be quite an accomplishment considering that the subjectivity in the FAR leaves most agency decision-making beyond judicial review.

AFGE would like to single this point out as a particularly unfortunate example of the "Alice in Wonderland" reasoning employed so often in the report by the pro-contractor faction. As mentioned earlier, the A-76 best value process is portrayed as vaguely suspect because the GAO has sustained protests related to its use. In the preceding paragraph, the pro-contractor faction blithely asserts that protests related to the use of the FAR which had been sustained are testimony to the strength of the FAR. In other words, when the FAR is found by GAO to have been used in error it is good; but when the A-76 best value process is found by GAO to have been used in error it is bad. Curiouser and curiouser, indeed.

The pro-contractor faction writes that "Tradeoffs are widely credited with getting the federal government past the `low proposal' mentality of the past, and with increasing consideration of factors such as quality and past performance."

AFGE cannot let this canard pass without comment, especially given the inability of the pro-contractor faction to provide a single example of an agency being denied an opportunity to improve the quality of its service through an OMB Circular A-76 best value competition. Under any well-managed cost-based process, any agency can conduct a competition that leads to qualitative improvements while still being decided on the basis of costs—without opening up the process to the corrupting subjectivity of FAR-based best value. An agency can simply identify the standards it needs by including them in the solicitation. If the offerors can realistically perform the work, then they are allowed to compete on the basis of costs. This is an objective process that is driven by agencies'

actual needs, not whatever gold-plated bells and whistles are being touted that day by contractors' sales staff.

Mr. Doke puts it far more pithily and pungently:

> "It is a popular misconception that a low price means low quality. If you are buying or selling gold and specify 98 percent purity, the price is irrelevant to quality if you *specify* the purity required, *inspect* to assure the product conforms, and *reject* any nonconforming products." (Emphasis original)

And what Mr. Doke says about products is equally true of services.

7. "Protest Rights"
This is yet another disingenuous gripe about the circular, particularly so in that it uses the obvious inequity of federal employees and their unions being denied the same legal standing enjoyed by contractors as an excuse to recommend replacing A-76 with a more pro-contractor public-private competition process. There is nothing in OMB Circular A-76 that would prevent the Congress from taking action that would give federal employees and their unions legal standing. That federal employees and their unions don't have such standing is attributable not to the circular itself.

As every member of the panel's pro-contractor faction knows, out of deference to contractors, the Congress has not passed legislation to provide federal employees with standing to take their protests to the GAO and the Court of Federal Claims. In fact, a very modest standing bill (H.R. 2227) is pending before the House Government Reform Committee. The only thing more objectionable than launching an arbitrary tidal wave of A-76 reviews at federal employees knowing that they, unlike their contractor counterparts, have no legal standing is knowing that this indefensible act is being perpetrated and doing nothing, absolutely nothing.

8. "Time and Money"
The panel's pro-contractor faction criticizes the circular because the competitions conducted under its rules take too long. Only after a protracted behind-the-scenes struggle did the pro-contractor faction relent and reluctantly, very reluctantly, agree to include this admission in its report: **"Whether and to what extent FAR-based public-private competitions would be faster than A-76 cost comparisons is unknown."** (Historically, FAR-based best value competitions take longer, sometimes significantly so, than FAR cost-based competitions.)

In other words, after all of this effort, the pro-contractor faction has served up a recommendation that is not an improvement—indeed, it may well be a step backwards—on the one widely-acknowledged flaw in OMB Circular A-76. Even

at its debut when its advocates are in full flack mode and it is unsullied by experience, the pro-contractor faction cannot deny that the FAR-based best value competition process may take longer and thus cost more than competitions currently conducted under the circular.

As discussed earlier, the key to conducting more expeditious public-private competitions, regardless of what process is used, is by making competition prior to conversion to contractor performance a sure thing instead of an option, as it is today, and by strengthening the acquisition workforce through increased staffing and the provision of training.

The pro-contractor faction makes two sub-points here that deserve responses.

Concern is expressed over the money required to complete an A-76 competition. What the pro-contractor faction does not address here or elsewhere in the report is that contracts entered into under a FAR-based best value competition process historically cost more for the taxpayers than if the contracts had been undertaken as part of a FAR-based cost competition process. I know I wasn't asked, but I have, all modesty aside, crafted the perfect advertising slogan for the introduction of a new competition process:

FAR-BASED BEST VALUE— COSTS MORE / TAKES LONGER.

No wonder the pro-contractor faction didn't want to see their controversial recommendation tested before it was implemented!

The pro-contractor faction also expressed concern about the impact of A-76 on small businesses. What the pro-contractor faction does not address here or elsewhere in the report is that small businesses have historically had very strong objections to the use of the FAR. As Mr. Doke writes,

> "One of the most serious erosions of competition (and perhaps the most subtle) has been the adverse impact of current procurement practices on small business concerns and minority enterprises...It is relatively easy to eliminate small business concerns from competition merely by including responsibility-type evaluation factors in the solicitation and then comparing the small business concern's capabilities with much larger, more experienced companies (even if the greater capabilities or resources of the large businesses exceed the Government's actual needs)...The effective elimination of small business concerns from competition excludes numerous qualified competitors and creates a subtle restriction on competition to larger, over qualified competitors without justifying that such a restriction is necessary to meet the Government's actual needs..."

That is, the pro-contractor faction's recommendation would disadvantage both federal employees and small contractors in order to advance the already considerable interests of the large contractors.

"Other Concerns"
It is difficult to know what to make of this section, an unfocused, stream-of-consciousness-style discussion by the pro-contractor faction of issues and concerns that are actually unrelated to OMB Circular A-76.

"...(O)ne concern raised by several witnesses before the panel, as well as by a number of panelists, was that an agency should always strive to be the most efficient organization possible, and not wait until an A-76 cost comparison to begin those efforts." AFGE would heartily agree that agencies should strive every day to hit their MEO's—without having to wait for an A-76 competition. That some don't because they lack enlightened management or sufficient resources cannot be blamed on the circular.

The pro-contractor faction asserts that the federal government should employ human capital strategies necessary to recruit and retain a "high-performing workforce." Of course, the imposition of a subjective FAR-based public-private competition process that makes it easier to contract out work for reasons other than merit will only make it harder for the government to recruit and retain a qualified workforce.

The only work done by the pro-contractor faction in relation to "human capital" is the HPO concept, which was reportedly important to the panel's chairman. Of course, the HPO part of the recommendation had to be scaled back significantly in the face of strong opposition from the contractor and the OMB panelists. And, as mentioned earlier, the Bush Administration has expressed no interest in following up on the part of the pro-contractor faction's recommendation to establish HPO's, even on the very "limited" basis called for in the report. Therefore, it can be said that the CAP report does next to nothing to improve the government's ability to recruit and retain a capable workforce; and in exacerbating the crisis in federal contracting by recommending the imposition of a more pro-contractor public-private competition process, the panel will only worsen the related "human capital crisis."

The section ends with a wordy tribute to the "innovative (human capital) initiatives that are common today in the commercial sector." Unfortunately, the very last time sustained attention was paid to the status of the contractor workforce in a particular industry the Congress and the President found the situation so abhorrent and contrary to the public interest that they effectively nationalized the industry. I am referring, of course, to the federalization of airport screening. Virtually all participants in that debate, regardless of their political affiliation or position on the ideological spectrum, agreed that the failure of contractors to provide workers with decent pay, benefits, protections, and advancement

opportunities constituted an intolerable contractor "human capital crisis." It is highly unlikely that the "human capital crisis" in the contractor workforce is limited to airport screening. Unfortunately, the extent of the "human capital crisis" in the contractor workforce is shrouded in secrecy because of poor contract administration and contractors' stubborn opposition to even the most basic efforts to determine what work contractors are performing and how much they cost. It should be noted that the pro-contractor faction opposed any effort to document the "human capital crisis" in the contractor workforce and take remedial measures to correct this crisis.

Summary: As the foregoing made clear, the pro-contractor faction was unable to make a case for junking OMB Circular A-76, let alone for replacing it with a controversial, unproven, and subjective FAR-based best value public-private competition process.

1. "Complicated Process": This argument is flawed in that it relies on a misleading apples-to-oranges comparison.

2. "Inconsistent Application": This redundant argument is merely a restatement of the flawed first argument.

3. "Unequal and Unfair": The pro-contractor faction identified only one concern, although no documentation was provided to show that it actually is a problem. To the extent it is a problem, the pro-contractor faction acknowledged elsewhere in the report that it could easily be corrected.

4. "Inadequate Support for Employees": This is indeed a problem, but it has everything to do with the service contracting process being stacked against federal employees, rather than a flaw intrinsic to A-76.

5. "Conflicts of Interest": This is a problem for the entire federal service contracting process. Singling A-76 out for criticism on this score is manifestly mindless. Indeed, the pro-contractor faction acknowledged that the one identified conflict of interest problem related to A-76 has already been corrected.

6. "Cost / Technical Tradeoffs": The pro-contractor faction never bothered to demonstrate how the A-76 best value process had denied agencies opportunities to improve the quality of their services. The pro-contractor faction could identify only one concern with the A-76 best value process: that the GAO had sustained protests against its use. However, the pro-contractor faction could not say that the sustain rate for A-76 best value protests is higher than the sustain rate for protests generally, i.e., that it actually is a problem. Moreover, the pro-contractor faction used highly disingenuous reasoning in insisting that sustained protests against the FAR were a sign of

strength whereas sustained protests against A-76's best value process were a sign of weakness.

7. "Protest Rights": There is nothing in OMB Circular A-76 that would prevent the Congress from providing federal employees with the same legal standing that is possessed by contractors. The problem is that the Congress has not passed the necessary legislation.

8. "Time and Money": The pro-contractor faction acknowledged that its recommended alternative may be slower and thus cost more than A-76.

It must also be noted that in most cases the imposition of a FAR-based public-private competition process would exacerbate most of the concerns identified by the pro-contractor faction, particularly with respect to conflicts of interest. Moreover, with respect to efforts to address concerns identified by the pro-contractor faction that were actually common to federal service contracting generally, instead of A-76 specifically, the pro-contractor faction ignored efforts by the pro-taxpayer faction to recommend genuinely remedial measures, even including such seemingly non-controversial recommendations as improving the acquisition workforce, strengthening conflict of interest rules, and ensuring that public-private competitions are always conducted before work is given to contractors.

Quick quiz: which agency used these adjectives just a few months ago in official briefings to describe OMB Circular A-76: "standardized," "understandable," "acceptable," "disciplined," and "successful"? The Department of Defense—and such glowing reviews were still being given even after the panel had begun its work. Of course, in just a few months, the fix was in, and the pro-contractor faction would re-write history to make OMB Circular A-76 into something unrecognizable, a public policy abomination.

IV. THE SOURCING PRINCIPLES: SO MUCH LESS THAN MEETS THE EYE

Much is made by the panel's pro-contractor faction of the fact that one part of the CAP report—indeed, the only part of the CAP report—received unanimous support from the panel: the so-called sourcing principles. Unfortunately, there is much less to this unanimity than meets the eye. In some instances, the principles are so bland and soporific as to be almost meaningless. In other instances, the principles were not incorporated into the recommendations. That is, the pro-contractor faction played a classic game of bait-and-switch, asking the pro-taxpayer faction to support certain principles in order to provide the panel with a respectable air of unanimity while crafting a narrow and parochial recommendation that failed to pay even lip service to the principles. In still other instances, the pro-contractor faction's recommendation flatly contradicts the principles. And in several cases, the Bush Administration has already indicated that it will defy the principles that its representatives on the panel supposedly supported.

1. "Support agency missions, goals, and objectives."

This is almost too bland to bother discussing. How a narrowly-focused recommendation to replace OMB Circular A-76 with a subjective FAR-based best value process can be even remotely construed to "support agency missions, goals, and objectives" is unclear.

For example, does a recommendation that would greatly increase contracting out of services without in any way increasing agencies' abilities to track the cost and quality of the services performed by the federal government's ever-increasing contractor workforce "support agency missions, goals, and objectives?" Does a recommendation that does nothing to keep agencies from managing their in-house workforces by arbitrary personnel ceilings "support agency missions, goals, and objectives?" Does a recommendation that does nothing to ensure that federal employees will actually be allowed to compete for new work or contractor work "support agency missions, goals, and objectives?" Of course not. And those are just three examples.

2. "Be consistent with human capital practices designed to attract, motivate, retain a high-performing federal workforce."

A small part of this principle was actually incorporated into the report's recommendation, specifically the call for agencies to provide federal employees with assistance from and access to management during the competition process. Of course, 10 U.S.C. 2467 already deals with such matters in large part, and, unlike the panel's approach, explicitly allows for the involvement of the employees' union representatives.

For the most part, however, this principle was not incorporated by the pro-contractor faction into the report's recommendation. The commentary to this principle insists that agencies should consider the impact of outsourcing on recruitment and retention and that the workforce should be treated as "valuable assets." In light of the Pentagon's adoption of a policy of divestiture of non-core work, i.e., giving it to contractors without any consideration of the impact on cost or readiness, can it be said that DoD civilian employees are viewed as "valuable assets?" Clearly, the Pentagon's acquisition executives, the vast majority of whom come from the contractor community, view the department's civilian employees as thoroughly dispensable and couldn't care less about the impact of wholesale privatization on the department's ability to recruit and retain employees. In fact, the department has no interest in recruiting and retaining civilian employees, period. Mr. Ray Dubois, the Deputy Defense Undersecretary, in an article in the March 4 edition of *Federal Times*, said that "'When public employees retire, they're (going to be) replaced with private sector employees...'" DoD has no intention of even replacing the part of the workforce that leaves through normal attrition, let alone recruiting new employees.

