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IRAQI RECONSTRUCTION: RELIANCE ON PRIVATE MILITARY CONTRACTORS AND STATUS REPORT

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

FEBRUARY 7, 2007

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IRAQI RECONSTRUCTION: RELIANCE ON PRIVATE MILITARY CONTRACTORS AND STATUS REPORT

WEDNESDAY, FEBRUARY 7, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2157, Rayburn House Office Building, Hon. Henry A. Waxman (chairman of the committee) presiding.

Present: Representatives Waxman, Lantos, Towns, Maloney, Cummings, Kucinich, Davis of Illinois, Tierney, Clay, Watson, Lynch, Higgins, Yarmuth, Braley, Holmes-Norton, Cooper, Van Hollen, Hodes, Murphy, Sarbanes, Welch, Davis of Virginia, Shays, Souder, Platts, Cannon, Duncan, Turner, Issa, Westmoreland, McHenry, Foxx, Bilbray, and Sali.

Also present: Representative Schakowsky.

Staff present: Phil Schiliro, chief of staff; Phil Barnett, staff director and chief counsel; Kristin Amerling, general counsel; Karen Lightfood, communications director and senior policy advisor; David Rapallo, chief investigative counsel; Theodore Chuang, deputy chief investigative counsel; Jeff Baran, counsel; Christopher Davis, professional staff member; Earley Green, chief clerk; Teresa Coufal, deputy clerk; Matt Siegle, special assistant; Lauren Belive, Kerry Gutknecht, Davis Hake, and Will Ragland, staff assistants; Leneal Scott, information officer; David Martin, minority staff director; Larry Halloran, minority deputy staff director; Jennifer Safavian, minority chief counsel for oversight and investigations; Keith Ausbrook, minority general counsel; Ellen Brown, minority legislative director and senior policy counsel; John Brosnan, minority senior procurement counsel; Steve Castor, minority counsel; Edward Kidd, Christopher Bright, and Allyson Blandford, minority professional staff members; John Cuaderes and Larry Brady, minority senior investigator and policy advisors; Patrick Lyden, minority parliamentarian and member services coordinator; Brian McNicoll, minority communications director; and Benjamin Chance, minority clerk.

Chairman WAXMAN. The meeting of the committee will come to order.

Today the committee will investigate potential fraud, waste, and abuse in the almost indecipherable world of contractors and subcontractors.

In the last 2 years I have tried to get a clear answer to what I thought was a simple question: How much money the Halliburton subsidiary named KBR and private security subcontractors were making under the Army's troop support contract called LOGCAP.

We know that the war in Iraq has given private contractors an unprecedented role in providing security services. Almost $4 billion in taxpayer funds has been paid for private security services in the reconstruction effort, alone. But sorting out overhead, subcontracts, sub-subcontracts, profit, and performance has been nearly impossible.

For over 18 months the Defense Department wouldn't even respond to my inquiry. When it finally replied last July, it didn't even supply the breakdown I requested. In fact, it denied that private security contractors did any work at all under the LOGCAP contract. We now know that isn't true, and today we will try to understand the layers of subcontractors, with a particular emphasis on the Blackwater company.

On March 31, 2004, four Americans working as private security personnel for Blackwater, all of whom were military veterans, were ambushed and killed in Fallujah while on a protection mission. Their tragic death became a turning point in public opinion about the war and directly resulted in a major U.S. military offensive, which is known as the First Battle of Fallujah.

Twenty-seven American soldiers and over 800 insurgents and Iraqi citizens died in that battle, and military observers believe it helped fuel an escalation of the insurgency.

It is now almost 3 years later and we still don't know for sure the identity of the primary contractor under which the four Blackwater employees were working. What we do know is that Blackwater was providing security services under a contract with a Kuwaiti company called Regency, and that Regency was, itself, a subcontractor for ESS Support Services Worldwide, which in turn was a subcontractor providing dining services and contract services for other contractors such as KBR and Fluor Corp.

We also know that both Blackwater and Regency were adding significant markups to the cost of providing the security services. And, on top of that, the prime contractor, whomever it was, was making its own percentage off the contract. Blackwater initially indicated that it believed KBR was the prime contractor under the LOGCAP contract. Three months ago, however, ESS told the committee that the Fluor Corp. was actually the prime contractor for Blackwater work in Fallujah. The Fluor Corp. disputes this, and the Defense Department doesn't seem to be sure what is going on.

It is remarkable that the world of contractors and subcontractors is so murky that we can't even get to the bottom of this, let alone calculate how many millions of dollars taxpayers lose in each step of the subcontracting process, but the impacts of contracting waste go beyond just dollars and cents.

Today four family members of the four murdered Blackwater employees will share their testimony with us. They believe Blackwater sent their relatives into Fallujah unprepared and without armored vehicles, a rear gunner for each vehicle, or heavy automatic weapons to defend against attacks. Their experience tells them that tax dollars never reached the security personnel on the ground. They

believe that the money for protective equipment took a back seat to the multiple layers of contractor profits.

I don't know if we will be able to resolve that issue today, but I am deeply troubled by one document we have found in preparing for this hearing. The day before the four soldiers were killed, a Blackwater employee sent an e-mail alerting superiors that a lack of equipment, armored vehicles, and other safety equipment left the team unprepared to begin its mission. That warning was seemingly ignored, and we need to explore that further.

Without objection, this e-mail will be made part of the hearing record today.

I have already learned that sorting out the webs of subcontracts is confusing work, but our committee has an absolute obligation to the taxpayers to make sure their tax dollars are well spent and not siphoned off into billions of dollars of unnecessary overhead. And, even more important, we have an inviolate obligation to the men and women in harm's way and to their families to make certain that their safety doesn't take a back seat to corporate profits or wasteful spending.

I look forward to learning more from our witnesses this morning.

[The prepared statement of Chairman Henry A. Waxman and the e-mail follow:]

Opening Statement of Rep. Henry A. Waxman, Chairman
Committee on Oversight and Government Reform
Hearing on Reliance on Private Military
Contractors in Iraq Reconstruction
February 7, 2007

Today the Committee will investigate potential fraud, waste, and abuse in the almost indecipherable world of contractors and subcontractors.

For the last two years I have tried to get a clear answer to what I thought was a simple question: How much money a Halliburton subsidiary named KBR and private security subcontractors were making under the Army's troop support contract called LOGCAP?

We know that the war in Iraq has given private contractors an unprecedented role in providing security services. Almost $4 billion in taxpayer funds has been paid for private security services in the reconstruction effort alone. But sorting out overhead, subcontracts, sub-subcontracts, profit, and performance has been nearly impossible.

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work in Fallujah. The Fluor Corporation disputes this, and the Defense Department doesn't seem to be sure what's going on.

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But the impacts of contracting waste go beyond just dollars and cents. Today four family members of the four murdered Blackwater employees will share their testimony with us. They believe Blackwater sent their relatives into Fallujah unprepared and without armored vehicles, a rear gunner for each vehicle, or heavy automatic weapons to defend against attacks.

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Without objection, this email will be made part of the hearing record today.

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I look forward to learning more from our witnesses this morning.

LB003909

From: Lourens Badenhorst
Sent: Wednesday, March 31, 2004 11:30 PM
To: Smith, Cathy; Len Swain
Subject: FW: Security Issues

FYI summary of notes and mails of what was described to me at Monday afternoon's meeting held at Camp Taji this is in sharp contrast to the bells and whistles described in all mails I have read and seen from Mr. Tim Tapp and Jim Brown defending the position every time I have spoken to him about the burning issues.

Regards
Lourens Badenhorst
CEO ESS Design & Build
ESS Support Services Worldwide
[redacted]
Tel: [redacted] - Cyprus office
Fax: [redacted] - Cyprus office
Mobile: [redacted] - International
Mobile: [redacted] - Kuwait
Mobile: [redacted] - Iraq

-----Original Message-----
From: Tom Powell [redacted]
Sent: 30 March 2004 18:58
To: hilton.vandeventer[redacted] Lourens Badenhorst
Subject: Security issues

This will clarify where Blackwaters position is Hope it helps Between us Tom

From: "Mike Rush" [redacted]
>To: "Tom Powell" [redacted],<justin[redacted],"Brian
>Berrey" [redacted]
>CC: <RTTapp[redacted]
>Subject: RE: Thuraya Phones / Support etc
>Date: Tue, 30 Mar 2004 09:19:00 -0500
>
>Tom, First off, I know you are the right man for the Baghdad office and
>will make this work. But allow me to point out a couple of things. You
>are right about vehicles and comms being the responsibility of RHHS.
>And you are right, you and JP worked this for quite some time.
>
>We have a contract to support five 6 man teams, not ten. The expansion
>to support ESS D&B is yet to be completely identified, let alone
>contracted.
>
>There is no order for "Hard Cars". The contract only allows for
>"hardening" and yes I realize that is not optimum. That is never going
>to be totally fixed but it should be addressed. Body armor for the
>client is not our responsibility either. I am including Tim on this
>email since it is in fact up to RHHS to fix some of the things you
>mentioned, particularly reliable vehicles.
>
>Continue to do what you can but we are counting on you to draw the line
>when it is not safe or prudent to conduct operations in unreliable
>vehicles or in an unsafe manner.
>
>FITH
>Mike
>
>

LB003910

>-----Original Message-----
>From: Tom Powell [redacted]
>Sent: Tuesday, March 30, 2004 1:01 AM
>To: justinm[redacted] Mike Rush; Brian Berrey
>Subject: Re: Thuraya Phones / Support etc
>
>GROUND TRUTH
>
>Guys this reality
>I have NO Thurayas from ESS/CRG at this Time date
>
>I have vehicles that I have sent to Jordan for a pickup that are
>suspect The ones going to Kuwait are in bad shape The Baghdad ones look
>like this two with bearing and wheel problems one is overheating
>
>I have an ops vehicle that I rented of the streets to insure I have a
>CAT
>
>Today is the 30th of March
>The shopping days should be over and Equiptment forwarded ASAP
>
>The SitREPs By Regency/RHHC I'm reading are very mis leading and
>bougus on the surface
>
>I need NEW VEHICLES by the 3rd of april 2004 along with 10 teams to
>meet the needs of the client here in Baghdad one for each team and two
>in reserve at the ops shop
>
>I need Comms
>I have only borrowed hand helds
>
>the 4 Iruridums have Problem
>The numbers and associated comm plan is wrong I will address this in
>the next mail
>
>I need Ammo 9mm and 556
>I need Glocks and M4s
>
>all the client Body armor you got
>
>I need help in the office/ this is a two man operation and when they
>split offices on the 3rd I will need 2 more totalling 4 office
>personnel
>
>I'm still unsure of the contractual who's responsible for what and
>frankly It's out of my lane
>
>But guys are in the field with borrowed stuff and in harms way with the
>client to which I'm very unconfortable with given the up coming events
>with 5 million Shiea moving into Karbala in 5 days.
>
>I have requested Hard cars from the beginning and from my undersatnding
>an order is still pending Why I ask?
>
>The client wants them/ get them!
>
>It my understanding that someone in Kuwait made a decision to go with
>suburbans that are used Bad idea!
>
>MY only hope is that Justin see thru the smoke and mirror show and
>believe's me when I'm telling him that all is not what it seems
>
>Justin knows what he has to forward and realizes that it's just enough
>to sustain the appearance of gear/ and an operational capibility
>

LB003911

>Please Justin send your sitreps to the Client with reality based
>information and speak on behalf of Blackwater
>
>We were promised from the start that the Vehicles letters radios,
>computers and all the other line items would be ready by RHHC
>
>If my memory serves me Regency was excited to recieve it's contract on
>the 5th and JP and I have work this issue since 5 December
>
>They have had plenty of time to act on getting gear and equipment
>forward an allowing RHHC to send sitreps to the client not reflecting
>Ground Truth is appauling
>
>Patiently waiting
>TOM
>
>
>
>
>
>
>
>
> >From: RTTAPPatRegency[redacted]
> >To: mrush[redacted] tompinpcb[redacted],
>justinm[redacted]
> > bberrey[redacted]
> >CC: bberrey[redacted] swyant[redacted]
> >Subject: Re: Thuraya Phones / Support etc
> >Date: Mon, 29 Mar 2004 23:44:52 EST
> >
> >Mike,
> >
> >Do not loose sleep over this one. RHHC is repsonsible for comms and
> >vehicles. He means RHHC. We have an accountant full time on just
> >the accounting for ESS. Jim sees RHHC/BW as one. Once we get
> >everyone pushed forward, we
>
> >will
> >sit down and reconcile everything on this end with Justin. He is
>keeping
> >good
> >records, hand receipts, etc.
> >
> >Provided him with $5,000 in cash last night for use as petty cash and
>for
> >Tom
> >up North to handle out of pocket things. Hand receipted to Justin.
> >
> >DBA has been wired by ESS last week. Typical banking BS though.
> >They
>sit
> >on
> >your dollars and get a fee to do it. Since it is a dollar
> >transaction
>had
> >to
> >go through their corresponding bank then back to us. Going forward
>this
> >won't happen again. We straightened this out last night with them.
>Soon
> >as the
> >dollars hit we are transferring to Sara Payne with all info copied to
>BW.
> >TT

LB003912

> >
> >R. Timothy Tapp
> >Managing Director
> >Business Development & Operations
> >Regency Hotel & Hospital Company
> >Salmiya, Al Taawen Street
> >Kuwait Regency Palace Hotel
> >Kuwait City, Kuwait
> >Tel: [redacted]
> >Fax: [redacted]
> >Mobile: [redacted]
> >Email: RTTAPPatRegency[redacted]
> >
> >USA contact:
> >Tel: [redacted]
> >Fax: [redacted]
> >Mobile: [redacted] (US & International)
>
>_____
>Free up your inbox with MSN Hotmail Extra Storage. Multiple plans
>available.
>http://join.msn.com/?pgmarket=en-us&page=hotmail/es2&ST=1/go/onm0020036
>2
>ave/direct/01/
>

_____
MSN Toolbar provides one-click access to Hotmail from any Web page - FREE download!
http://toolbar.msn.com/go/onm00200413ave/direct/01/

Chairman WAXMAN. I now call on the ranking member of this committee, Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you, Mr. Waxman. And thank you for holding this hearing.

We once again meet to examine the challenges of managing contracts in Iraq. Since 2004 the committee has been engaged in continuous and vigorous oversight of contracting activities in the war zone. That oversight involved 5 full committee hearings, 14 subcommittee sessions, numerous briefings from the agencies involved, and review of thousands of documents the committee obtained from key Federal agencies. Those efforts focused on contracts for logistical support of U.S. military operations and for reconstruction efforts.

Throughout this review it has been our goal to move beyond just the charged rhetoric and easy generalities that swirl around the topic and get to the underlying realities of acquisitions in Iraq. The truth is gritty enough. No one needs to embellish or exaggerate it. Still, some prefer to oversimplify, distort, and prejudge the outcome of complex contracting processes to fit the preordained conclusion that nothing goes right in Iraq. I would rather pursue a more constructive mode of oversight that looks beyond the headlines to make a lasting difference in our policies and save taxpayers money.

Some of today's testimony will focus on a brutal incident in 2004 in which four civilian security personnel retained by Blackwater USA, a security contractor, were ambushed and killed in Fallujah. Our hearts go out to the families of those four men. Committee members should keep in mind that liability of Fallujah incident is the subject of pending civil litigation, and I would ask unanimous consent at this point to put in the record a letter from Callahan and Blain to Speaker Pelosi on this matter.

Chairman WAXMAN. Without objection, the letter will be made a part of the record.

Mr. DAVIS OF VIRGINIA. Thank you.

[The information referred to follows:]

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BOARD OF LEGAL SPECIALIZATION

LAURALI M. KOBAL
OFFICE ADMINISTRATOR

December 13, 2006

OUR FILE NUMBER:
2525-02

The Honorable Nancy Pelosi
235 Cannon HOB
Washington, D.C. 20515

RE: War Profiteering and Blackwater Security Consulting

Dear Honorable Pelosi:

Please be advised that our office currently represents the families of the four American security contractors who were beaten, burned, killed, dragged through the streets of Fallujah, and strung up over a bridge for all the world to see. Those images, which were broadcast worldwide on March 31, 2004, will be forever etched into the minds of the American people as one of the symbols of the war in Iraq. Those four men were unfortunately working for Blackwater Security Consulting at the time of their death.