While the policies of divestiture and no additional in-house hiring are too outrageous to even be endorsed in the CAP report, the panel's pro-contractor faction knows that DoD is pursuing these policies—and refused any effort to use the report to address them, let alone call unambiguously for their reversal. In fact, the pro-contractor faction refused to include in the panel's recommendation any reference to ending the use of the arbitrary personnel ceilings that were so instrumental in bringing on the "human capital crisis" although a foundation for such easy and obvious language was provided by Principle #6.

It is surely self-evident that enlightened human capital practices are fundamentally in conflict with the widespread practice of privatizing work performed by federal employees in order to lower workers' wages and reduce their benefits.

It is well-established that contracting out has been used in the private sector and in the non-federal public sector to shortchange workers on their pay and benefits. It is likely that this pernicious practice exists at the federal level as well. In 1998, at the request of AFGE, Representatives Steve Horn (R-CA) and Dennis Kucinich (D-OH) asked the GAO to examine the pay and benefits of the federal service contractor workforce. Congressional auditors, however, came back empty-handed: agencies couldn't be helpful because they did not keep the relevant information and contractors did not respond to surveys. A survey conducted by GAO in 1985 of federal employees who were involuntarily separated after their jobs were contracted out revealed that over half "said that they had received lower wages, and most reported that contractor benefits were not as good as their government benefits."

The Economic Policy Institute (EPI), in a ground-breaking 2000 study, has determined that more than one in ten federal contractor employees earn less than the "living wage" of $17,000 per annum, i.e., the amount of money necessary to keep a family of four out of poverty.

> "The federal government saves money by contracting work to employers who pay less than a living wage ($8.20 per hour). Even the federal government jobs at the low end of the pay scale have historically paid better and have had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers..."

Contractors ritualistically invoke the Service Contract Act whenever the human toll from service contracting is raised. However, EPI's research reveals the very limited reach of prevailing wage laws.

> "In 1999, only 32% of federal contract workers were covered by some sort of law requiring that they be paid at least a prevailing wage...But even this minority of covered workers is not guaranteed a living wage under current laws. For example, the Department of Labor has set its minimum pay rate at a level below $8.20 an hour for the workers covered by the Service Contract Act in 201 job classifications."

GAO has been unable to determine the extent to which contracting out undercuts workers on their wages and benefits. And despite its pioneering work in this area, EPI acknowledges that

> "Further research, such as a survey of contracting firms, is needed in order to know more about these workers and their economic circumstances."

The pro-contractor faction refused to address this issue in any meaningful way, whether conducting a study to determine the extent to which contractors provided their workers with inferior compensation or removing wages and benefits from the competition process so that the federal and private sectors could compete on the basis of staffing levels and service delivery techniques, instead of how fast the contractors could transform the working and middle class Americans in the federal workforce into a poorly-paid contingent workforce with few if any benefits or protections. The pro-contractor faction never challenged the reliability of the EPI report. However, the only concession the pro-contractor faction would make is to call on agencies, in Principle #10, to make sure that the Service Contract Act is enforced. Of course, as the EPI report made clear, that law is irrelevant to the vast majority of contract workers.

3. "Recognize that inherently governmental and certain other functions should be performed by federal workers."

So what? It is commonly acknowledged by even senior Bush Administration officials that inherently governmental work has been privatized. In a December 26, 2001, memo to OMB asking for relief from the onerous outsourcing quotas, Undersecretary for Acquisition, Technology and Logistics Pete Aldridge, also a CAP member, wrote that "a reassessment may very well show we have already contracted out capabilities to the private sector, that are essential to our mission..."

It was reported in a November 5, 2001, posting on GovExec.com that "Certain agencies have outsourced too many jobs and should consider bringing work currently done by contractors back in-house, the Bush administration's top procurement official said last week. Angela Styles, administrator of the Office of Federal Procurement Policy in the Office of Management and Budget, (also a

CAP member,) said that some agencies have sent so much work to the private sector that they are unable to provide effective oversight of the contracted work."

Of course, federal agencies don't know how much they spend on service contracting, how many service contractor employees are indirectly on their payrolls, or even what work these contractors are actually performing. What we do know is that agencies have contracted out inherently governmental work. The absence of a reliable and comprehensive tracking process prevents us from knowing which inherently governmental work has been contracted out.

Moreover, as times change, so do perspectives. Just as work that had once been considered inherently governmental can become commercial, work that had once been considered commercial can become inherently governmental. Indeed, airport screening is an excellent example of work that had once been considered commercial but has since become inherently governmental. Again, however, there is no comprehensive and reliable process—indeed, there is no process at all, let alone one that is comprehensive and reliable—to track work performed by contractors to determine whether changing times demand that it be redesignated as inherently governmental so that it can be performed by reliable and experienced federal employees.

In the panel's commentary for this principle, it is said that "(c)ertain other capabilities...or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution." Although far too narrowly stated, this is an excellent point. That is, commercial functions can be contracted out to such an excessive extent that it undermines the government's ability to perform its work. However, if agencies aren't tracking contractors' work, how do they know when too much commercial work has been contracted out?

Therefore, it is meaningless to say that federal employees ought to be performing inherently governmental work and certain other work if there is no mechanism for determining whether inherently governmental work is being performed by contractors or whether commercial functions have been given to contractors to an excessive extent.

AFGE and other members of the pro-taxpayer faction repeatedly recommended borrowing the methodology perfected by the Army to track the cost and size of its workforce, both specifically and globally. As the panel noted, "the FAIR Act has helped to identify commercial work being performed by the government." Surely, any panelist who was motivated by a determination to actually fulfill the promise of this principle would have supported our efforts to provide for a comparable inventory of work performed by contractors.

In fact, the only actual contractor in the panel's pro-contractor faction, in an article posted on the GovExec.com website, on April 5, said that the Army inventory was both manageable and valuable. According to

> "Mark Filteau, president of Johnson Controls, a Florida-based contractor, the changes should make it fairly easy for contractors to comply with the study. `So long as the Army doesn't invent new categories or require cross-correlation from old contract categories to some new set of definitions, then there won't be a significant cost impact on new bids or current contracts,' he said. While noting that contractors already report on a variety of topics to the government, Filteau praised the concept behind the study. `Frankly, the Army ought to know what it is paying for contract labor,' he said. `As a citizen, a taxpayer and an all-around fan of good management practice, I support what the Army is trying to do here.'"

However, the pro-contractor faction not only rejected any attempt to track the cost and size of the federal government's massive contractor workforce, it also refused to address the important principle of what's inherently governmental, period.

But aren't inherently governmental issues the sort that a panel chaired by the *Comptroller General* should be considering? You'd think so, as did several surprised lawmakers in attendance at the recent Readiness hearing, especially given the comments made to GovExec.com before the panel began its work. According to a June 8, 2001, posting:

> "A high-level panel reviewing federal outsourcing policy is working to better define when and why federal jobs can be considered inherently governmental, Comptroller General David Walker said this week.
>
> "Walker is chair of the Commercial Activities Panel, a 12-member working group that is reviewing federal outsourcing issues. In an interview with *GovExec.com*, he addressed one of the most difficult aspects of outsourcing decisions: how to determine what functions must remain in-house to provide effective government...`One question that has to be on the table is what is a reasonable way to go about defining inherently governmental,' he said. `It's not well-defined today, and arguably not being consistently applied [by agencies] today.'"

On May 1, less than a year later, the GovExec.com reporter followed up on this issue, and the situation had changed:

> "Some observers were disappointed that the panel did not spend more time studying broader contracting issues, such as the rules that govern what federal jobs are eligible for outsourcing. 'The hope is that with this process issue now out of the way we can get to the big picture,' said Dan Guttman, a fellow with the National Academy of Public Administration. 'The [panel report] looks more like an interest group battle than a discussion of issues of great public consequence.'
>
> "But most panel members weren't interested in studying the definition of 'inherently governmental' work, which by law is off-limits to outsourcing, according to Walker. 'That was not something that people felt we needed to spend a lot of time on,' he said."

Actually, members of the pro-taxpayer faction repeatedly pressed the panel to consider this issue, but met with failure. Of course, it would be foolish to expect otherwise. With a panel overwhelmingly comprised of representatives that are either part of, or beholden to, a special interest group that is dedicated to substituting its own interest for the public interest, why would there be any interest in dealing with important questions, such as what work is inherently governmental and should always be performed by reliable and experienced federal employees? Contrary to a contention made at the hearing, this dereliction was not a result of too little time; rather it was because there was no interest on the part of the pro-contractor faction.

4. "Create incentives to foster high-performing, efficient and effective organizations throughout the federal government."

As discussed earlier, Mr. Walker attempted to incorporate this principle into the recommendation with his HPO proposal. However, due to strong opposition from other members of the pro-contractor faction, this proposal was significantly watered down. Moreover, the Bush Administration has no interest in HPO's. Neither the DoD nor the OPM panelists mentioned HPO's in their additional remarks. The OMB panelist did—but only to denounce them. Consequently, it can be written that although this principle was incorporated into the recommendation to a very limited extent, that part of the recommendation is already being ignored by the Bush Administration.

That's being polite, however. Actually, the pro-contractor faction refused efforts that would have created real "incentives for its employees, its managers, and its contractors to seek constantly to improve the economy, efficiency, and effectiveness of the delivery of government services through a variety of means..." The only way to ensure that agencies actually have such incentives is by eliminating the easy out of privatization. Rather than take the time and expend the effort to reform and streamline operations internally, it's all too easy for agencies to contract out that work (along with the inefficiencies) without

public-private competition, which ill serves taxpayer interests in the short-term as well as the long-term. The panel refused to eliminate the easy out of noncompetitive outsourcing, even to the point, as discussed earlier, of staunchly defending the ridiculous yet notorious direct conversion loophole for large contractors who claim to be 51% Native American-owned.

5. "Be based on a clear, transparent, and consistently applied process."

As we discussed earlier, the pro-contractor faction, in its lengthy attack on OMB Circular A-76, was unable to land even a single punch.

The pro-contractor faction claimed that it was too complicated. However, as proof, it could only point to a higher sustain rate for A-76 proposal protest decisions than for proposal protests generally. Unfortunately, that conveniently ignores the fact that the circular, as an objective process, is eminently easier to litigate against than the FAR because the latter process' subjectivity places most agencies' decision-making beyond judicial review.

Then the pro-contractor faction said that A-76 was unequal and unfair. Again, however, it could only point to one example of the circular being inequitable and then admitted that the problem could be easily corrected, and, indeed, included that fix in its recommendation.

Finally, the pro-contractor faction turned its attention to A-76's best value process. Unable to produce even a single example of how the circular's best value process had kept an agency from improving the quality of its services, the pro-contractor faction nonetheless insisted that the process was an utter abomination because it had been litigated—even though the replacement process it was recommending had also been litigated. However, the pro-contractor faction could not say if the number of sustained A-76 best value process protests was proportionately greater than the number of protests sustained generally or under a FAR-based best value process.

So, after giving the pro-contractor faction its best shot and making the one minor change included in the report, A-76 easily qualifies as a "clear, transparent, and consistently applied process."

Is that true of a FAR-based best value process? As discussed earlier, agencies have extensive discretion over that process, from beginning to end, and the standards of review established by the Comptroller General are difficult to overcome. The subjective scoring that is intrinsic to FAR-based best value, as Mr. Doke notes, "permits the judges to postpone deciding what they want until after the competitors have completed their participation." For example, a solicitation might indicate that the award was going to be based on technical and cost factors, and that technical factors would be more important than cost factors. However, judges are permitted to wait until after the proposals are submitted to

decide how much more important technical factors will be. That is, they decide after submission of proposals to assign the specific relative weights of the technical / cost split, be they 55 / 45, 70 / 30 or some other subjectively determined ratio. That's hardly a "clear, transparent, and consistently applied process." Moreover, while agencies are required to identify all "significant" evaluation factors and subfactors in a solicitation, they are not required to identify all "areas of each factor" which may be taken into account, provided that the agency can contend that the unidentified areas are reasonably related to or encompassed by the stated criteria.

In his comments at the Readiness hearing, the Comptroller General said, "(F)irst, if you look at the recommendations that we're talking about and come back and say that *transparency* is the key. I mean if you want to minimize the possibility of abuse you've got to have *clearly defined criteria that are set out front*...You've got to have a process that *everybody knows what the rules of the ball game are before you get started, included what the weighting is going to be on various factors*." (Emphasis added) However, as the foregoing makes abundantly clear, the actual weighting is not made known in advance; nor are all of the subfactors which will be assigned weight identified in advance.

As Mr. Doke reports, the use of subjective or even unnecessary factors in the FAR-based best value process has been extensively litigated. Eyebrow-arching examples include: "creative or innovative thoughts", "visionary" approaches, the importance of the contract to the offeror, "aesthetics", "employee appearance," and the deeply strange "availability of pop-up dispensers for paper towels." Moreover, the FAR includes no rules, standards, or guidelines for the use of subjective standards. Consequently, how can the pro-contractor faction contend that its FAR-based best value recommendation would ensure that agencies use a "clear, transparent, and consistently applied process?"

Similarly, small businesses have pointed out repeatedly that competition under a FAR-based best value process is, reports Mr. Doke, "prejudiced because there is no statutory or regulatory guidance to limit the evaluation of responsibility factors (e.g., corporate experience, risk) to the level that is *adequate* for the performance of the contract." (Emphasis original) Is that what we should expect of a "clear, transparent, and consistently applied process?"

Under a FAR-based best value process, agencies never actually decide what they want until after the proposals have been submitted. In fact, agencies actually award points to offerors who exceed the requirements set forth in the solicitation. This is why a FAR-based best value process has historically been a burden on taxpayers. Instead of agencies telling contractors what they want, a FAR-based best value process has contractors telling agencies what they need. With the tail wagging the dog, is it any wonder contract administration is such a mess? Mr. Chairman, if you're at all like me, I doubt you've ever walked into an automobile dealer's showroom, walked up to the salesperson with the predatory

smile, and blurted out: "Tell me everything you think I need—and I mean everything! And don't scrimp on those expensive optional extras!"

Should acquisition personnel follow developments in the private sector so they can take advantage of those elusive opportunities to improve the quality of their services? Of course. That's why AFGE and other members of the pro-taxpayer faction strongly urged the panel to recommend bolstering the acquisition workforce with additional staff and training, so that agencies can decide what they need, based on what's best for the taxpayers, as opposed to what's best for the commissions of contractors' sales staff. However, even with sufficient staff and training, there will, of course, be times when an offeror will include in its proposal additional services or features that, although not required in the solicitation, are desirable to the agency. Under the A-76 best value process, the agency allows the other offeror an opportunity to match the competitor's proposal, ensuring that the agency secures all of the quality it needs at the lowest possible prices. Under the FAR-based best value process, however, taxpayers are out of luck—as is that other offeror, even if it had submitted the lower-cost, more responsive proposal.

As Mr. Doke writes,

> "Competitive evaluations that award points for exceeding the Government's requirements raise real questions as to whether there is genuine competition at all. It is difficult to compete to *meet* the requirements, but with undisclosed evaluation plans, undisclosed and subjective evaluation factors, etc., how can there be any meaningful competition to *exceed* the requirements? How much more than the requirements is desired (and will be awarded points)? In what areas are additional performance or capabilities desired? What will you be competing against? Finally, how can the Government justify paying a higher price for something that exceeds its actual needs as reflected by the specification requirements?" (Emphasis original)

Moreover, agencies need not identify the "price premiums" that are paid for contracts awarded to other than the low offeror and the specific factors for which those premiums are paid. Although the agency's negotiating memorandum normally will discuss the relative position of the proposals with respect to various factors, there is no requirement specifically to identify the reasons the evaluators considered that the higher priced proposal should be accepted. Frequently, the documentation merely reflects that the higher priced offer was rated more highly. How much of a price premium (as a percentage over the low offer) should be permitted? Similarly, there is no government reporting requirement to disclose such information under any of the many contract reports required by law and regulation. Therefore, there is no way that anyone knows how much money the

agency is spending under FAR-based best value procurements for contracts awarded to offerors that do not have the lowest price proposal.

Clearly, the FAR-based best value process is not more "clear, transparent, and consistently applied process" than A-76. In his remarks at the Readiness hearing, Mr. Walker conceded that "there's discretion in every process." Of course, the problem is that the pro-contractor faction recommends replacing an objective competition process that *minimizes* the role of discretion with an explicitly subjective process that *maximizes* the role of discretion.

6. "Avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals."

This principle was never incorporated by the pro-contractor faction into the report's recommendation. For example, the recommendation includes no provision to abolish the infamous OMB outsourcing quotas. In fact, there is not even a reference in the recommendation to elimination of the pernicious practice of managing the in-house workforce by personnel ceilings. Although illegal in DoD, the practice persists, both in DoD and in most other agencies. In fact, as discussed earlier, senior DoD officials are openly acknowledging their intention to let attrition take its inexorable toll by refusing to hire any additional staff. In other words, the backwards personnel policy of arbitrary personnel ceilings that did so much to bring about the "human capital crisis" will now be pursued with an unchecked vengeance. As mentioned earlier, the panel's pro-contractor faction knows of DoD's policy, but refused to use the report to draw attention to this outrage or call for its repudiation.

Moreover, OMB did not even wait until the ink was dry before defying this principle. Although the OMB panelist said in her additional remarks that the agency was "revising (its) criteria for success," agencies are still being directed to convert and compete the jobs of at least 425,000 federal employees by the end of 2004. Moreover, she reaffirms that agencies are encouraged by OMB to continue to use direct conversions, i.e., giving work to contractors without public-private competition, to fulfill these quotas. Finally, she insists that the agencies will be encouraged to consider opportunities to allow federal employees to compete for new work and contractor work. The Administration's competitive (sic) sourcing initiative is well over a year old. Agencies are frantically competing and converting federal employee jobs, but only now has OMB gotten around to "considering" subjecting contractors to the same competitive scrutiny experienced by federal employees.

7. "Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles."

This is another principle that the pro-contractor faction didn't incorporate into the report's recommendation. For example, that DoD civilian employees should be allowed to compete for new work and contractor work is not an option; it's the law. 10 U.S.C. 129a requires DoD to shift work between its civilian, military, and contractor workforces, depending on what's best for the taxpayers. Nevertheless, DoD almost never reviews work performed by contractors to see if the public sector performance is appropriate and continues to systematically starve the civilian workforce of opportunities to take on new work.

This anti-taxpayer, anti-federal employee history is not exactly shrouded in mystery. The verdict of history is clear. Absent competition requirements, taxpayers will never benefit from the savings that would be generated by allowing reliable and experienced federal employees to compete for new work and contractor work. While the principle talks of the benefits of public-private competition, the panel's pro-contractor faction ensured that only work performed by federal employees would actually be subject to public-private competition.

And as has been conclusively established, contractors not only acquire their work without competing against federal employees, they also infrequently compete against one another.

According to a 2000 report of the DoD Inspector General, "(I)nadequate competition occurred for 63 of the 105 contract actions" surveyed.

Later that year, the General Accounting Office reported that most information technology orders were sole-sourced. In fact, "only one proposal was received in 16 of the 22 cases" (or about $444 million of the total $553 million).

The Associated Press recently reported that the federal government "bought more than half its products and services last year without bidding or through practices that auditors say do not fully take advantage of the marketplace...Concerns about the government's new (i.e., post-acquisition reform) style of shopping are simply put: Buying without competition often means the public treasury gets overcharged."

It was said at a March 6 hearing of the Senate Governmental Affairs Committee by a contractor representative that "Contractors, for instance, are subject to a range of checks and balances, including continual competitive pressures. In fact, some 75 percent of all services contracting actions, and more than 90 percent of all information technology services contracting actions, are competitively awarded..."

This is a very misleading use of statistics from the Federal Procurement Data System. Although the contract vehicle (a.k.a., "hunting license") in a multiple award scenario may be considered to be competitively awarded, funding is

provided through task orders. Such task orders through September 30, 2001, were automatically classified as competitively awarded, regardless of the circumstances. Although it is not possible to recreate the records to determine whether task orders to multiple award service contracts were competitively awarded, a DoD IG review indicated that an astounding 72% of 423 multiple-award task orders awarded in fiscal years 2000 and 2001 were awarded on a sole-source or directed-source basis.

Finally, this principle is also an example of the pro-contractor faction's bait-and-switch tactics. In the commentary for Principle #7, it was written that "Criteria would need to be developed, consistent with these principles, to determine when sources in *either* sector will participate in competitions." (Emphasis added) However, the only reference in the recommendation to the development of participation "criteria" related to instances in which federal employees would be competing for work. Why should such criteria only apply "where there is no *in-house* workforce currently performing the work"? (Emphasis added) It is well-known that contractors, usually the smaller ones but often the larger ones as well, regularly bid on work for which they have no "excess capacity."

Why shouldn't agencies be allowed to undertake the same "make-or-buy" decisions that are made every day by firms, including contractors, in the private sector, without having to jump through arbitrary hoops established by the panel's pro-contractor faction? Sometimes the agency will have excess capacity, sometimes the agency will be performing similar work, sometimes the agency will be able to make arrangements for performance by employees in another agency, and sometimes the agency will start from scratch as the Transportation Security Administration is doing right now with airport security screening. Agencies should vigorously consider all such options because that's what would best serve taxpayers and the people who depend on agencies for important services.

However, while the pro-contractor faction talks the talk of competition, it could never walk the walk, and the report's recommendation preserves new work and contractor work as no competition zones.

8. "Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible."

This principle raises essentially the same issues as Principle #6; and my concerns over the failure of the pro-contractor faction to actually incorporate this principle in the recommendation are essentially the same.

I would like to address one point. The commentary for this point insists that "Fairness requires that competing parties, both public and private, or their *representatives*, receive comparable treatment throughout the competition regarding, for example, access to relevant information and legal standing to challenge the way a competition has been conducted at all appropriate forums,

including the General Accounting Office and the United States Court of Federal Claims." (Emphasis added) Because of the nature of discussions surrounding what should have been an open-and-shut issue, we had asked that the word "union" be inserted before the word "representative." Even this ambiguous language was not incorporated into the pro-contractor faction's recommendation, which gave standing only to offerors.

In comments at the Readiness hearing the importance of litigation in keeping decision-makers in a FAR-based best value process on the straight and narrow path was emphasized: "(Y)ou need to have appropriate appeals processes to qualified, independent third parties who don't have a vested interest in the result." We find this invocation of litigation to be puzzling.

First of all, an emphasis on litigation as a policing mechanism is wholly contrary to the most fundamental precepts of the acquisition reform movement, for which GAO has been a consistent advocate. More importantly, the onset of acquisition reform has resulted in a drastic decrease in the use of procurement litigation, both protests and disputes, as Professor Steven Schooner demonstrated in a recent groundbreaking article in the American University Law Review. Professor Schooner points out that the GAO's docket has been more than halved in less than a decade.

As discussed earlier, giving agencies much greater discretion is the principal cause in the reduction of procurement litigation. In light of that important piece of information, the litigation argument can be scrutinized more carefully. GAO is arguing that the ill effects of shifting to a more subjective process can be made accountable by increased litigation when, in fact, litigation in the increasingly subjective private-private competition process has already decreased significantly precisely because the increased use of subjectivity undermines the threat of litigation.

9. "Ensure that competitions involve a process that considers both quality and cost factors."

That's obvious. And, of course, the federal government already has such a process that considers both quality and cost factors. It is called OMB Circular A-76. There are essentially three different types of A-76 competitions: 1) sealed bids, 2) negotiated, and 3) best value.

The first method has become, over the last three years, the least used. As its name implies, there are no discussions with competitors after the bids are submitted. In this case, qualitative issues are dealt with under the terms of the performance work statement. The use of the second method allows the contracting officer to hold discussions with competitors to resolve any deficiencies in their technical and / or cost proposals. Thus, under negotiated A-76 competitions, qualitative issues can be dealt with both before and after

submission of proposals. The third method is best value, which, as established earlier, allows for an explicit review of qualitative issues.

Thus, A-76 allows agencies to secure the highest quality services at the lowest possible prices, i.e., the best of both worlds for taxpayers and agencies. That is, the circular or any other well-managed cost-based process allows agencies "to take into account the government's need for high-quality, reliable, and sustained performance, as well as cost efficiencies."

No panelist, whether part of the pro-contractor faction or the pro-taxpayer faction, ever recommended that the government "buy whatever services are least expensive, regardless of quality." That is clearly not the way federal sourcing should work and it is clearly not the way federal sourcing under the circular works.

However, as Mr. Doke reminds us, "It is a popular misconception that a low price means low quality." Agencies should decide what services they want with the features they want, determine that the offerors can provide the services they want with the features they want, and then decide in favor of the offeror who can do that work for the least cost to the taxpayers. And that's how it works under OMB Circular A-76 or any other well-managed cost-based competition process.

Unfortunately, that common sense isn't part of the pro-contractor faction's recommendation. Although unwilling or unable to make the case that agencies have been deprived of opportunities to improve the quality of their services because of OMB Circular A-76, except for a tiny handful of cases that were rectified on appeal, the pro-contractor faction recommends that A-76 be junked in favor of an explicitly subjective process that historically has cost taxpayers more for the same services than if they had been acquired under a cost-based process. A FAR-based best value process is not needed to take into account quality, undermines the integrity of the sourcing process by introducing bias and subjectivity in a way that cannot be corrected by the appellate process, and undermines taxpayer interests.

10. "Provide for accountability in connection with all sourcing decisions."

This is another occasion when the pro-contractor faction was all talk and no action. The commentary for this point insists that "accountability requires that all service providers, irrespective of whether functions are performed by federal workers or by contractors, adhere to procedures designed to track and control costs..." Yet, the part of the pro-contractor's faction recommendation dealing with the FAR-based best value process does not address the tracking of costs, period. Not one word.

With respect to the part of the report's recommendation relating to OMB Circular A-76, the pro-contractor faction offered four specific proposals dealing with

tracking costs—all of them dealing with in-house costs. The only time the pro-contractor faction addressed the tracking of contractor costs was at the very end of the A-76 section when it included vague and meaningless boilerplate language that called on agencies to ensure "that all contracts are properly administered."

This extraordinary dereliction, one of many, is the natural result of the panel being packed with a pro-contractor majority that consistently displayed a sneering contempt for taxpayer interests.