Prior to this past November's election, there were a couple of democratic subcommittees that were looking into the issue of war profiteering in Iraq. Blackwater naturally rose to the top of both of these investigations. On the Senate side, the investigation was headed by Senator Byron L. Dorgan (D-ND), who is the chair of the Senate Democratic Policy Committee. On the House side, the investigation was led by Congressman Henry Waxman (D-CA).

Although these congressional investigations into war profiteering and Blackwater seemed to be heading in the right direction, it appears that the prior position of the democrats in Congress led to these private security companies being evasive and recalcitrant toward the committees conducting the investigations. For example, during Blackwater's testimony before the Government Reform Committee, Subcommittee on National Security, Blackwater's Chris Taylor was repeatedly evasive and non-responsive with respect to his answers, and even had to be

reminded by Congressman Christopher Shays (D-CT) that he was under oath. Blackwater was then asked to produce particular documents, which it has refused to do to date.

In my opinion, these Congressional committees have only begun to scratch the surface of what is deplorable conduct by war profiteers such as Blackwater simply to make a buck. Not only has Blackwater's conduct potentially defrauded the American tax payers out of millions of dollars under government contracts that never even authorized Blackwater to perform security services in Iraq, it has also lead to the death of at least four American citizens -- all in the name of corporate greed. The civil lawsuit that we are currently prosecuting in North Carolina alleges that while Blackwater was being paid exorbitant amounts of money under a murky scheme of subcontracts, Blackwater cut corners and reduced costs in an effort to pad its bottom line.

For example, one of the subcontracts that we have acquired specifically states that all missions in Iraq would be conducted in no less than six-man teams and in armored vehicles. On March 31, 2004, when my clients' loved ones were working for Blackwater in Fallujah that fateful day, they were not working in six-man teams and were not operating in armored vehicles. As our lawsuit alleges, Blackwater pocketed the millions it had been paid to buy armored vehicles, and sent these four men into the most dangerous part of Iraq at the time in nothing more than soft-skin Mitsubishi Pajeros (known in the U.S. as a standard Mitsubishi Montero). Had Blackwater not attempted to increase its profits by not purchasing the armored vehicles required by its own series of contracts, those four Americans would be alive today and the war in Iraq would have taken a slightly different path (as this ambush actually caused the U.S. military to invade Fallujah ahead of schedule in what has been described as the deadliest battle of the war).

There are many other examples alleged in our precedent-setting lawsuit concerning Blackwater's wrongful conduct, including Blackwater not permitting the men to conduct a risk assessment prior to the mission, gather intelligence concerning travel routes, conduct pre-trip inspections of the routes, acquire the necessary weapons, or even obtain a map of the area. Blackwater even sent these men out operational prior to the start date of their own contract.

This particular lawsuit against Blackwater is the first of its kind concerning the lack of accountability for private security contractors operating in Iraq, and is already becoming precedent setting. So far, we have obtained favorable published decisions from the U.S. District Court in North Carolina, as well as the Fourth Circuit Court of Appeals in Richmond, Virginia. As we continue to push this case forward in North Carolina, Blackwater will be also fighting it at the U.S. Supreme Court (where Blackwater has already lost its first motion which was denied by Justice John Roberts).

Nonetheless, as American citizens, we hereby petition to you to initiate, support, and continue the Congressional investigations into war profiteering and specifically Blackwater's conduct. Now that there has been a shift in power in Congress, we are hopeful that your

CALLAHAN & BLAINE

Congresswoman Nancy Pelosi
December 13, 2006
Page 3

investigation, as well as the investigations by Senator Dorgan and Congressman Waxman, will be taken seriously by these extremely Republican companies, such as Blackwater, who have been uncooperative to date, and that these investigations will be fruitful and meaningful. To the extent that we can provide any assistance to you or these Congressional committees, we will do so to the extent permitted by law.

We look forward to the New Direction of America, and to your dedication to putting an end to the fleecing of the American taxpayers and death to its citizens in the name of war profiteers such as Blackwater. Please do not hesitate to contact me at any time.

Very truly yours,

Daniel J. Callahan

DJC:jsr

cc: Rep. Nancy Pelosi (District Office)
Rep. Henry A. Waxman (Washington and Los Angeles offices)
Senator Byron L. Dorgan
Senator Harry Reid
Rep. Chris Van Hollen

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Mr. DAVIS OF VIRGINIA. In view of the court actions, I know that the longstanding committee policy still applies. This is not the forum to prosecute private lawsuits or the place to exploit the tragic events, but there are some unanswered questions, Mr. Waxman, and I applaud you for trying to get to some closure on these issues.

A separate focus on this hearing is on management and oversight of private security agreements; specifically, the allegation that tiering of personnel charges by layers of security subcontractors exorbitantly inflated the price paid by the Government under cost-plus agreements. Tiering could be pernicious if each party was free to mark up their invoices and pass them on, but so far we found that subcontractors had fixed price contracts with the DOD prime contractor, KBR, a former Halliburton subsidiary, so the subcontractors could not pass on costs beyond the fixed unit prices—mostly competitive bid—in their contracts. In those cases, at least, the alleged profiteering shouldn't be possible. There is no legal way to profit from tiering under that scenario.

Even so, there remains the question of whether KBR may have acted improperly by allowing its subcontractors to use any type of security services at all, or for not knowing whether third and fourth-tier subs included any security costs in their competitively bid fixed price contract costs.

The prime contract includes a generic prohibition against employees carrying weapons without special permission. Whether state prohibition can be stretched into a specific ban or even specific security charges by remote subcontractors operating in a war zone will likely be the subject of intense discussion between the Army and KBR.

Make no mistake: there are still too many problems with contracting in Iraq. Just look again at the mess made through the Baghdad Police College, with raw sewage surging through classrooms. More recently we heard about unauthorized VIP trailers and Olympic-sized swimming pools paid for with U.S. tax dollars. With that in mind, I look forward to exploring solutions to the constant security and logistical challenges that make contract oversight in a war zone so challenging.

How do we get the right number of acquisition professionals and auditors with the right skills to the operational theater in time to prevent and not just chase costly mistakes?

In previous hearings we heard that emergency short-term contracting gave way to longer contingency agreements. Then many sustainment contracts were opened into using full and open competition. The process needs to mature and stabilize even further. I hope these hearings help us get to that end. We are looking for a slope to the acquisition learning curve, evidence that lessons learned are being applied.

Thank you.

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

Statement of Rep. Tom Davis
Ranking Member
Committee on Oversight and Government Reform

"Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report"

February 7, 2007

Good morning. The Committee once again meets to examine the challenges of managing contractors in Iraq.

Since 2004, the Committee has been engaged in continuous and vigorous oversight of contracting activities in the war zone. That oversight involved five full committee hearings, fourteen subcommittee sessions, numerous briefings from the agencies involved, and review of thousands of documents the Committee obtained from key federal agencies. Those efforts focused on contracts for logistical support of U.S. military operations and for reconstruction efforts.

Throughout this review, it has been my goal to move beyond the charged rhetoric and easy generalities that swirl around this topic and get to the underlying realities of acquisitions in Iraq. The truth is gritty enough. No one needs to embellish or exaggerate it. Still, some prefer to oversimplify, distort and prejudge the outcome of complex contracting processes to fit the pre-ordained conclusion that nothing goes right in Iraq. I would rather pursue a more constructive mode of oversight that looks beyond tomorrow's headlines to make a lasting difference.

Some of today's testimony will focus on a brutal incident in 2004 in which four civilian security personnel retained by Blackwater USA, a security contractor, were ambushed and killed in Fallujah. Our hearts go out to the families of those four men.

Committee Members should also keep in mind that liability for the Fallujah incident is the subject of pending civil litigation. [**Ask U/C to insert Atty. letter to Pelosi**] In view of the court actions, I hope longstanding Committee policy still applies: This is not the forum to prosecute private lawsuits, or the place to exploit a tragic event for political purposes.

A separate focus of this hearing is on management and oversight of private security agreements, specifically the allegation that "tiering" of personnel charges by layers of security subcontractors exorbitantly inflated the price paid by the government under cost-plus agreements. Tiering could be pernicious if each party was free to mark-up their invoices and pass them on. But so far we've found that subcontractors had fixed-price contracts with the DOD prime contractor, KBR, a former Halliburton subsidiary.