It would be instructive to review what the Comptroller General's own staff had written just last year about the ability of DoD, the agency with the most experience with service contracting, to track its service contracting costs. They reported that DoD has chosen not to keep its commitment to the Congress to improve its system for reporting the costs of contract services:

> "The Department of Defense (DoD) spends tens of billions annually on contract services—ranging from services for repairing and maintaining equipment; to services for medical care; to advisory and assistance services such as providing management and technical support, performing studies, and providing technical assistance. In fiscal year 1999, DoD reportedly spent $96.5 billion for contract services—more than it spent on supplies and equipment. Nevertheless there have been longstanding concerns regarding the accuracy and reliability of DoD's reporting on the costs related to contract services—particularly that expenditures were being improperly justified and classified and accounting systems used to track expenditures were inadequate...
>
> "...DoD has not developed a proposal to revise and improve the accuracy of the reporting of contract service costs. DoD officials told us that various internal options were under consideration; however, these officials did not provide any details on these options. *DoD officials stated that the momentum to develop a proposal to improve the reporting of contract services costs had subsided.* Without improving this situation, DoD's report on the costs of contract services will still be inaccurate and likely understate what DoD is paying for certain types of services." (Emphasis added)

But that's only the beginning. The pro-contractor faction has insisted that the replacement of A-76 with a FAR-based best value public-private competition process was necessary to improve the quality of government services. However, not only does the pro-contractor faction's recommendation include no specific provisions to track contractor costs, the pro-contractor faction's recommendation includes no specific provisions to track the quality of services performed by contractors. Apparently, actually reducing costs and actually improving quality is

not what's really important to the pro-contractor majority, only replacing the circular with a subjective competition process—as, indeed, Mr. Frank Camm, a member of the panel's pro-contractor faction, acknowledged in his additional remarks.

In contrast, the pro-contractor faction's recommendation for changing A-76 includes two specific provisions related to tracking the quality of services performed by federal employees. It's not just that the pro-contractor faction produced a report that was completely one-sided, it's that they made no effort to conceal their overweening bias.

Of course, tracking the cost and quality of government services is only part of ensuring accountability to the American people. As the independent scholar Dan Guttman has written, federal employees, but not contractors, are subject to a variety of rules "that address conflict of interest (e.g., 18 U.S.C. 208), assure that government activities are (with limits) 'open' to the public (e.g., Freedom of Information Act), limit the pay for official service, and limit the participation of officials in political activities." Despite strenuous efforts by AFGE and other members of the pro-taxpayer faction to ensure that the unaccountable contractor workforce finally be made accountable to the American people, in the same way that federal employees already are, the pro-contractor faction refused to even consider these important issues.

Summary: As pointed out, the principles, although supported unanimously were, in many instances, not incorporated by the pro-contractor faction into the recommendation. In several instances, the pro-contractor faction either crafted a recommendation that contradicted the principles or significantly changed the principles when incorporating them into the recommendation in order to disadvantage federal employees. In still other instances, the Bush Administration is defying the principles ostensibly supported by its own representatives on the panel.

The four members of the pro-taxpayer faction consistently and conscientiously attempted to work with the pro-contractor faction to devise a set of principles that were acceptable to all. Our goodwill clearly was not reciprocated.

V. RECOMMENDATION: IF YOU CAN'T WIN THE GAMES, JUST CHANGE THE RULES

Let's not be distracted from the real reason the pro-contractor faction rammed through its FAR-based best value recommendation: pro-contractors can't compete on the basis of costs. Contractors are confounded that, despite all of their advantages, they lose 60% of all public-private competitions. Contractors simply can't win regularly enough when they compete on the basis of costs, the standard that is best for taxpayers. Rather than improve their efficiency, contractors have decided to change the rules of the game. They want to replace the current system with one that increases the role of bias and politics. This

effort has been rejected repeatedly by both Republican and Democratic Administrations over the last 50 years. Indeed, thanks to the vigilance of successive Congresses, Title 10 is replete with requirements that ensures the government's service decisions are cost-based.

The pro-contractor faction often reminds us that the FAR-based best value process is used by agencies for conducting competitions between contractors. As discussed, the subjectivity of the FAR-based best value process often benefits one contractor at the expense of another contractor. And, indeed, contractors are not reluctant to litigate when they think agencies are showing favoritism towards their competitors.

However, the subjectivity in a FAR-based best value process can not be used systematically to favor one group of contractors over another because private-private competition is non-ideological. As we know, that is not the case with public-private competition, which is essentially politics by other means. When agency officials are indisputably predisposed towards the private sector, increasing the subjectivity of the service contracting process will provide those agency officials with opportunities to show their favoritism by skewing the outcomes of competitions in favor of contractors. As stacked as the deck is against federal employees, the situation could become even worse by allowing agency officials already predisposed towards outsourcing to employ an openly subjective public-private competition process that permits them even more opportunities to favor the private sector.

The four members of the pro-taxpayer faction crafted an alternative proposal to that offered by the pro-contractor faction that would have allowed for alternatives to OMB Circular A-76 to be thoroughly tested, including FAR-based best value and FAR-based low-cost / technically acceptable. Given that the pro-contractor faction acknowledges that competitions conducted under FAR-based best value could take longer than those conducted under the circular, no time would be lost by continuing to use the circular or a reformed version thereof until the desirability of the alternatives had been determined. Given that the pro-contractor faction is unable to show that agencies are being deprived of opportunities to improve the quality of their services because of A-76, nothing substantive would be lost. And given that the history of acquisition, particularly during the last ten years, is littered with serious mistakes, it is just common sense to look before we leap.

The pro-contractor faction was uninterested in this more thoughtful approach. While acknowledging that its untested and unproven FAR-based best value process should be evaluated, an evaluation under its recommendation would not occur until *after* the recommendation had been implemented and widely used. At a time when the Bush Administration has unleashed a tidal wave of outsourcing, demanding that agencies compete or convert at least 425,000 federal employee jobs by the end of 2004, now is clearly not the time to be making radical,

unprecedented, and highly controversial changes to the public-private competition process. That is surely self-evident. However, the members of the faction understand that their recommendation cannot stand scrutiny, and therefore insist on its immediate implementation.

The changes recommended by the pro-contractor faction to OMB Circular A-76 are typically one-sided. Four changes are recommended to the circular to improve tracking of in-house costs. No specific changes are proposed dealing with tracking contractor costs. In fact, tracking contractor costs goes unmentioned, except for a throw-away line at the end about "ensuring that all contracts are properly administered." There is no mention of providing legal standing for federal employees and their union representatives. OMB has said that there are "obstacles" to using the circular to contract in work in non-DoD agencies. No proposal is offered to surmount those alleged obstacles.

The HPO part of the recommendation has been discussed earlier. In light of the Bush Administration's, at best, ambivalent attitude towards labor-management cooperation and investments in the workforce, even for purposes of training, the future for HPO's is not bright. Because of the subjectivity intrinsic to the process—with respect to determining the performance benchmarks and then determining compliance with those benchmarks—HPO's should first be tested and evaluated.

VI. CONCLUSION

Thank you for this opportunity to testify, Mr. Chairman. I look forward to answering your questions.

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[i] In fighting against the Kennedy and Allen-Andrews Amendments to the Senate and House defense authorization bills to promote more public-private competition for new work and contractor work, competition-averse contractors and their Bush Administration allies have argued, unpersuasively, that the competition requirements are, somehow, contrary to the CAP principles.

The Kennedy and Allen-Andrews Amendments translate the panel's rhetoric about the importance of ensuring that federal employees have opportunities to compete for new work and contractor work into law, consistent with the already existing statutory requirement (10 U.S.C. 129a) that DoD is required to shift work back and forth between its federal, military, and contractor workforces, depending on which costs least.

Currently, only one category of work is subjected to public-private competition, work performed by federal employees—and, of course, most of that work is still contracted out without public-private competition. Contractors acquire and retain the vast majority of their work without ever competing against federal employees. Indeed, as GAO and the DoD Inspector General, among others, have reported, there is frequently little competition between contractors for work. Nevertheless,

the Bush Administration has established arbitrary quotas for competing only work performed by federal employees, despite the fact that the federal government already contracts out in excess of $115 billion annually for services.

AFGE agrees that arbitrary goals, like the ones established by the Bush Administration for work performed by federal employees, should be "avoided." Obviously, it would be better to leave such matters to managerial discretion. However, when there's a clear pattern of abuse, as there is in the case of not competing new work and contractor work, that discretion must be restricted. And, clearly, absent a requirement that there be public-private competitions for new work and contractor work, such competitions will never occur, frustrating the adoption of an important CAP Principle.

The Kennedy and Allen-Andrews Amendments do not require that all contracted work be subject to public-private competition. The Kennedy and Allen-Andrews Amendments would only guarantee federal employees the right to compete for a tiny fraction of new work. The Kennedy and Allen-Andrews Amendments don't require DoD to compete a single contractor job; however, if DoD does choose to compete federal employee jobs, then it must be fair and compete a comparable number of contractor jobs, but not necessarily the same number. Significantly, the Kennedy and the Allen-Andrews Amendments are all about public-private competition—unlike the Bush Administration's "competitive (sic) sourcing initiative" which explicitly encourages agencies to contract out work with no public-private competition and the Pentagon's wholly anti-competitive divestiture campaign.

Moreover, the Kennedy and Allen-Andrews Amendments would allow DoD to determine how many federal employee jobs to compete, how many contractor jobs to compete, which federal employee jobs to compete, which contractor jobs to compete, which new work to compete, whether to conduct any competitions at all (because the legislation allows DoD the unfettered use of national security waivers), and which cost-based competitive process or processes to use. While the Kennedy and Allen-Andrews Amendments leave DoD with extraordinary discretion, their enactment would still ensure, in the panel's words, that "federal sourcing policies (finally) reflect the potential benefits of competitions between and within (the public and private) sectors."

OMB has said it will look for opportunities for federal employees to compete for new and contractor work. At the same time, OMB is actively reviewing for outsourcing only federal employee jobs. When public-private competitions for new work and contractor work happen naturally, then there will be no need for the flexible competitions requirements included in the Kennedy and Allen-Andrews Amendments. (It should be noted that the Kennedy and Allen-Andrews Amendments place explicit time limits on the new work competition requirements, in the hope that DoD will grow accustomed to working in accordance with the CAP principle and not have to be statutorily required to do so.) However, absent

such requirements, new work and contractor work will remain no competition zones. While that would serve the interests of contractors and their allies in the Bush Administration, it is clearly in the best interests of taxpayers if the CAP report's Principle to ensure real public-private competition for new work and contractor work is forcefully reflected in the law.

Mr. DAVIS. Mr. Wagner, thanks for being with us.

Mr. WAGNER. Thank you, Mr. Chairman, Mr. Turner.

Mr. Filteau sends his regrets, and I appreciate the opportunity to represent him.

The Commercial Activities Panel started with the premise that, whatever was ultimately recommended, it must support Federal agency mission objectives, while being fair to all stakeholders, including government employees, contractors and the taxpayers.

With this foundation, we unanimously adopted its 10 principles, which embody the concept of fairness by calling for a clear, transparent process that is consistently applied to all parties. Fairness is crucial to public-private competitions. If the process isn't being fair, then the private sector won't participate. Fairness is also vital when it comes to the treatment of the government work force, no matter who wins the competition.

If my company or any other responsible company wins a public-private competition for a base operations support contract, we want to hire as many of the existing work force as possible. There are good workers with a lot to contribute, but if the public sector employees are dragged through a long process filled with misinformation and uncertainty, many workers will find jobs well before the competition is even decided. It's not in anyone's interest to abuse loyal government workers.

Similarly, we need a process that encourages the private sector to compete. Currently, many good government contractors don't want to spend their scarce bidding proposal resources on A–76, because, as you mentioned, the process is long, unfair, uncertain and costly. In my own company, we pass up on many more A–76 opportunities than we bid, and it's unlikely that we'll bid more in the future unless the process is changed.

To appreciate how unfair the current A–76 process is, imagine a nonA–76 procurement in which one special bidder, the incumbent, gets as many chances as it needs to submit a technically acceptable proposal. Next, that special bidder always gets to compete against the best proposal chosen from among the other bidders, and if the performance level of the special bidder doesn't match that of the best chosen, then he gets that proposal change to be brought up to the higher performance level before any costs are even considered.

Finally, during the cost comparison, the special bidder gets a 10 percent price advantage. While this may sound unreasonable, these are the advantages provided to the in-house team under A–76. It's no wonder that MIOs win half of the competitions, over half of the competitions.

But back to the guiding principles that were adopted by the Panel. They led to a logical recommendation which was to shift it rapidly to a FAR-type process under which all parties compete under the same set of rules. The FAR embodies a fair process with clear rules. It has the confidence of government and industry. And this high level of confidence, combined with a fair, time-tested process, is the key to encouraging quality competitive proposals from the private sector.

Shifting to a FAR-based process also addresses several other key issues. It provides flexibility. You can award based on best value or on low cost as the need dictates. The FAR embodies a high de-

gree of accountability for all parties, public and private alike, with provisions for third-party audits by agencies like the Defense Contract Audit Agency to track costs and performance.

A FAR process would allow the public sector to participate in competitions for work currently performed by contractors as well as work performed in-house; and since the public sector would be competing under the same process and would be treated as a true bidder, they would have the right to protest, just like a contractor.

Moving to a FAR-based process is neither a radical idea nor one in which the government lacks experience. The FAR is used successfully every day by the government to make thousands of purchase decisions between competitors. We can and should make it work fairly for competitions involving public sector bids.

In conclusion, the contractor community is not afraid of competition or accountability. We are subject to intense competition on FAR-type procurements every day, and we are subject to routine audits on performance and costs. The program's recommendation to switch to a FAR-based process embodies a concept of fairness, accountability, competition, an approach under which all parties compete under the same set of time-tested rules.

Thank you, Mr. Chairman and Mr. Turner.

Mr. DAVIS. Thank you very much.

[The prepared statement of Mr. Filteau follows:]

STATEMENT OF
Mark Filteau, President of Johnson Controls World Services, Inc.

BEFORE
Government Reform Subcommittee on
Technology and Procurement Policy

HEARING ON
Commercial Activities Panel Report
Improving the Sourcing Decisions of the Government

September 27, 2002

Mr. Chairman and members of the Subcommittee on Technology and Procurement Policy, my name is Mark Filteau and I am President of Johnson Controls World Services, Inc.

Background

Johnson Controls, Inc. is a 117-year old Fortune 200 Company with global sales in buildings controls technology, automotive interiors, and facilities outsourcing for both government and commercial markets. I manage our federal government business in which we provide facility management and base operations support for the Departments of Defense and Energy, NASA and other federal agencies. On the commercial side of Johnson Controls' facility management business, our customers include companies such as IBM, Compaq, CSC, Hoffman-LaRoche, and Novartis.

I have had extensive experience with the A-76 Competitive Sourcing process. Johnson Controls has been involved in more than a dozen large A-76 competitions. I am very familiar with the process, including the bidding, the appeals, the protests and the successful transition from public to private sector performance.

It was an honor and pleasure to serve on the Commercial Activities Panel. My fellow panel members brought a wide range of expertise and experience to the table. I was pleased to be able to add my industry perspective and contractor experience to the knowledge mix. Thank you for the opportunity to be here today and to share with you my views on the panel's report and recommendations.

Ten Principles of the Commercial Activity Panel

The Commercial Activities Panel, ably chaired by David Walker, Comptroller General of the United States, received valuable input during our public hearings. When we began our deliberations, we started with the premise that whatever the panel ultimately recommended,

it must be fair to all stakeholders involved in the process, including government employees, contractors, the interest of the federal government and ultimately, the taxpayers.

Upon this foundation, we developed and unanimously adopted ten fundamental principles to guide sourcing decisions. We discussed these sourcing principles at length during a number of meetings and carefully crafted the wording, in both the principles themselves and the accompanying commentary.

The principles embodied our concept of fairness by calling for a clear, transparent process that is consistently applied to all parties. We stressed that all competitions should be conducted "fairly, effectively, and efficiently as possible."

Fairness is crucial. We must create a process that is fair to public sector employees and treats them with respect. For instance, if my company wins a public-private competition for a base operations support contract, we want to hire the existing workforce. They have the experience and the know-how we need. If public sector employees are dragged through a long ugly process which lacks fairness and transparency, they may be encouraged to find jobs elsewhere or arrive unhappy at the outset if they do come to work for us.

Unfortunately, there seems to be a commonly held belief among many government employees that contractors produce cost savings by exploiting employees. This just is not true. Service companies depend upon employee good will to efficiently function. An unhappy workforce requires expensive supervision and almost always performs poorly. In other words, if we treated our employees poorly, we wouldn't be in business very long.

Another important theme in the principles was accountability. We all want accountability because it protects everyone's interest. It ensures that the competitive process was fair and the resulting performance the government receives is what was promised.

Unfortunately, some believe the myth that contractors are not accountable, despite rigorous accountability during competition and performance of the work. Virtually all service contract work is subject to intense competition between private sector competitors. These competitions are closely monitored by federal officials and subject to pricing, conflict of interest and past performance evaluation under strict guidelines. Before and after award, the winning contractor must conform to the Federal Acquisition Regulations, as well as a myriad of other rules governing accounting, labor and compensation, safety and environmental regulations – all subject to oversight and audits.

The principles also reflected the Panel's unanimous agreement that competition is good and should be encouraged. Competition not only produces cost savings for the government but also encourages innovation, which is the key to improving the quality of service delivery. Federal sourcing policy should reflect the benefits of competition.

Fundamental Recommendation

Once the Panel had the guiding principles in place, we turned to the question of what the process should look like. This lead to a logical recommendation:

> " In order to promote a more level playing field on which to conduct public-private competitions, the government needs to shift, as rapidly as possible, to a FAR-type process under which all parties compete under the same set of rules."

The Federal Acquisition Regulations embodies a fair process with clear rules. The FAR has the confidence of both the government and industry. Unlike the current A-76 process, the FAR offers a well-documented process that is fully understood by procurement officials as well as a broad base of large and small contractors. This high level of confidence, combined with a time-tested process, will be the key to encouraging high quality competitive proposals for government commercial activities.

It should be noted that this is neither a radical idea nor one in which the government lacks experience. The Panel's report pointed out in Appendix E the federal government has experience conducting public-private competitions without the use of A-76 procedures during the 1990's when the Department of Defense conducted dozens of public-private depot competitions. Those public-private depot competitions were conducted under a process that incorporated much of the FAR for negotiated procurements. The Air Force established procedures, stating that, in public-private depot competitions, "standard acquisition policies and procedures will be used to the maximum extent possible with all offerors (public and private) subjected to the same process.

Under our recommendations, shifting to a FAR- based process will provide the public sector employees two important elements they do not have under A-76. First, since the public sector is competing under the same process and would be treated as a true bidder, then the public entity should have the right to protest to the General Accounting Office or file in the United States Court of Federal Claims. This is only fair – but only if all parties are playing under the same rules.

Second, shifting to a FAR process would allow public sector employees to make offers based on best value, and therefore encourage innovation from those who know the work best. Under the current A-76 process, the public sector proposal is driven primarily to slash cost, reduce personnel, and only meet the minimum performance level required by the statement of work. Under a FAR-based process, public sector employees could be encouraged to come up with innovative approaches and solutions, not discouraged into a process in which cost is the only factor.

This concept was embraced by all of the panelists in a principle when we stated that:

> "Public-private competitions should be structured to take into account the government's need for high-quality, reliable, and sustained performance, as well as cost efficiencies."

Goals

Let me also comment on the issue of goals and targets as they relate to competitive sourcing. The Panel considered this issue carefully in issuing a principle, which recommended that the government should:

> "Avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals."

Legislation pending before Congress would prohibit the Office of Management and Budget from establishing or enforcing "numeric goals" for competitive sourcing. Unfortunately, the pending legislation goes much further than our recommendation because it is not limited to arbitrary goals. It would prohibit any use goals or targets and would likely discourage public-private competition, which as noted above is a fundamental principle.

Any organization, whether in the private sector or in government, should have the ability to set reasonable goals and targets. A wholesale prohibition could lead to unintended or undesirable results.

Conclusion

Congress challenged the Commercial Activities Panel to recommend improvements to the competitive sourcing process.

The ten principles unanimously adopted by the Panel are fundamental to sourcing policy and should help guide changes to be made as to how and when to conduct public-private competitions. If they are to be read and understood together, not selected individually, they are fair to all parties.

The resulting recommendation to shift to a FAR-based process embodies the concept of fairness, accountability and competition. All parties compete under the same set of rules and are treated fairly under a time tested, clear and transparent process -- a process where best value, not just low cost, is the end goal.

Mr. DAVIS. Let me start with Ms. Kelley and Ms. Simon, just ask a few questions here. Clearly, a great frustration among Federal workers is that some of these competitions are just going outside almost automatically without giving them an appropriate opportunity.

Those are legitimate concerns that we try to address. My concern is that we are just not—at the Federal level—and part of this can be addressed through the civil service system, making sure that we are recruiting and retaining people adequately to stay in the Federal work force to keep a work force that can compete with the private sector, particularly in the IT area.

This wasn't the case in government 30 years ago. I was a page up here 30 years ago, you know, when President Kennedy said, "Ask not what your country can do for you; ask what you can do for your country." There was a real spirit of coming into government, working for the government, being a part of something. I don't detect that same spirit today when I walk through the halls of some of our agencies, when I talk to kids that are getting out of college, asking what they are going to do, that government can effectuate change in the same way and particularly in the IT section.

You still get that in some of the government regulatory agencies and some of the legal departments at Justice where it's still pretty tough to get jobs.

But in some of these IT areas, it seems to me there are some difficulties in retaining people and even recruiting people. No. 1 is that the pay differential between the private sector is very pronounced; and changing that would, in my opinion, mean revisiting some of the civil service regulations in terms of how we pay people, what we pay them and not just raising everybody's pay but maybe making it a little more select.

Second is training. Who wants to go to a job where you're not getting trained in being up to date on things that are going forward? You know, sometimes you'll stay with government, you'll give it a shot, you'll try to be a part of something important, but when you're trained for yesterday's jobs and yesterday's technology and you're not being kept up—and yet, that is one of the first things that gets cut in government.

This is something we need to work on together. We have tried honestly through our CERA legislation, through our Tech Corps, through some of these things to try to get at this, and maybe we're just getting around it and not working with you close enough so that we can have an honest discussion over the best ways we can bring more people into the government. Because ultimately you can revamp A–76, but if you don't have the in-house capability and the in-house training, which isn't the fault of the workers, it's just not going to be competitive, and for the taxpayers, there's no choice but to send it out.

Frankly, to give taxpayers their best value, it seems to me, you need to keep a good in-house cadre there, because that keeps the contractors competitive.

So I think we need to get to that to make this whole equation work. Otherwise, we can make it FAR-based, we can do anything we want, and it seems to me you're going to lose inevitably.

Those are my thoughts going into this, that this is a more complicated process than just working through A–76, that we need to look internally at civil service rules, pay rules, training rules and the like. We've tried to get at it. There's not a bottomless pit of money that we can put into these, but there is some additional expenditure of funds that I think can ultimately save the taxpayers money.

So with that in mind, I'd like to get your reaction to what I've said from both of you.

Jackie, if you don't feel you want to comment today, we'd be happy to have you come in and submit something later, but we're pleased to have you here. You are, as Mr. Walker said, an important part of this equation. We can't simply outsource everything and stay competitive and get the government what it wants, and we want to give you and your workers the tools they need to be able to compete. Then I think it works for everybody.

Ultimately, remember this: Our job, my job, is not to help contractors or unions—it's to get the best value for the taxpayer dollar and the services we're buying, and we can only do that if we can have a robust public sector that is trained, up to date, recruiting the best and brightest, and that's where we seem to be losing it.

I've talked enough. Let me try to get a reaction from each of you on that.

Ms. KELLEY. Actually, I very much appreciate, Chairman Davis, your recognizing that this is about so much more than just a process. All of the things you've said I have written down because I was going to respond back to you, but you've covered so many of them——

Because this whole issue of recruiting and retaining the Federal work force is one—and I know David is sitting next to me nodding his head, because we've had these conversations many times.

For me, the issues run a very wide range, many of which you've touched on. The issues of pay—and I would say that this competitive sourcing issue and the quotas imposed by OMB are also a factor that is now out there for those who are looking to come to the Federal sector and those who are deciding whether or not to stay, because they are asking themselves the question if theirs will be one of the 425,000 jobs that the administration is interested in competitively sourcing outside of the Federal Government.

On the technology issue, which is I think an area we can probably all agree on that we see exactly the problems that you identify. And it is about resources. First of all, the resources so that the government has the cutting-edge technology to do its work on, which would then provide the work force with the cutting-edge technology to maintain those skills and to be able to stay in competition with the private sector and the need, I believe, for the government to maintain those skills. I think it is very risky for the government in any arena, in any occupation, in any skill, to rely solely on outside services, rather than maintaining it within the government to some degree.

I guess the last thing that I would say is NTEU's interest is in working with you, with Congress on anything that we could do to help to address this problem. At the moment, the way it always seems to come down is on the issue of the ability to pay, whether

there are recruiting or retention bonuses or annual salaries that keep the workers able to stay with the Federal sector, and that usually comes down to a discussion around flexibilities that agencies need or have in order to be able to provide additional compensation to employees.

Over and over again what I see happening is Congress authorizes flexibilities, whether it's special pay rates or the ability to pay recruiting, retention, relocation bonuses, student loan repayments, a lot of really good things are authorized. What never comes along with that is the appropriation to give the agencies the resources to do it. Then the question for them is, if they want to implement it, even though they agree this is a top priority, they have to take the resources from somewhere else, and that is—becomes the reason why very few of these are ever implemented.

So NTEU would welcome the opportunity to figure out how to not only provide the authorization but the funding to help make that happen in a way that begins to address the problem that you so accurately defined.

Mr. DAVIS. Let me just respond to that in a minute. First of all, I have opposed the quotas and the goals. I not only supported the amendment you had offered, I spoke for it. I just think that's the wrong way to go currently. Now I understand where the administration comes from. I understand the need to do that and that's the way to get things moving and the like, but I think at this point it is so weighted when you go outside with these. You go to A–76 or whatever, and you lose almost every time given what we've talked about, not every time, but it's just very weighted until we make some of these other changes.

Second, I used to work for a government contractor and I will tell you this: I was general counsel, I was a Senior Vice President and we were $1 billion a year company and our most important asset in that company was our employees who walked out the door every night. And we did everything we could to make sure our employees came back the next day because that was our asset. It wasn't our building. It wasn't our computers. It was our people. And if our people left the company it went under. Everybody in the private sector understands that, but government doesn't seem to appreciate it. And until we can change the culture where we recognize that our employees are the way that we can become efficient on behalf of our taxpayers in an investment, and their training and their recruitment and their retention is really dollars saved, something the private sector—we always talk about copying what the private sector is doing—we're in the same boat. So a lot of your concerns I understand and I empathize with. Unfortunately, for the short-term, in terms of, for example, with homeland security and other areas trying to get things done quickly, we're not up to snuff. We need to work on doing that. And I think as we do that some of these other areas that you expressed concern I think are going to be easier to resolve. But I understand it is kind of weighted against you as you look at it. At least that's my opinion.

I appreciate your comments, Jackie, and I didn't mean to interrupt you.

Ms. SIMON. I wanted to take this opportunity to join in the congratulations to Mr. Walker because AFGE has certainly appre-

ciated the attention what he calls the human capital crises has gotten ever since GAO began talking about this problem. AFGE considers this human capital crisis, however, to be self inflicted in the Federal Government. It's not something that we didn't all understand when it was happening. It's the result of downsizing and contracting out. And as Colleen Kelley just mentioned, the single most important thing we believe that the Federal Government could do would be to get rid of the privatization quotas. At best it sends a mixed message to the employees the Federal Government would like to recruit or retain by telling them that they have a 50–50 chance of losing their job and even less 50–50 chance of having the opportunity to compete to defend that job.