So the subcontractors could not pass on costs beyond the fixed unit prices in their contracts. In those cases at least, the alleged profiteering shouldn't be possible. There's no legal way to profit from the tiering.

Even so, there remains the question of whether KBR may have acted improperly by allowing its subcontractors to use any type of security services at all, or for not knowing whether third and fourth tier subs included any security costs in their competitively bid, fixed price contract costs. The prime contract includes a generic prohibition against employees carrying weapons without special permission. Whether this prohibition can be stretched into a specific ban on even implicit security charges by remote subcontractors operating in a war zone will likely be the subject of intense discussion between the Army and KBR.

Make no mistake: there are still too many problems with contracting in Iraq. Just look again at the mess made of the Baghdad Police College, with raw sewage surging through classrooms. More recently, we heard about unauthorized VIP trailers and Olympic-sized swimming pools paid for with US tax dollars.

With that in mind, I look forward to exploring solutions to the constant security and logistical challenges that make contract oversight in a war zone so challenging. How do we get the right number of acquisition professionals and auditors, with the right skills, to the operational theater in time to prevent, not just chase, costly mistakes?

In previous hearings, we heard that emergency, short-term contracting gave way to longer "contingency" agreements. Then many sustainment contracts were entered into using full and open competition.

The process needs to mature and stabilize further. We're looking for slope to the acquisition learning curve, evidence that lessons learned are being applied.

Chairman WAXMAN. Thank you very much, Mr. Davis.

By the announcement yesterday, all Members who have made an opening statement will not be called on today for an opening statement. Mr. Towns was not here yesterday and has requested that he be given an opportunity for an opening statement.

Mr. TOWNES. Thank you very much, Mr. Chairman. I had a conflict yesterday and, of course, was unable to be present. Thank you, Mr. Chairman, for holding these hearings on waste, fraud, and abuse in Federal contracting.

Today's hearing focuses on military contracts in Iraq, but the problems identified are not unique to the Pentagon or the war. In fact, we see exactly the same type of waste in contracts of Hurricane Katrina and in other areas. The American people and Congress have been very, very generous, but not nearly enough of the money has been sent into the places that need the help, especially the victims of Katrina.

One of the biggest problems I see, Mr. Chairman, and something that I plan to look into in my subcommittee as the Chair, the layers and layers and layers of middle men, each taking a cut of the money before it gets to the people who are actually doing the work. If we could cut out these middle men and middle women, we could get more funds applied to the problems we are trying to solve and save some money while we are dealing with the problem.

This problem is more than just wasted dollars. With so many layers of subcontractors, the Government cannot monitor the work and hold people accountable. This absence of accountability has real, real human cost. People who lost homes in Hurricane Katrina tell us how many different contractors they had to deal with just to get a trailer to live in or to put a roof over their heads. And relatives of Blackwater employees will tell us today how the lack of oversight and planning can contribute to a tragedy.

Mr. Chairman, I am glad that we have the chance today to question some contractors and finally do some oversight, but the same type of wasteful contracting happens so often that this is not just a problem with a few bad apples. The Federal contracting system is broken and we must fix it.

In this Congress we need to pass a bill that closes loopholes and requires more competition. We need to take oversight and control out of the hands of huge contractors and have Government officials supervising the people who are actually doing the work. And we need to make sure that we are not outsourcing work that should be done by Government employees.

I look forward to working with you, Mr. Chairman, and with the members of this committee on both sides of the aisle to pass some real contracting reform as soon as possible.

On that note, Mr. Chairman, I yield back. I am eager to hear from the witnesses.

Chairman WAXMAN. Thank you very much, Mr. Towns.

The Chair would note that Ms. Foxx did not have an opportunity for an opening statement yesterday. I want to see if she wishes to make one to day.

Ms. FOXX. I do, Mr. Chairman. Thank you very much for this opportunity.

As our country engages in the historic struggle against evil and terror, some publicly question whether our efforts are being properly administered and operated. While constructive criticism and genuine critical analysis help ensure transparency and proper management, some partisan rhetoric can actually compromise the good work that is being accomplished in places like Iraq.

Many contractors operating in Iraq have been subjected to a great deal of scrutiny. While I understand there may be some waste as contractors operate in a war zone, a vast majority of the work done by our military contractors is praiseworthy.

American contractors deliver critical supplies, infrastructure, and security in an incredibly hostile environment. One of these contractors, Blackwater USA, is headquartered in my home State of North Carolina. Today they are facing accusations of negligence and profiteering, but I see another side of this company that often remains unmentioned in the media. For example, many Blackwater security personnel were previously honorable law enforcement and military personnel, professionals. These folks are well trained and well equipped as they work tirelessly side by side with our military as they pursue victory over vicious, heartless attacks of violence. Furthermore, in response to emerging threats arising in the war on terror, Blackwater is developing a number of technologies which can serve to protect our brave servicemen and women fighting overseas.

Given the tremendous personal sacrifices and acts of patriotism made every day by the brave folks who work for contractors such as Blackwater, I hope that today's hearing will provide an opportunity for a fair defense against some of the accusations which have been leveled against them.

I look forward to the testimony of today's witnesses.

I want to add one comment to the prepared statements. I appreciate very much what Mr. Towns was saying about how we should be looking at waste, fraud, and abuse throughout the Federal Government. I will tell you that this is an issue near and dear to my heart. But one of the problems that we have is we are doing too much at the Federal level and Congress is not exercising its appropriate oversight authorities. I think many times we are working with systems that simply don't work. Having hearing after hearing is not as productive as it should be in terms of our looking at that. But I think one of our biggest problems is that the Federal Government tries to do things it has no business doing, and we simply cannot do the proper oversight, and we need to reduce the role of the Federal Government instead of increasing the role of the Federal Government.

Thank you.

Chairman WAXMAN. Thank you very much for your comments.

We will now turn to the witnesses, but before that we have a memo that has been circulated to the members of the committee. It is additional information for hearing on private security contractors. Without objection, we would like to make that part of the record.

[The information referred to follows:]

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

TOM DAVIS, VIRGINIA
RANKING MINORITY MEMBER

ONE HUNDRED TENTH CONGRESS

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MEMORANDUM

February 7, 2007

To: **Members of the Committee on Oversight and Government Reform**

From: **Majority Staff**

Re: **Additional Information for Hearing on Private Security Contractors**

One novel feature of the war in Iraq has been the heavy reliance on private contractors to provide security services. According to estimates from the Special Inspector General for Iraq Reconstruction, 12.5% of the federal spending on Iraq reconstruction – which would equal $3.8 billion in taxpayer funds – has been expended on security services. Some estimates say that there are close to 50,000 private security forces operating in Iraq.

Today's hearing provides an opportunity for the Committee members to ask three basic questions about the extensive use of private security services: (1) Are private security contractors operating in Iraq doing an adequate job? (2) How much are they costing the federal taxpayer? And (3) is the federal government providing sufficient oversight?

The hearing will focus in particular on the operations of Blackwater USA, one of the largest private security contractors operating in Iraq.

I. GROWING RELIANCE ON PRIVATE SECURITY CONTRACTORS

The Bush Administration has increasingly relied on private security contractors to support and replace traditional military functions in Iraq. Under direct contracts with the government and subcontracts with reconstruction firms, private security contractors perform a wide range of security functions, including: site security for military bases, the Green Zone, and critical infrastructure; cash transport; weapons demolition; surveillance; the guarding of key personnel, contractors, and civilian dignitaries; armed escorts for supply convoys; intelligence

gathering; psychological warfare; covert operations; and the training of Iraqi security forces.[1] The Administration does not know how many private security contractor employees are operating in Iraq. In March 2006, the director of the Private Security Company Association of Iraq estimated that there were 48,000 employees from 181 security firms operating there.[2] That is the equivalent of three U.S. Army divisions. The Department of Defense estimated that at least 60 security contractors were operating in Iraq with as many as 25,000 employees.[3] Major security contractors operating in Iraq include Aegis, Blackwater, Dyncorp, Erinys, and Triple Canopy.

GAO has found that security costs represent a significant portion of the total funds spent under major reconstruction contracts. Eight of the 15 reconstruction contracts examined by GAO in July 2005 had security costs in excess of 15% of the total contract billings. Security costs exceeded 25% under three of these contracts. These rates do not reflect all of the security costs under these contracts because they largely exclude the security costs of subcontractors. Salaries for private security personnel are as high as $33,000 a month, according to GAO.[4]

Similarly, a recent survey of contracts by the Special Inspector General for Iraq Reconstruction reported that 12.5% of federal spending on reconstruction projects was consumed by security costs.[5] Extrapolating this percentage to the more than $30 billion spent on the reconstruction to date produces an estimate that $3.8 billion in taxpayer funds has been expended on private security services. This figure does not include any estimate of the costs of security services associated with military support contracts.

While the Pentagon does not track nonmilitary casualties, it is believed that private security contractors have suffered hundreds of deaths and casualties in Iraq. Various non-military sources have counted at least 312 security contractors killed in Iraq.[6]

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[1] Government Accountability Office, *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers* (July 2005) (GAO-05-737).

[2] Committee on Government Reform, Subcommittee on National Security, International Relations, and Emerging Threats, *Hearings on Private Security Firms: Standards, Cooperation and Coordination* (June 13, 2006).

[3] Government Accountability Office, *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers* (July 2005) (GAO-05-737).

[4] *Id.*

[5] Special Inspector General for Iraq Reconstruction, *Fact Sheet on Major U.S. Contractors' Security Costs Related to Iraq Relief and Reconstruction Fund Contracting Activities* (Jan. 30, 2007) (SIGIR-06-044).

[6] See *Private Security Workers Living on Edge in Iraq*, Washington Post (Apr. 23, 2005) (reporting that 240 security contractors had been killed in Iraq as of April 2005); *see also* Iraq Coalition Casualty Count (online at icasualties.org/oif/Civ.aspx) (accessed on Feb. 5, 2007) (documenting 72 additional security contractor deaths since April 2005).

Thus, by many measures, the role of private security contractors in Iraq is unprecedented in its size and scope. According to Peter Singer of the Brookings Institution, "Iraq is not just the biggest US military commitment in generations, it is also the biggest market for private military services — ever."[7] There have been reports of misconduct by private security forces in Iraq. In February 2005, NBC reported that four former private security contractors working for Custer Battles had alleged that other Custer Battles security personnel "terrorized civilians" by shooting into a car to clear a traffic jam and gunning down an unarmed teenager walking by the side of a road.[8]

The conduct of private security contractor personnel has not been subject to a clearly defined and practically effective legal regime. The Coalition Provisional Authority granted foreign contractors immunity from Iraqi law while working within the boundaries of their contracts, a rule which remains in effect today. Although U.S. contractor employees may be prosecuted under American criminal law, the Department of Justice has not pursued any prosecutions to date. The defense bill passed in October 2006 included a provision that subjects all security contractors in Iraq to the Uniform Code of Military Justice, but it has yet to be applied in a particular case.[9]

II. ARE THE PRIVATE SECURITY CONTRACTORS DOING A GOOD JOB?

There has been no comprehensive assessment of the quality of the work done by private security contractors. At the hearing, members will have an opportunity to begin to address this question by examining a disastrous incident in Fallujah involving Blackwater.

On March 31, 2004, four Americans working as private security personnel for Blackwater USA — all of whom were veterans of the U.S. armed forces — were ambushed and killed in Fallujah while on a protection mission. This incident was a turning point in public opinion about the war, as photos of their burned and mutilated bodies were widely displayed in the U.S. media. The killings prompted the First Battle of Fallujah, a major U.S. military offensive into Fallujah that began on April 4, 2004, and resulted in the deaths of 27 U.S. servicemen and approximately 800 insurgents and Iraqi civilians. Military observers have credited the intensity of the U.S. offensive in Fallujah with aggravating the negative Iraqi sentiment towards the coalition occupation and fueling an escalation of the insurgency.[10]

Family members of the four individuals killed in Fallujah are now raising questions about the performance and motivations of Blackwater. They allege that Blackwater sent their family

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[7] Peter W. Singer, *The Enron Pentagon* (Oct. 19, 2003).

[8] *U.S. Contractors in Iraq Allege Abuses*, NBC Nightly News (Feb. 17, 2005).

[9] *Contractors in War Zones Lose Immunity,* Boston Globe (Jan. 7, 2007).

[10] *See, e.g., Changing the Army for Counterinsurgency Operations,* Military Review (Nov. 2005).

members into Fallujah unprepared — without armored vehicles, a rear gunner for each vehicle, or heavy automatic machine guns to defend against attacks — in violation of contractual obligations. They allege that Blackwater even refused to provide the personnel with a map of the area. In their view, it is dangerous to rely on for-profit contractors to provide military services because the private contractors have an economic incentive to cut expenditures on safety equipment to maximize profits.

In preparation for the hearing, the Committee received over 100,000 pages of documents from Blackwater and other sources. Some of the documentary evidence received by the Committee raises questions about whether Blackwater adequately equipped the contractors sent into Fallujah.

III. ARE THE TAXPAYERS BEING OVERCHARGED?

The reliance on private security contractors is expensive. As mentioned above, salaries for private security personnel can be as high as $33,000 a month, which would amount to $396,000 on an annual basis.

A review of the contracts received by the Committee shows that the cost to the government of Blackwater private security personnel can be even higher. In the contracts examined by the Committee, Blackwater was providing security services to ESS Support Services Worldwide (ESS), which was in turn providing dining services and construction for other contractors such as KBR and Fluor Corporation. Although Blackwater paid its security personnel $500 per day, it billed these personnel at between $815 and $1,075 per day. On an annual basis, this amounts to $297,475 to $392,375 per employee. This did not include the costs of food, housing, and insurance, which were covered separately by ESS.

Blackwater was providing security services to ESS in conjunction with a Kuwaiti company, Regency Hotel & Hospital Company. Regency added on a markup of $285 to $425, bringing the cost actually billed to ESS to $1,100 to $1,500 per day. On an annual basis, this is equal to between $401,500 and $547,500 per year per security personnel.

Under this particular contracting arrangement, the actual costs to the taxpayer may have been even higher. Although ESS provided services under fixed price contracts, it factored security costs into the prices it negotiated. In addition, because prime contractors such as KBR had cost-plus contracts, the cost to the government for these services effectively increased by an additional 1% to 3%, not counting overhead or general and administrative costs.

These costs are significantly higher than the direct costs that would be incurred by the military. The security services provided by Blackwater would typically be performed by an Army Sergeant, whose salary, housing, and subsistence pay range from approximately $140 to $190 per day, depending on rank and years of service. These equate to an annual salary ranging

from approximately $51,100 to $69,350 per year.[11] The Blackwater costs are four to ten times higher.

Blackwater has told the Committee that because of contract disputes, Blackwater was not paid by Regency. ESS has confirmed that there was a dispute about the security services provided by Blackwater, causing ESS to issue cure notices. ESS informed Committee staff, however, that it paid Regency for the security services it believed were provided, and ESS billed KBR and Fluor for its full array of services, which included private security services. If this is accurate, it would appear that the taxpayer paid for the security services provided by Blackwater, as marked up by Regency, regardless of whether this money actually was paid by Regency to Blackwater.

Defenders of private security contractors say that using private security contractors saves the government money because it avoids the need to train, equip, and support troops. There is evidence, however, that the reliance on private contractors is actually increasing the government's training costs. According to one expert, private security firms inflate cost to the taxpayer by using "public funds to offer soldiers higher pay, and then charge the government at an even higher rate, all for the services provided by the human capital that the military itself originally helped build."[12]

Another concern is overcharging and double-billing by private security contractors. A January 2005 audit of a Blackwater security contract by the State Department Inspector General found that Blackwater was charging the government separately for "drivers" and "security specialists," who were in fact the same individuals.[13] The audit also revealed that Blackwater was improperly charging profit as part of its overhead costs, which results "not only in a duplication of profit, but also a pyramiding of profit because, in effect, Blackwater is applying profit to profit."[14]

IV. IS THE FEDERAL GOVERNMENT PROVIDING ADEQUATE OVERSIGHT?

The Committee's investigation suggests that there is little federal oversight of the private security contractors. On November 30, 2004, then-Ranking Member Waxman wrote to the U.S. Army Field Support Command requesting basic information about private security services provided under KBR's LOGCAP contract, including "how much the individuals providing the

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[11] U.S. Department of Defense, *Regular Military Compensation Calculator* (online at www.dod.mil/militarypay/pay/calc/index.html) (accessed on Feb. 5, 2007).