A couple of things have recently occurred, and I won't even talk about the homeland security debate. That's certainly been rather demoralizing for many Federal employees to have their loyalty and fitness questioned and it's really been unfortunate. But one step that the Office of Personnel Management has recently taken to try to make the Federal Government a more attractive employer is to establish flexible spending accounts to help Federal employees pay for their health insurance costs. And while this is a positive development and a good thing and will probably save some Federal employees some money, we have recently read in the press that OPM has already decided that it will contract out all that work, the work in administering, setting up and keeping track of those flexible spending accounts. Now the employees at OPM have the skills and ability. OPM is certainly set up to do that kind of work. They do that kind of work in other areas of Federal employee compensation. And the decision has been made apparently unilaterally not to give the employees the opportunity to compete for new work, and we hear that all the time, and in particular, as you mentioned, in the area of IT, interesting, exciting, challenging new work that would keep them on the cutting edge of new technology. When new work is taken on by an agency it's automatically contracted out and the existing work force is virtually never given an opportunity to compete to do it or to do it automatically like the contractors are. And I think that and the quotas are the two biggest problems facing the Federal work force when it comes to motivating and making them feel as though they are valued assets.

Mr. DAVIS. Again, beefed up Federal work force, a better trained, prepared, recruited Federal work force may or may not win the competition but it just sharpens the level of competition.

Ms. SIMON. What is most demoralizing, to be honest, is the knowledge and repeated experience of being precluded from the opportunity either to compete in defense of their jobs or to compete ever for new work.

Mr. DAVIS. You are talking about the jobs that go out that don't go through the A–76 in some cases?

Ms. SIMON. That's the other thing I was going to hand you here. We hear a lot of denials that the President's competitive sourcing agenda is really—is about something other than competition. I have just as an example the U.S. Department of Agriculture's plan that it submitted to OMB for how it expects to comply with those quotas. And it's, you know, page after page after page of work unit after work unit after work unit, 5 and 10 and 15, 20, 7 and 6 and

4, perfectly innocent Federal employees doing their jobs. No one is alleging that they aren't doing their jobs well or efficiently, that they aren't the low cost, high quality provider, but merely to comply with these quotas they are going to lose their jobs. And here it is page after page of a virtual firing squad.

Mr. DAVIS. For the record, Mr. Turner and I have some concerns about the quotas. On the other hand, I think we have to find the right balance. Mr. Walker.

Mr. WALKER. If I can, to comment on several——

Mr. DAVIS. I am off script here.

Mr. WALKER. It is free flowing anyway. First, I believe the administration's current quotas, targets, call it whatever you want, violates the principles, because they are arbitrary. I understand that the administration came up with it during the campaign and I am sure the President and his team feel some obligation to try to deliver on campaign promises, but it's fairly clear that there was not a considered, thoughtful process that resulted in the determination of those percentages. And I think the key word is arbitrary. At the same point time it is possible and I would argue appropriate for this administration and any administration to undertake a considered review and analysis of functions and activities that based upon, you know, past practice in the government or based upon prevailing practice for large enterprises, whether they be public sector, private sector, not-for-profit sector or based upon past experience, it makes sense to consider competitive sourcing.

The one example on FSA, if I can give it, I have got a lot of experience in the benefits area both in the government as well as the private sector, and the simple fact of the matter is this FSA is a plus. I think it will help employees. It will help them save some money by being able to pay for some things with pretax dollars rather than after tax dollars. That's a plus. But I think you'll find if you did an analysis that most major employers out source this work and it's not something that's currently being done within the public sector. And it is not just a matter of whether or not the people have the skill and the abilities to do it. I don't think there's any doubt about that. We have a lot of great people in the government, but it's also the systems. There are many entities out there that already have systems. They're already running. They've got many, many different people that they are providing these services to. And part of the question is do you want to stand up those kinds of systems and do you have the excess capacity there that would be available to do that type of work.

So I mean I do think there are clearly circumstances in which Federal employees have the ability and should have the opportunity to compete for new work and potentially bring work back in, but I think it's facts and circumstances. It's not across the board.

Mr. SOLOWAY. Since we are having a free flow discussion, just a couple thoughts on what Mr. Walker just said on a very critical point and I think it's worthy of expanding a little bit, and that is maybe separating out some of the differences between a private sector company, whether it's a government contractor or not, and the way the government views these issues when we talk about human capital roles and missions, if you will, in a company. In the private sector, high performing company—and I think this is what

Mr. Walker was referring to, there is a big separation, an understanding of the separation between a core competency and a core requirement. A core requirement is to provide benefits to my employees. It may not be the competency of my company. That is one of the reasons that the government does not compete as well for people.

For instance, when information technology workers go to work for an IT company they are part of the core competency of that company. They are the fundamental mission of that company. Therefore, they are likelier to get greater support and professional development, greater benefits, the kinds of things that make work quality so important, whereas in the government by and large information technology positions are support functions and they never compete well in a resource constrained environment, be it in the public or private sector, for the kind of investment dollars you're talking about.

Mr. DAVIS. But you would admit that the government can do a better job, particularly in the procurement side, of getting a little bit more competency within it. I don't disagree with what you're saying, but we can do a better job.

Mr. SOLOWAY. Absolutely, and I would agree that the government needs to always retain a residual capability to understand the supply base, manage and apply the solutions and so forth. But my point would be that pay and all of those kinds of benefits level issues are critical and certainly the Federal work force deserves that support, but that in and of itself will not solve the recruiting and retention problem.

The last two points I'll make very quickly. We have to be very careful not to assign the human capital crises to outsourcing and contracting out because frankly the data doesn't support that at all relative to employment reductions in the civilian agencies as compared to contracting out. And I think the human capital crises is a crises faced not only in government but in many industry sectors where we simply have an aging work force.

And the final thing is on the quotas. I would like to be very clear about this—the so-called quotas. This is one of the few areas where I disagree with Mr. Walker and it's an area that many members of the panel are in disagreement on. It was never specifically discussed or debated on the panel. And there are those of us who believe that the principle that speaks to arbitrary quotas and numerical goals actually does not speak to the administration's plan because I think there is a big difference between an arbitrary plan that presumes the outcome; in other words, it presumes you are going to out source, it presumes you're going to in source by a goal for performance. And we set performance goals all the time.

So I think it's for the record important to note that the panel was not unanimous at all in its view that particular principle was intended as or was in fact a direct criticism of the administration's goals. That is a matter that has been of some discussion.

Mr. WALKER. If I can, Mr. Chairman, it is fair and accurate to say that the panel did not explicitly address the administration's goals, quotas, target, whatever, but I believe in substance over form and I think substance speaks for itself.

Ms. STYLES. I would like to take an opportunity to clarify what is a tremendous amount of confusion and misrepresentation about our goals. First, it's an aggregate 15 percent governmentwide goal. It's not 15 percent at each agency. There is not a single one of the 26 departments and agencies that have come in to me with a plan, a reasonable and rational plan that is something other than 15 percent that represents good management and a good thing for the agency that I've said, no, sorry, you are going to have to compete 15 percent. We have applied our goals for competitive sourcing in a manner to build infrastructure at the departments and agencies for public-private competition. I have agencies that over the next couple of years have said I am going to look at public-private competition for 7.5 percent for what I have in House and 7.5 percent of what I have contracted out. I have departments and agencies that are at 10 percent over 3 years. Each and every plan is tailored specifically for the needs of each and every agency and their specific circumstances.

On the direct conversion, there have been representations here that there are agencies out there that are going to directly convert everything to meet these goals. Not a single one. Not a single one that I know of. The Department of Agriculture plan that was represented here, they came in with that plan and we said absolutely not. That's not what we are about. We are about competition and we are not about meeting these goals through direct conversions.

Mr. DAVIS. Let me make one other comment and just address this to Ms. Kelley and Ms. Simon. We had a conversation on what we agree on. But let me just tell you what I've tried to do to help along, just marginally, the issues we've talked about. We have our Services Acquisition bill, our digital Tech Corps, our Acquisition Work Force Exchange Program. Our recruiting and retention efforts in our CERA bill in particular, I think, will be very, very helpful to employees and we haven't been able to get support from you on that. I know there's a lot of suspicion. I know there are other issues on that. But I think we need to try to work together and where you don't agree figure how we can make this go. This is complicated. There's a lot of mistrust on all sides of the table. I recognize that. I'm a big boy. I have been here awhile and probably will be here a little longer. These are issues that we have to have a serious, dispassionate discussion about. And I think, Mr. Walker, you made a good start with this panel that you put together where you got everybody around the table and so on. If we could sit here and quit gaming it and just sit down—we have a number of areas we do agree on. That's a great starting point. We need to focus on some of the areas that you didn't discuss here that, if we could add pieces to that on work force training and recruiting and retention issues we've talked about, they might feel a little bit better about some of the other issues that you and Ms. Styles have addressed. And also, the staff reminds me of this, that 60 percent of the A–76 stay in government. 60 percent of the competition. So it's not completely weighted but I still think we need work on the items we've discussed. And I appreciate the union representatives articulating that eloquently.

I'm way over my time. I am going to yield to Mr. Turner, but I will get back to my script on the next round.

Mr. TURNER. Thank you, Mr. Chairman. Mr. Walker, I want to inquire of you and perhaps other panel members would comment on one of the recommendations which as I understand was not universally accepted by the panel but was a part of the panel's recommendations; that is, to encourage development of high performing organizations. Tell me a little bit about what that concept was and perhaps those who had concerns about it could share with me their concerns.

Mr. WALKER. It's a concept that quite frankly I and, you know, Bobby Harnage really talked about early on in the process and that is that while the administration is very committed to the concept of competitive sourcing as a means to try to achieve, you know, best taxpayer value as they would say, my view is and that is in the end what we're looking for, as both of you have said, we're looking for the best answer for the taxpayers. And in doing that we have to recognize that a vast majority of government will never be subject to public-private competition. And therefore what are we going to do with that vast majority of government that will be—where it never will be subject to public-private competition. How are we going to try to make them high performing organizations, what can be done to do that? But as a supplement to that to the extent that there are certain functions or activities that might at some point in time be subject to public-private competition, might we provide them to have an opportunity to take advantage of this high performing opportunity concept to see if they can deliver under that and not get a permanent pass from competitive processes, but to get some type of temporary stay from competitive processes if they end up, you know, committing to and delivering on certain key objectives in advance, whether they be performance objectives, cost objectives or whatever else?

And let me also say, I couldn't agree more that we have to keep this in context. Our biggest problem is what are we going to do to attract and retain a qualified and motivated work force. And this is a subset of a much bigger issue and we've got to make sure that we're also taking steps not only to deal with this controversial area but to deal with the more fundamental problem, which is what we are going to do to accomplish that broad objective, because over time if we don't, the decks are really going to be unfairly stacked just because of erosion in government's capacity and capabilities over the years to be able to effectively compete.

Mr. TURNER. Clearly to have a high performing organization you're saying you have to have a trained and competent work force and you have to figure out how to recruit it, train it and retain it. What else is in the concept of a high performing organization?

Mr. WALKER. It's the concept that you would end up providing not only some financial resources to try to be able to help the function or activity or agency or entity be able to become a high performing entity, but second, you would also provide access to technical expertise, that there would be individuals who would have requisite expertise with regard to people process technology issues, change management issues, etc., to try to help determine what needs to be done and most importantly to get it done, because in most things in the public-private, not-for-profit sector the difference between success and failure is not the plan, it's the implementation

of the plan. Ninety percent of success or failure is based on implementation. And so people need support both as it relates to resources, as it relates to expertise, training, other types of activities.

Mr. TURNER. The high performing organization—is the concept then to select certain agencies or subsets of agencies and apply management principles and techniques to evaluation of the performance of that particular organization that is selected and then to implement those? Is that the concept?

Mr. WALKER. Basically. And obviously there's a capacity problem. I mean you can't have every department and agency doing this at once. It's got to be something that you end up doing, you know, in some considered fashion and, you know, possibly on some type of an installment basis looking for the best targets of opportunity, matching resources to where you think you're going to get the best results.

Mr. TURNER. Do you envision a special team of managers with expertise being available to the various agencies when they are selected and they come in and they begin to evaluate it and determine what changes need to be made within that agency?

Mr. WALKER. Without getting into too much detail, I envision there could be individuals that are Federal employees who have skills, knowledge and abilities in this area as well as contractors who have skills, knowledge and abilities and experience in this area who could end up being made available to provide assistance to the targeted, you know, entities, functions or activities.

Mr. TURNER. And I gather that the concept that you're referring to is not universally accepted by the panel members, and I would like to hear from someone who saw some difficulties.

Mr. WALKER. Let me mention one thing and let Jackie speak. We voted on the additional recommendations as a package. And while the vote on that was 8 to 4, my personal opinion is the reason the vote was 8 to 4 was not as much concern over this HPO concern, but it is because we voted on it as a package, and of course Jackie can speak for AFGE and Colleen for NTEU, etc., but my sense was that the concerns that caused them to vote no was not this. It was the issue of the FAR-based process and how many times Congress should be required to act. I mean that's my understanding, but they can speak for themselves.