[12] Peter Singer, Outsourcing War, *Foreign Affairs* (Mar. 10, 2005).

[13] U.S. Department of State, Office of the Inspector General, *Agreed-Upon Procedures Review of Daily Direct Labor, Aerial Support Equipment and Indirect Expense Rates Proposed by Blackwater Security Consultants, Incorporated* (Jan. 31, 2005) (OIG-AUD/IQO-05-13).

[14] *Id.*

security services were paid and how much KBR and each of the subcontractors involved charged for overhead, profits, and other components."[15]

For over 18 months, the Defense Department refused to answer this inquiry. When a response was finally provided, it did not provide the requested accounting, but instead offered erroneous assertions about the contracting arrangement itself. In a July 14, 2006, letter, the Secretary of the Army represented that the Defense Department was "unaware of any services under the LOGCAP contract that were provided by Blackwater USA."[16] It appears, however, that security services were provided by Blackwater under the contract. According to ESS, the company did utilize Blackwater to provide private security under the LOGCAP contract.

The Secretary of the Army also asserted that "KBR has stated they have no knowledge of any subcontractor utilizing private armed security under the LOGCAP contract."[17] ESS, however, has now provided Committee staff with documents establishing not only that ESS used private security contractors under LOGCAP, but that KBR was made aware of such arrangements.

The more the staff has investigated private security contracts, the more questions and uncertainties arise. To this day, almost three years after the incident in Fallujah, there remains a dispute about the identity of the prime contract under which the four Blackwater personnel were conducting their mission at the time of their deaths. Initially, press reports and Blackwater itself took the position that the mission was conducted under KBR's LOGCAP contract. In November 2006, however, ESS informed Committee staff that the mission was conducted under a contract held by Fluor Corporation. Fluor, however, has taken the position that the mission was not conducted on its behalf. The Defense Department has provided no independent information that would resolve this dispute.

Likewise, there is disagreement about the legality of the use of private security subcontractors on certain contracts. In the July 14 letter, the Secretary of the Army asserted that "[u]nder the LOGCAP contract, the U.S. military provides all armed force protection for KBR unless otherwise directed" and that "the LOGCAP contract states that KBR personnel cannot carry weapons without the explicit approval of the theater commander."[18] KBR and ESS have taken the position that these provisions apply only to KBR, not to its subcontractors. In contrast, Fluor, which had a comparable provision in its contract, views these rules as applying to subcontractors as well.

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[15] Letter from Henry A. Waxman, Ranking Minority Member, House Committee on Government Reform to Brigadier General Jerome Johnson, Commander, U.S. Army Field Support Command (Nov. 30, 2004).

[16] Letter from Secretary of the Army Francis J. Harvey to Rep. Christopher Shays (July 14, 2006).

[17] *Id.*

[18] *Id.*

Last year, the Defense Department seemed to take the position that contractors were bound by this restriction against using private security subcontractors. In the July 14, 2006, letter, the Secretary of the Army stated: "To date, KBR has not pursued any requests under the LOGCAP contract for personnel to carry weapons nor has the theater commander directed or authorized KBR or any LOGCAP subcontractor to carry weapons."[19] This year, however, after receiving information that Blackwater conducted work under KBR's LOGCAP contract, the Defense Department informed Committee staff that it is reassessing the meaning of these provisions.

V. CONCLUSION

The Fallujah incident was highly publicized and had a significant impact on the course of the war in Iraq. It would be reasonable to expect that nearly three years after the incident, the Defense Department would be able to answer basic questions about the existence of private security subcontracts, the contracts and contractors involved, and the costs to the taxpayer. The fact that the Defense Department is unable to answer even these simple questions suggests that federal oversight of private security contracts is unsatisfactory.

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[19] *Id.*

Chairman WAXMAN. We will receive testimony from the first panel of witnesses. Let me introduce them.

On March 31, 2004, four men working as private security personnel for Blackwater USA were securing a convoy when they were killed as they traveled through Fallujah. These brave and patriotic men were Scott Helvenston, Wesley Batalona, Jerry Zovko, and Michael Teague.

We have with us today family members of all four men. Katy Helvenston-Wettengel is the mother of Scott Helvenston. Scott was a former Navy Seal and a Seal instructor, a world-class athlete, and the father of two young children. Donna Zovko is the mother of Jerry Zovko, a former Army Ranger who was fluent in four languages and was just 32 at the time of his death. Rhonda Teague is the widow of Michael Teague, who was also survived by his son. Mike has served as a member of the Army's elite helicopter unit known as the Nightstalkers. He had completed tours of duty in Afghanistan, Panama, and Grenada. He was awarded the Bronze Star. Kristal Batalona is the daughter of Wesley Batalona, a 20-year veteran of the Army Rangers, who took part in the 1989 invasion of Panama, the first Gulf war in 1991, and the 1993 humanitarian mission in Somalia. Ms. Batalona heard the news of her father's death on her 22nd birthday.

Before we begin, I would like to express, on behalf of myself and the entire committee, our deepest condolences. Our hearts go out to all of you for your loss. As Americans, we all felt the pain that came across when we saw the horrific images, but none of us can truly know your anguish and loss.

Second, I would like to thank you for being here today. Just like your husbands, your fathers, and your sons, you are also very brave to testify before Congress. It is not an easy thing to do, so we thank you very much for it.

It is the custom of this committee to swear in all witnesses that appear before us, so if you don't mind I'd like to ask you to stand.

[Witnesses sworn.]

Chairman WAXMAN. Thank you very much. The record will note that each of the witnesses answered in the affirmative.

We invited all of you to be here today. I understand that you have a joint statement that all four of you signed and want to provide to the committee. Normally we'd give each witness 5 minutes, but if one of you would like to read the statement we would like to recognize you to do that and to take as much time as you need to read the statement.

Mr. ISSA. Mr. Chairman, I would like unanimous consent to place into the record two documents pertinent to this hearing, one addressed to you and Mrs. Pelosi in which it is cited that hearings should go after the Blackwater, the serious lead by extremely Republican companies such as Blackwater, and second a memorandum of the funds given specifically to democratic causes by the law firm that represents these three women.

Chairman WAXMAN. OK. Have you had a chance to review them? Without objection, we will accept those and make them part of the record.

Mr. ISSA. Thank you, Mr. Chairman.

[The information referred to follows:]

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LAURALI M. KOBAL
OFFICE ADMINISTRATOR

December 13, 2006

OUR FILE NUMBER:
2525-02

The Honorable Nancy Pelosi
235 Cannon HOB
Washington, D.C. 20515

RE: <u>War Profiteering and Blackwater Security Consulting</u>

Dear Honorable Pelosi:

Please be advised that our office currently represents the families of the four American security contractors who were beaten, burned, killed, dragged through the streets of Fallujah, and strung up over a bridge for all the world to see. Those images, which were broadcast worldwide on March 31, 2004, will be forever etched into the minds of the American people as one of the symbols of the war in Iraq. Those four men were unfortunately working for Blackwater Security Consulting at the time of their death.

Prior to this past November's election, there were a couple of democratic subcommittees that were looking into the issue of war profiteering in Iraq. Blackwater naturally rose to the top of both of these investigations. On the Senate side, the investigation was headed by Senator Byron L. Dorgan (D-ND), who is the chair of the Senate Democratic Policy Committee. On the House side, the investigation was led by Congressman Henry Waxman (D-CA).

Although these congressional investigations into war profiteering and Blackwater seemed to be heading in the right direction, it appears that the prior position of the democrats in Congress led to these private security companies being evasive and recalcitrant toward the committees conducting the investigations. For example, during Blackwater's testimony before the Government Reform Committee, Subcommittee on National Security, Blackwater's Chris Taylor was repeatedly evasive and non-responsive with respect to his answers, and even had to be

reminded by Congressman Christopher Shays (D-CT) that he was under oath. Blackwater was then asked to produce particular documents, which it has refused to do to date.

In my opinion, these Congressional committees have only begun to scratch the surface of what is deplorable conduct by war profiteers such as Blackwater simply to make a buck. Not only has Blackwater's conduct potentially defrauded the American tax payers out of millions of dollars under government contracts that never even authorized Blackwater to perform security services in Iraq, it has also lead to the death of at least four American citizens -- all in the name of corporate greed. The civil lawsuit that we are currently prosecuting in North Carolina alleges that while Blackwater was being paid exorbitant amounts of money under a murky scheme of subcontracts, Blackwater cut corners and reduced costs in an effort to pad its bottom line.

For example, one of the subcontracts that we have acquired specifically states that all missions in Iraq would be conducted in no less than six-man teams and in armored vehicles. On March 31, 2004, when my clients' loved ones were working for Blackwater in Fallujah that fateful day, they were not working in six-man teams and were not operating in armored vehicles. As our lawsuit alleges, Blackwater pocketed the millions it had been paid to buy armored vehicles, and sent these four men into the most dangerous part of Iraq at the time in nothing more than soft-skin Mitsubishi Pajeros (known in the U.S. as a standard Mitsubishi Montero). Had Blackwater not attempted to increase its profits by not purchasing the armored vehicles required by its own series of contracts, those four Americans would be alive today and the war in Iraq would have taken a slightly different path (as this ambush actually caused the U.S. military to invade Fallujah ahead of schedule in what has been described as the deadliest battle of the war).

There are many other examples alleged in our precedent-setting lawsuit concerning Blackwater's wrongful conduct, including Blackwater not permitting the men to conduct a risk assessment prior to the mission, gather intelligence concerning travel routes, conduct pre-trip inspections of the routes, acquire the necessary weapons, or even obtain a map of the area. Blackwater even sent these men out operational prior to the start date of their own contract.

This particular lawsuit against Blackwater is the first of its kind concerning the lack of accountability for private security contractors operating in Iraq, and is already becoming precedent setting. So far, we have obtained favorable published decisions from the U.S. District Court in North Carolina, as well as the Fourth Circuit Court of Appeals in Richmond, Virginia. As we continue to push this case forward in North Carolina, Blackwater will be also fighting it at the U.S. Supreme Court (where Blackwater has already lost its first motion which was denied by Justice John Roberts).

Nonetheless, as American citizens, we hereby petition to you to initiate, support, and continue the Congressional investigations into war profiteering and specifically Blackwater's conduct. Now that there has been a shift in power in Congress, we are hopeful that your

ALLAHAN & BLAINE

Congresswoman Nancy Pelosi
December 13, 2006
Page 3

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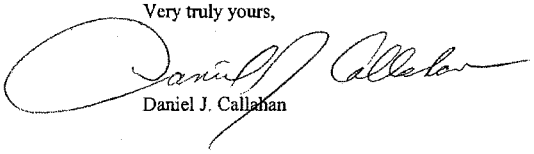
We look forward to the New Direction of America, and to your dedication to putting an end to the fleecing of the American taxpayers and death to its citizens in the name of war profiteers such as Blackwater. Please do not hesitate to contact me at any time.

Very truly yours,



Daniel J. Callahan

DJC:jsr

cc: Rep. Nancy Pelosi (District Office)
Rep. Henry A. Waxman (Washington and Los Angeles offices)
Senator Byron L. Dorgan
Senator Harry Reid
Rep. Chris Van Hollen

G:\2525\2525-02\Cor\Con Pelosi 121206.wpd

LYNN A. WESTMORELAND
8TH DISTRICT, GEORGIA

WASHINGTON OFFICE:
1118 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-5901

DISTRICT OFFICE:
1801 EAST HIGHWAY 34
SUITE B
NEWNAN, GA 30265

Congress of the United States
House of Representatives
Washington, DC 20515–1008

February 6, 2007

Dear Chairman Waxman:

I am writing to express my interest and concern over this week's Hearings on Iraq Reconstruction.

Specifically, concerning the hearing the committee has scheduled for February 7th, I have the deepest sympathies for the families of the men who were murdered by the enemy in the now infamous Fallujah ambush. I understand your interest in questions that may have policy ramifications.

But I write out of a concern that plaintiff's lawyers pursuing civil litigation in this matter against one of our scheduled witnesses for Wednesday's hearing have attempted to use this committee and this hearing to advance their private litigation. In a letter to Speaker Pelosi, a copy of which I have attached, the plaintiffs' attorney for the litigants urged Speaker Pelosi to have the House hold Wednesday's hearing.

The important policy matters that we can address in this forum should not be overshadowed or substituted by advancing private litigation matters. The official business of the committee should be to provide oversight of government activities not promote particular private interests. The plaintiffs will have their day in court; but the American people deserve to have these matters treated independently of private lawsuits.

Furthermore, I understand that your staff has made it clear that the hearing will closely track the litigation file. It was my hope that this hearing would focus on policy matters and be conducted in a bi-partisan manner, but if these reports are true, that the exclusive focus of the hearing is a legal matter active in the Judicial branch, I am disappointed.

Yesterday we were informed that you cancelled the first and last panel of witnesses who would have addressed US government contracting issues. The only panels you have remaining are the clients of the California law firm, Callahan & Blaine, and the panel with the defendant. Furthermore, in the attached letter from Callahan & Blaine addressed to Speaker Pelosi, dated 12/12/06, the plaintiff's lawyers referred to the defendant as an "extremely Republican company." This situation concerns me. I hope that you will reconsider this approach.

Sincerely,

Lynn A. Westmoreland
Member of Congress

PRINTED ON RECYCLED PAPER

CALLAHAN & BLAINE
A PROFESSIONAL LAW CORPORATION

3 HUTTON CENTRE DRIVE
NINTH FLOOR
SANTA ANA CALIFORNIA 92707
(714) 241-4444
FAX (714) 241-4445
WWW.CALLAHAN-LAW.COM

DANIEL J. CALLAHAN*
STEPHEN E. BLAINE
JIM P. MAHACEK@
MICHAEL J. SACHS†
EDWARD SUSOLIK
BRIAN J. MCCORMACK
JAVIER H. VAN OORDT

CAROLINE A. MOLLOY#
SARAH C. SERPA
GREGORY B. SCARLETT
DAVID E. HAYEN
TAE J. IM
MARC P. MILER
JAMES R. ROUSE
DOUGLAS M. CARASSO
LEE E. BURROWS
MICHAEL T. SMITH
KIMBERLY A. MAYNARD
SUE Y. PARK
KATHLEEN L. DURHAM
REBECCA S. LEEDS

OF COUNSEL
SHELLEY M. LIBERTO
IN RABAT, MOROCCO

*ALSO MEMBER OF HAWAII STATE BAR
†ALSO MEMBER OF ILLINOIS STATE BAR
#ALSO A MEMBER OF COLORADO STATE BAR
@CERTIFIED APPELLATE SPECIALIST
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

LAURALI M. KODAL
OFFICE ADMINISTRATOR

December 13, 2006

OUR FILE NUMBER:
2525-02

The Honorable Nancy Pelosi
235 Cannon HOB
Washington, D.C. 20515

RE: <u>War Profiteering and Blackwater Security Consulting</u>

Dear Honorable Pelosi:

Please be advised that our office currently represents the families of the four American security contractors who were beaten, burned, killed, dragged through the streets of Fallujah, and strung up over a bridge for all the world to see. Those images, which were broadcast worldwide on March 31, 2004, will be forever etched into the minds of the American people as one of the symbols of the war in Iraq. Those four men were unfortunately working for Blackwater Security Consulting at the time of their death.

Prior to this past November's election, there were a couple of democratic subcommittees that were looking into the issue of war profiteering in Iraq. Blackwater naturally rose to the top of both of these investigations. On the Senate side, the investigation was headed by Senator Byron L. Dorgan (D-ND), who is the chair of the Senate Democratic Policy Committee. On the House side, the investigation was led by Congressman Henry Waxman (D-CA).