Ms. SIMON. There are sort of two aspects of the HPO issue. First, President Harnage would like to say that MEOs shouldn't be something that Federal agencies aspire to only when they have a gun to their head, the gun being the threat of losing the work to the private sector. But if you situate the issue of MEOs or high performing organizations in the larger context of contracting out, which is where we were discussing this idea, it's part of the shift. Once upon a time, privatization and contracting out were advocated as a way of saving the government money. The idea was that the government was too expensive and the private sector could do the job less expensively. And for a while, you know, that was sort of the reigning argument and the reigning ideology in favor of contracting out. But the problem with that was first, as Chairman Davis indicated, using a cost based process for public-private competition, the contractors lost most of the time when cost was the criterion that decided whether something would stay in-house or go

to contract. And then when the work did go out the door and did go to contractors, when cost was the criterion for deciding, the resulting contracts were not as profitable as the contractors wanted them to be. Consequently, when we were discussing a new way of deciding whether work should be contracted out and on what the criteria would be for selecting which source and the criteria for selecting which contractor was going to be something other than cost, the new rhetoric was the private sector was better, was more technologically adept and more modern and more competent. And then that raised the question of, well, why is that the case? And you know, the discussion—there's a few factors that we could cite but certainly one of them was what Mr. Walker was just describing, is the fact that those agencies are constrained by Federal budgeting processes when it comes to hiring necessary personnel because of FTE ceilings even though they are illegal. And in the Department of Defense they are still certainly practiced. And the fact that the government is prohibited from making large capital expenditures even when that's the necessary—to get the new technology that's needed to perform at a very high level. And consequently, this concept of HPOs was developed. And part of the HPO concept that was controversial on the panel, not from our perspective—we supported this—was the idea that while an agency or an office had been designated as an HPO, it would have a break from being subjected to the privatization quotas and it would allow the workers in that office or agency to focus on the agency's mission and the work at hand rather than spending so much time and energy figuring how to comply with quotas or engage in competition.

Mr. SOLOWAY. Mr. Turner, as one who supported the recommendations and certainly agree with everything Mr. Walker just said in terms of the lay down of how the debate went and sort of the issues that were in play, there were a couple of areas some of us were concerned about with regard to HPOs but not enough to have us certainly oppose the concept because it's a very logical, common sense approach. There are really two core issues, one of which Jackie just touched on in her history lesson, which is the question of are we going to have a process where we have commercial activities that are going through an HPO process of some kind and using it as an excuse not to optimize as opposed to improve. And the report is fairly clear that competition is the principal driver of top optimal efficiency. So there was that issue. And the other point, even perhaps more important to that, and Mr. Walker touched on this in his answer, and that is that with all of the work being done in government and the amount of government activity that would never be considered for competition, appropriately not considered appropriate for government competition—some of us think that the HPO is best focused there because you are never going to have the management tool of competition there and therefore where you have other alternatives where competition, for instance, can exist, you don't necessarily need to focus on what will be limited resources, as Mr. Walker said, in an HPO. You need to focus those limited resources where you're never going to have competition. It's not a religious or philosophical difference. It's just more of an implementation question of where the emphasis ought to go.

Ms. KELLEY. Mr. Turner, if I could add, from NTEU's perspective, it's pretty hard not to support the concept of high performing organizations, and in fact we do. I wish there was more emphasis on it outside of the discussions around the commercial activities panel because if every agency in fact were given the resources and the support to strive for that, then the—and if part of that was that agencies were able to retain some or all of the savings that they recognize by in fact becoming a high performing organization, then that would be the incentive and the competition, whatever you want to call it, that I think would help to lead agencies to be able to actually reach that level without determining whether or not it's going to be competitively sourced or out sourced or contracted out, or whatever the words are. And so NTEU supports that. That was not an issue on our vote to not support the panel. It was about quotas. It was about standing. It was about a governmentwide roll-out of a new system rather than something that would be tested first. Those were our issues on the panel.

Mr. TURNER. Well, I think the concept certainly deserves our attention. It certainly seems to go to the heart of creating a more efficient Federal Government, and I hope we'll have the opportunity to pursue that further. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much. Let me get back on my script here. The panel endorsed the consideration of both cost and non-cost factors. This is really for anybody who wants to comment. The panel endorsed the consideration of both cost and non-cost factors in making source selections in public-private competition. Are there any instances in which such an approach would not be appropriate? Why would the government not want to consider technical past performance, innovation management approach and other such non-cost factors? Anybody want to take that?

Ms. STYLES. I think it's important to clarify here that costs from our perspective—cost is never, never the only consideration. Whether it's our procurement process or an A–76 competition, whether it's the old one or the new we're developing, it's never exclusively a cost determination. If somebody can't meet the technical qualifications to do the work, they shouldn't and I hope they aren't doing the work. My best example is custodial and lawn maintenance services in our minds, whether it's now or going forward, shouldn't be subject to cost-technical tradeoffs. We should be buying those based on lowest costs. But they do have to make a determination that those kinds of things are technically acceptable, you know, you have the ability to mow the lawn, you have the equipment, that type of thing.

Mr. SIKES. I would add to that since DOD is the one that is limited to cost by statute that I would agree totally with what Angela said. We found that we've gone to cost-technical tradeoff when it gets really complex because we find we're not getting the best value to the government if the true innovation of whoever is coming to bid is not able to be taken into account. In effect, sometimes the competition gets skewed away from that because we don't look at it. Cost is always going to be there and we have ways we can do that in the simpler custodial kinds of things. It gets difficult when we start talking about some of the complex functions we're looking at now.

Ms. KELLEY. From NTEU's perspective there are two issues that concern us and it has to do with one, a level playing field for the Federal employees who currently do the work. If the innovation which we are not opposed to nor are the Federal employees opposed to, if they don't have the resources or technology to be in that level playing field as the bar gets raised, that's a concern. And also there's a concern as to whether or not in fact the services being provided would have what some might call bells and whistles that the taxpayers don't need and could end up paying for services that are actually over and above what in fact the taxpayers do need. I don't have a specific example—I wish I did—that I could give you in our experience in working with the A–76 process, but I know that my concerns were not put to rest in our year long discussions that we had on the commercial activities panel. So seeing it actually play out and until I can see it play out where those issues are eliminated, they will continue to be concerns for NTEU.

Mr. SOLOWAY. Mr. Chairman, we have a long experience with what Angela referred to as cost-technical tradeoff or best value judgments in Federal procurement. I think there are two critical issues here. One is that under the A–76 process there can be a best value determination made but only in the evaluation of the private sector bidders. It does not apply to the government bidder. So there's a fundamental inequity when you have a whole set of factors that you apply to one side that are not then applied to the other. That is one of the inequities of a FAR-based process where everybody is subject to the same evaluation, criteria and so forth would be addressed.

The second thing that's important to note is that we sometimes presume that you either have a best value competition or you have a cost competition, but in the Federal acquisition legislation best value really encompasses virtually all categories of procurement with the exception of things like a sealed bid where we wouldn't get into that. But it is either—it can be a low cost, technically acceptable decision and go all the way up the spectrum to very high end, high technology R&D kinds of environments where cost becomes very secondary because you are really looking for unique technical skills or what have you. But the best value construct underneath it exists all of these varying alternatives that we're talking about and the whole concept is that you would design your acquisition strategy to meet your requirement rather than being locked in as you are in A–76 to effectively a cost only decision.

Mr. WAGNER. Stan was right. Currently the A–76 process forces the MEO to produce a low cost, technically acceptable bid and actually I think puts a wet towel on their ability to innovate. The beauty of the FAR is that it allows you the flexibility. If the particular service that you are procuring is the type that you want to buy in a low cost technically acceptable process, then the buyer may want to take that approach. They have the flexibility to go to best value or anything in between in terms of tradeoffs and percentages, including past performance and other criteria, whether they be management or technical things to consider in there. The beauty of the FAR-based process is that it will allow the MEO to actually propose best value solutions if that's the way the procurement is designed because that's the best solution for whatever the complex-

ity—if the particular service they are buying is complex. And sometimes they can be. Sometimes you can have grass mowing along with some IT services bundled into it. You could have a whole lot of different services put together to make a relatively complex procurement.

Mr. SIKES. Following on my two former DOD colleagues, I can guarantee you this is essential to the discussion of the integrated process because we worked for a long time with the separate process to figure out how to deal with that. And no matter what we did, everybody thought we were skewing it the other way. So it's sort of what they used to call a second bite of the apple. We were trying to level it, but whoever thought they were going to lose figured we were just skewing it one way or the other. The integrated process should hopefully allow us a way to do that at once so it's obvious that we are treating everybody fairly.

Ms. SIMON. Chairman Davis, in our written testimony we offer a very long and detailed critique of the FAR-based best value process and its subjectivity. And I am really happy about this discussion here today because it's very different from the last hearing on the CAP panel where it seemed—the implication seemed to be that A–76 lacked a mechanism for considering quality and was only a cost-based process. But one of the things I think is really important to point out with the FAR-based process is it takes away from the government or certainly allows the government to divest itself of the responsibility for determining what quality standards the government wants in its purchase. Although the government needs to reveal in its request for proposals whether cost or technical factors will predominate, they don't have to reveal by how much and they don't have to reveal which cost or technical factors will have what weights assigned to them prior to the offeror submitting that proposals.

And I would also like to quote Marshall Doke, a very well known conservative legal scholar actually from Texas. He is very prominent in the Texas Republican Party. He has written at length on the shortcomings of the FAR-based best value process. And I will quote him here briefly. He says it's a popular misconception that a low price means low quality. If you're buying or selling gold and specify 98 percent purity, the price is irrelevant to quality if you specify the purity required and inspect to ensure that the product conforms and reject any nonconforming products. The problem with the FAR is that all those standards aren't required to be revealed until after the proposals have been submitted and it's really ultimately a very anticompetitive process.

And one other point about the FAR-based best value. A lot of times contractors say they are very comfortable with it because it's widely used in private-private competition, competition between contractors. And although it has some problems in that area that I really can't speak to here, one thing that can be said is that when it's private-private competition, you can't have any kind of systematic bias in favor of one group at the expense of another. Contractors will be competing between one another and a contractor—one contractor will win but the loser will also be a contractor. But in the context we're living in where there's such tremendous political pressure to privatize, agency officials are under tremendous pres-

sure to use the discretion that the FAR process gives them to exercise a bias against Federal employees and in favor of contractors. And that's one of the most important problems with the FAR approach to best value.

Mr. WALKER. First, it's not that A–76 doesn't provide for considering something other than cost. It's just not dynamic enough. Second, A–76 does not provide for a level playing field. A–76 is not consistent with the principles adopted by the panel. At the same point—existing A–76. At the same time the panel recommended modifications to A–76 and it did not expressly recommend repeal of A–76, I might note. It said that we needed to move to a new integrated FAR-based process that was consistent with the principles, it had a level playing field. Had to modify A–76 in part to be able to handle the transition period and in part possibly there are some circumstances where it makes sense where it's not highly sophisticated and it's not highly technical and where cost is a primary driver and where you don't need the dynamic interchange on technology and certain other things. I think when you get right down to it there's three kinds of businesses we're talking about here just cutting through it, thinking about the panelists. You've got core that the government should do that should not be out sourced, and without getting into the debate of what that is, all right, that's one reason you need HPOs. There's a lot of that, tremendous amount of that.

Second, you have noncore that's new. It's new. The government may or may not have people who could do it, they may or may not have the technology available, they may or may not have the excess capacity. And in that kind of situation more likely than not it's probably going to be done externally. And you have noncore or gray areas where we do have government workers working. And one of the real fairness issues that I think people are touching on but not raising directly is that sometimes you need investments in technology and sometimes you need investment in training and development in order for the work force to be able to effectively compete. And candidly the way our budget system works, it doesn't facilitate that always, you know the fact that we don't have a capital budgeting concept and the fact that things are done based on cash-flow and not based on economical value added or discounted present value concepts. So as a result that ends up leading in certain circumstances to perverse decisions.

But last thing is, I think words matter. I think A–76 has got a lot of baggage. Rightly or wrongly, I think best value has a lot of baggage, too. I think what we're talking about here is what's the best choice, what's the best choice for the taxpayer, which is a lot more dynamic term. It considers whether or not we ought to ever think about it going outside the government or not as well as all these other factors that we're talking about.

Thank you.

Mr. DAVIS. Ms. Simon, let me ask you a question. In your statement you made it clear that you object to the use of any FAR-based, best-value type process for public-private competitions. But I was puzzled to find no mention of the FAR-based process that DOD has used over the past decade and-a-half or so for its depot-level workloads. As I understand it, that process has evolved over

the years from one that used the standard FAR-based value selection process in the late 1980's and early 1990's, to a more limited best value process based on the assignment of dollar values to technical aspects of the proposals. Also, as I understand it, in the most recent competitions using this process, the public sector either won outright or its proposals submitted in conjunction with the private sector partner were selected. These awards were quite substantial, in the realm of hundreds of millions of dollars up to over $10 billion.

I guess my question is, and if you don't want to answer it today you can get back to us, but try to understand this as we move and try to iron out where the administration is coming from with their FAR-based proposals. Have you studied the DOD FAR-based depot competition process? What specific objection, if any, do you have to the DOD competition process and do you think the experience gained with this process would be valuable in implementing the panel's recommendation for a FAR-based process?

Ms. SIMON. I would like to answer you later in writing.

Mr. DAVIS. It's not a trick question, but we all want to understand what works for you.

Ms. SIMON. Just responding now, you know, the FAR allows both best value and cost-based decisions. And it sounds like you're referring to a procedure for assigning costs to quality differences that are sometimes called dollarization. And one of the principles that AFGE certainly sought in the panel and has continued to advocate is that additions in public-private competition should always be cost based. We are no more wedded to A–76 than anybody else, although for very different reasons. I think there was one reason that all of the panelists agreed—one area of A–76 that everyone agreed A–76 needed improvement in, and that was the area of how time consuming it was and how slow a process it was. And although the FAR-based best value, as is acknowledged in the report, will certainly be no faster than A–76, we have always been open to changes in A–76 that would make it faster and we have been open to wholly new approaches that were in the end cost based.

Mr. DAVIS. You might want to supplement. If anything, this panel showed that everybody is prepared and there is a lot at stake obviously for the individual constituencies here. Ms. Styles, let me ask this. The panel recommended that OMB make limited changes to the existing A–76 process and outlined a number of potential changes. Can you share with us what changes you anticipate making and will you be making more changes, do you think, in addition to the ones included in the panel's report, and what's the time period you think before any changes could be implemented?

Ms. STYLES. We have really over the past several months taken kind of a top to bottom review of A–76 and we have completely overhauled it. We are ready very soon to cancel the existing circular and come out with an entirely new circular and reissue it as a new document. We are going to be folding in a couple things. We are folding in another circular A–97 which deals with sales to and from State and local governments. We're also folding in a policy letter 92–1 on what's inherently governmental and what's commercial. So you are going to be seeing very shortly, and it's in final clearance right now, I would expect by the end of October, a draft

proposal with some very significant, substantive changes to the circular itself. They are coming out in draft. We're going to have a 45-day notice and comment period. Then we'll take some time after that to assess the comments we received.

But I think what you're going to see is some real needed changes to this circular. It's been a document that's been around for 50 years. People kept tacking things on to it and changing them without consistency. So you are going to see a readable document, one that makes sense, one that reads well.

When I was reading the old circular, I came upon the word "privatization," and I thought and thought and thought and I'm like I've never seen privatization in the circular. Why is it defined here in the definitions? Turns out I did a search and privatization was never used in the circular. So there are a lot of strange inconsistencies that we've cleaned up. Specifically, some of the things that were recommended, I think all of our changes are consistent with the recommendations of the panel. There's going to be some issues that people are probably going to argue about, whether they're consistent or not. There are a few things that were recommended in changes to the A–76 process itself that we've definitively adopted, strengthening the good business practices by eliminating even any appearances of conflict of interest between the MEO and the PWF, implementing some tools for aggressive enforcement of the process, including better pre and post-award reviews, audits and inspections. You will see an adoption of the integrated process. You'll also see an overlay of many of our FAR processes that we have for consideration of the solicitation, of the award, of how bids are treated.

I think you will see this as a document that people in the acquisition field will understand and can use to a much better extent than the current circular.

Mr. DAVIS. Anything further?

Mr. WAGNER. Could I add one last thing. I think Mr. Walker said it best when he said what's really important is the best choice. You get to the best choice through competition, through good, rigorous competition, where the best come to play and compete. At the end of the day whatever process OFPP will come up with, and I hope it will be a good one, it's got to be one that the private sector is willing to compete in vigorously and good companies coming in and getting good quality proposals because on a public-private competition, the public sector will be there every time. If you don't have a process that is not attracting the best in the private sector, the government and the taxpayer are going to be cheated out of getting the best choice ultimately.

Mr. DAVIS. Let me say, the nub of this is we need to do two things. One is bring in the best from the private sector to compete and try to beef up our public sector and make sure that we can continue giving them the tools so they can be even sharper than they are now. If we do that, taxpayers won't lose and at the end of the day that's what we are about.

I want to take a moment to thank everybody for attending the hearing today. A lot of thoughtful testimony, not all in agreement of course, but that's why we are here; to try to solicit comments. I want to thank Congressman Turner for participating and thank staff for organizing this. I think it's been very productive and I'm

going to enter into the record the briefing memo distributed to subcommittee members. We'll hold the record open for 2 weeks from this date for those who want to forward submissions for possible inclusion on some of the questions or afterthoughts that you may have.

Thank you very much and the proceedings are closed.

[Whereupon, at 3:20 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Testimony Submitted for the Record
By the Contract Services Association of America
To the House Government Reform Technology and Procurement Policy Subcommittee

Oversight Hearing to Review the
Commercial Activities Panel Final Report and Recommendations

September 27, 2002

This statement is being submitted for the subcommittee hearing record on the *report and recommendations of the Blue Ribbon Commercial Activities Panel* on behalf of the members of the Contract Services Association of America (CSA).

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 of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, and Native American owned firms. The goal of CSA is to put the private sector to work for the public good.

CSA was a strong supporter of the creation of the Blue Ribbon Commercial Activities Panel and is committed to its success. Now that the report has been released, the big question is – WHERE DO WE GO FROM HERE?

The Demand for Competition and a Fair Process

> *The Comptroller General shall convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the Federal government from Government personnel to a Federal contractor.... (section 832 of the Fiscal Year 2001 National Defense Authorization Act, P.L. 106-398)*

AS CSA has noted on numerous occasions, outsourcing and privatization are not about cutting services. Neither is it a question of doing "more with less." And we are certainly not talking about a loss of capability. It is about changing the source of a service. It's about becoming more efficient, and saving money.

Competitive sourcing offers several advantages. By competing in-house staff commercial activities against the private sector, Federal agencies are forced to look at how they perform their missions and incorporate new and innovative methods to reduce time and cost. The end result, whether a service stays in-house or converts to contract, is improved performance, more efficient use of resources, and savings that can be used for modernization.

Outsourcing offers a chance to become more efficient in an increasingly demanding environment. Economically, there are obvious reasons for the switch – it all comes down to capitalizing on the advantages of the market. Competition pushes costs down, keeps output attractive, and gives the consumer (in this case, the Government customer) a choice, increasing the options. Government agencies do not always have the impetus or the funds to keep abreast of the latest technology, to find the newest cost-saving developments, or to innovate – but the private sector does.

Commercial Activities Panel Recommendations

> *Mission of the Commercial Activities Panel is to improve the current sourcing framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights and contractor concerns.*

CSA has never advocated that all Government services be contracted to the private sector. But as we continue to reinvent Government we must focus on competition. And that focus requires a balanced, responsible and unyielding commitment to exploring new ideas, challenging old prejudices and looking carefully at what services the Government must provide. It also requires a careful examination of who, inside or outside of Government, is in the best position to provide each service in the most efficient and effective way. This means, too, that the Government should adopt from the best of private enterprise those tools that foster the necessary incentives and rewards for high performance. And it must follow a fair process designed to protect the interests of the taxpayer and address the legitimate concerns of the current Government workforce while, at the same time, ensuring that the Government operates in a maximally efficient manner.

In the view of CSA, that was precisely what the Blue Ribbon Commercial Activities Panel set out to do.

We fully believe the composition of the panel provided balance – with two representatives each from industry and the public sector employee unions, as well as representatives from academia and the Administration. CSA member, Mark Filteau of Johnson Controls, was one of the industry representatives on the Panel. The fact that David Walker, the Comptroller General, chaired the Panel himself sent a signal of the critical value and importance of the Panel.

In a nutshell, the Panel offered four recommendations:

- Adoption of 10 sourcing principles (which are outlined in the report) – to which all 12 panelists unanimously agreed;
- Implementation of an integrated competition (FAR) process;
- Interim and limited changes to Circular A-76; and
- Establishment within Federal agencies of "high performing organizations."

Certainly, if asked, there are sentences here and there within the report that CSA members do not agree with, but we believe we need to focus on the ultimate and overall goal of the Panel's four recommendations, which is to bring fairness to the process. Therefore, rather than picking apart the report sentence by sentence, we intend to work toward that overarching goal.

Indeed, we believe that once the 10 sourcing principles were agreed upon, the Panel took what was, in our view, the next logical stop – deciding to move AWAY from A-76 to a Federal Acquisition Regulation (FAR) based system. A "tried and true" system, a system focused on best value and past performance and one that governs the vast majority of government contracting competitions.

What does this all mean? Simply put, the recommendations are aimed at: providing best value; promoting competition; valuing people and moving away from A-76. Of course, the "devil is in the details." And that is one of the purposes of today's hearing – to begin the process that will lead to full implementation of the report's recommendations to achieve the Panel's intent.

In discussing the findings of the report with CSA members, there is cautious optimism – but a lot of "hurrahs" over the recognition that the *"A-76 process may no longer be an effective tool for conducting competitions to identify the most efficient and effective service provider."* The intent behind A-76 (i.e., to establish a process for public-private competitions) has never really been in question. But, implementation has become a lengthy, expensive and unnecessarily convoluted process that has led all sides to declare it is unfair. Before the entire A-76 process goes out the window, however, we need to ensure that it will indeed be replaced with a better model – with interim revisions to the process until that better model is fully in place. That is what the Panel recommended, and what we believe the Office of Federal Procurement Policy is currently working on. That better model, as recommended by the Panel, is the FAR. Replacing A-76 with a FAR based system (which covers 98% of all service contracts) certainly should address many of the problems industry encounters when trying to compete on A-76 competitions. Of course, CSA is fully aware that fairly implementing this new model will be a challenge, filled with

nuances and potential pitfalls, but we stand ready to assist the Congress and the Administration in doing so. There are a few statutory changes that will need to be tackled in order to fully implement the recommendations, particularly related to statues governing A-76 competitions within the Department of Defense and the laws related to bid protests. However, we would stress that the majority of the recommendations, in our view, can be accomplished through the **regulatory** process and through changes to the OMB Circular A-76.

Interim Changes

Much as we might like, moving to a FAR process will not happen overnight. But Federal agencies should not be allowed to use this as an excuse to "shut-down" what is currently in the works, or even future public-private competitions of the Government's commercial activities, and sit paralyzed until a better system is in place. The Panel itself noted that making the changes necessary could take some time.

We agree with the Panel's recommendations that A-76 studies currently in the pipeline, or initiated in the near term, *should continue* under the current framework. All subsequent studies should be conducted along the lines of the improved A-76 process outlined by the Panel – although many of those improvements, we would argue could be instituted today (e.g., improved communication and cooperation, encouraging use of "lessons learned" and ensuring that all competitors have access to relevant information). This clearly means that the Panel intends there to be NO moratoriums on the conduct of A-76 studies. Until a better model (e.g., a FAR based process) is fully in place, A-76 cost comparison studies must – and should – move forward. And, in this interim period, new guidance should be developed in the Circular to improve the current A-76 process as recommended by the Panel.

Impact on Small Business

We remain hopeful that the one voice that has not been widely heard in the debate over A-76 – small business – would receive a fairer hearing under the FAR-based process. Few, if any, small businesses today can afford to compete on an A-76 competition. The 2-4 year time lag alone makes this process prohibitively expensive for small businesses. Will a FAR-based process ensure fairness for small businesses? We believe it will.

But there are certain issues that must be considered that were not addressed in the report or its recommendations. These deal with small business set-asides, minority business preference programs (e.g., 8a or small disadvantaged businesses set-asides), and HUBZones, as well as Native American preferences, and disabled-veteran and women-owned small business preferences. CSA membership includes many small companies that fall within these categories – and we want to ensure that their views are heard.

The Need to Address Acquisition Workforce Issues

As we move toward full implementation of the Panel's recommendations, the role of retraining and job placement will be a vital one – and it is an area in which the services industry is ready and willing to assist. The ability of the public sector workforce to implement and embrace changes hinges on the training and assistance that accompanies it. And it hinges on the degree to which that training is based on, and communicates, a real-world understanding of the competitive commercial marketplace.

We also need to get over the myth that contractors put Federal employees out of work, only to bring in their own people. When the private sector wins a contract, it does not have a "warehouse" of people just waiting to take over the job. A study done by the National Commission of Employment Policy (NCEP), a branch of the Department of Labor, indicates that over half of the workers on outsourced Government functions went to work for the private sector firm, while twenty-four percent of the workers were transferred to other jobs and seven percent retired. The study concluded that less than seven percent of the workers needed to find new employment.

Taking care of Government workers who are impacted by outsourcing decisions is an issue the private sector takes very seriously. Former Government workers affected by a conversion of their jobs to contract are typically offered a "right of first refusal," under which the workers are given first priority for employment for those jobs for which they are qualified. In many instances, persons previously stymied in their desire for promotion find that working for a contractor provides upward mobility they did not previously enjoy. Contractors are not typically bound by seniority in making employment decisions. As a result, contractors can often make dramatic improvements in a workforce just by selecting less senior persons (often those with high career motivation and energy) for supervisory and key technical positions. This infusion of fresh enthusiasm can invigorate a workforce even when the workforce as a whole remains relatively unchanged due to "right of first refusal" protections. Another positive aspect of conversion to contract that is almost always overlooked is that former Government employees become far more employable in a variety of private industry jobs after working in a "transition" environment on a Government services contract, thus helping with future career advancement.

Finally, in many instances, the contractors' benefit programs are equivalent or even superior to those enjoyed by Government employees. The one area where contractors cannot "compete" pertains to paid time off. But, responsible contractors understand that satisfied customers depend, to a considerable degree, upon satisfied employees. All responsible contractors treat benefits management as an important element of good labor relations.

Anti-TRAC

It is abundantly clear to CSA members that the recommendations of the Panel repudiate TRAC (the infamous *"Truthfulness, Responsibility and Accountability in Contracting" Act* introduced by Representative Al Wynn and Senator Richard Durbin) or anything TRAC-like (e.g., last year's Abercrombie amendment or this year's Allen-Andrews amendment). Everything about TRAC is contrary to the Panel's recommendations. TRAC is an effort to mandate a sourcing process – and one (the A-76 process) that all sides, for differing reasons, agree is unfair. TRAC also forces the Government into competitions where there is no incumbent workforce and there already exists a healthy competitive private sector. Instead, the CAP report promotes competition that is focused on management flexibility and the agency's strategic mission.

Conclusion

While CSA members certainly have concerns over how the recommendations will play out, we remain optimistic and are willing to work with the Congress and the Administration to move us forward.

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