Although these congressional investigations into war profiteering and Blackwater seemed to be heading in the right direction, it appears that the prior position of the democrats in Congress led to these private security companies being evasive and recalcitrant toward the committees conducting the investigations. For example, during Blackwater's testimony before the Government Reform Committee, Subcommittee on National Security, Blackwater's Chris Taylor was repeatedly evasive and non-responsive with respect to his answers, and even had to be

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Nonetheless, as American citizens, we hereby petition to you to initiate, support, and continue the Congressional investigations into war profiteering and specifically Blackwater's conduct. Now that there has been a shift in power in Congress, we are hopeful that your

ALLAHAN & BLAINE

Congresswoman Nancy Pelosi
December 13, 2006
Page 3

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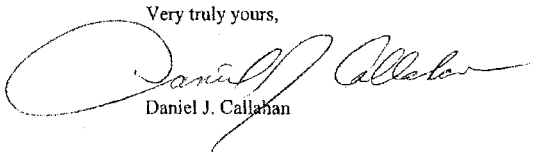
We look forward to the New Direction of America, and to your dedication to putting an end to the fleecing of the American taxpayers and death to its citizens in the name of war profiteers such as Blackwater. Please do not hesitate to contact me at any time.

Very truly yours,



Daniel J. Callahan

DJC:jsr

cc: Rep. Nancy Pelosi (District Office)
Rep. Henry A. Waxman (Washington and Los Angeles offices)
Senator Byron L. Dorgan
Senator Harry Reid
Rep. Chris Van Hollen

G:\2525\2525-02\Cor\Con Pelosi 121206.wpd

crowell moring

1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595 ▪ p202 624-2500 ▪ f202 628-5116

Beth Nolan, Esq.
(202) 624-2514
bnolan@crowell.com

February 16, 2007

1371:ljb
100876.0000037

By Hand Delivery

The Honorable Henry A. Waxman
Chairman
U.S. House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Rapallo

Dear Chairman Waxman:

Enclosed are supplemental answers from Andrew Howell, Esq., General Counsel, Blackwater USA, regarding his testimony to the Committee on February 7, 2007. Also enclosed is a copy of a February 6, 2007 letter to Chairman Waxman from Blackwater's corporate parent, the Prince Group, which Blackwater asks be made a part of the Record of the Hearing.

Sincerely,

Beth Nolan

Enclosures

cc: Honorable Tom Davis, Ranking Member (with enclosures)

ANDREW HOWELL
BLACKWATER USA, GENERAL COUNSEL

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

February 16, 2007 ADDENDUM

The information below is submitted in regard to points left open during testimony before the Committee on February 7, 2007:

1. WAXMAN: "Were your forces short on communications devices, as the e-mail describes?" [Transcript at 71].

- To clarify, I responded that "There was not sufficient communication gear for the team on the day of this memo, had it been fully manned. However, there was sufficient communications gear for the teams that would have been operational at this time." I should have more properly said "There was not sufficient communication gear for the project as a whole on the day of this memo, had it been fully manned. However, there was sufficient communications gear for the teams that were operational at the time."

2. KUCHINICH: "Did your company order that man back to the States?" [Tr. at 125]

- To clarify, when I stated that "our client also, understandably, directed that he be off the project immediately," I should have said that "our US government client directed that the individual be off the project and removed from Iraq immediately."

3. WELCH: "[I]s Blackwater currently under consideration for any [unclassified] sole-source or no-bid contract from the Defense Department or any other federal agency?" [Tr. at 125]

- No notification of intent to award sole-source has been issued. I cannot speak for any government entities as to whether they are considering issuing such a notification. I have inquired within Blackwater and have not learned of any such consideration.

4. WELCH: "Has Blackwater had any communications with the Defense Department or any other agencies in the past several months regarding a contract to provide emergency evacuation services?" [Tr. at 126]

- I have inquired within Blackwater and have not learned of any such communications.

5. WELCH: "And has Blackwater been trying to raise capital, to your knowledge to purchase or lease helicopters of this sort in order to potentially provide services to the United States government?" [Tr. at 126]

- Blackwater intends to competitively bid to provide support for Provisional Reconstruction Teams in Iraq, which project will require numerous helicopters. Accordingly, Blackwater is seeking to make arrangements for acquisition of required aircraft in the event its competitive bid is selected.

6. WELCH/WAXMAN: "[T]his Committee has requested the Fallujah incident reports from Blackwater" [and] "we are entitled to receive information, even if it is classified, and we want you and expect you to turn over that document to us. Will you comply?" [Tr. at 128]

- Blackwater understands the Chairman's assurance that information provided to the Committee "would not be transferred for purposes of litigation, especially if it's classified information" [Tr. at 128] to mean that no information provided to the Committee will be transferred to anyone involved in litigation, directly or indirectly, and thus Blackwater intends to comply with this request to the full extent permitted by federal law. We understand the Committee has the facilities and necessary clearances to hold classified information. As a contractor, however, Blackwater lacks unilateral authority to provide the Committee with any classified incident reports (or any other classified information). Blackwater must obtain release authority from the government agency that has classification jurisdiction over the information. *See, e.g.*, William J. Clinton, Executive Order 12885, December 14, 1993, amending Executive Order 12829, "National Industrial Security Program," January 6, 1993, and Executive Order 12958, "Classified National Security Information," April 17, 1995, as implemented by DoD 5220.22-M, "National Industrial Security Program Operating Manual," February 28, 2006. In light of these legal restrictions, Blackwater is actively engaging various government entities that have such classification jurisdiction in order to comply fully with the Committee's request within the constraints of the law—by either producing the documents in question or identifying them to the Committee.

PRINCE GROUP

February 6, 2007

By Hand Delivery

The Honorable Henry A. Waxman
Chairman
U.S. House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman Waxman:

Blackwater USA will participate in the Committee's hearing on February 7, 2007, as directed and required by the letter of invitation sent to the company, and the Committee's separate request for documents.

In the Committee's invitation to Blackwater USA of January 18, 2007, it indicates that the "topic of the hearing will be the United States' involvement in Iraq reconstruction and, in particular, the financial effects to the taxpayer of layering multiple subcontracts." Your letter of January 19, 2007, requests that Blackwater produce documents in connection with "an investigation into various aspects of the work of government contractors in Iraq, including their role in Iraq reconstruction efforts," indicating that the Committee hearing is "part of this investigation."

Subsequent to receiving your letters of January 18 and January 19, the Committee decided that the plaintiffs in an ongoing lawsuit against Blackwater would be invited to testify at the same February 7, 2007 hearing. Committee staff also provided Blackwater with a copy of a December 13, 2006, letter from the same plaintiffs' counsel to Speaker Pelosi requesting a congressional investigation by this Committee into the very same allegations pending in the plaintiffs' lawsuit described below. It is our understanding based on discussions with your staff that a significant portion of the questions that will be asked of Blackwater will relate to these issues.

However, we are writing to respectfully request that the Committee voluntarily refrain from seeking to elicit information related to a pending civil lawsuit, *Nordan et al. v Blackwater Security Consulting, et al.*, a case filed in the General Court of Justice, The Supreme Court of Wake County North Carolina; alternatively, if the Committee is intent on such questioning, we respectfully request that you close that portion of the hearing that addressed those issues.

1650 TYSONS BOULEVARD, SUITE 800
MCLEAN, VIRGINIA 22102
PHONE: 571-633-9530 FAX: 571-633-9535

As background, all contracts between Blackwater and its independent contractors, including the four men killed, some of whose families have retained the plaintiff's counsel which wrote the December 13, 2006, letter contains the provisions requiring that issues related to the contracts not be discussed publicly and that any dispute be referred to arbitration not litigation.

The allegations repeated throughout the December 13, 2006, letter are directly from the pending lawsuit, are erroneous in almost every respect and are by their nature designed "to defame, degrade, or incriminate" Blackwater. These are precisely the type of circumstances envisioned in Rule 13 of the Committee Rules, which indicates that, "Meetings for the transaction of business and hearings of the Committee shall be open to the public, or closed in accordance with Rule XI of the House of Representatives." House Rule 2(g) in turn provides that Committee meetings shall be open "except when the committee or subcommittee, in open session and with a majority present, determines by a record vote that all or part of the remainder of the meeting that day shall be in executive session because disclosure of matters to be considered . . . would tend to defame, degrade or incriminate any person, or otherwise would violate a law or rule of the House."

To the extent the hearing scheduled for February 7, 2007, will focus on specific allegations in ongoing litigation at the request of plaintiffs' counsel, such a hearing would inevitably "tend to defame, degrade or incriminate" Blackwater, the defendant in the ongoing litigation, and could well "violate a law or rule of the House."

Finally, in addition, any investigation of the underlying facts of what happened in Fallujah that day will likely require a discussion of "operational" issues that should not be publicly disclosed.

We ask that documents that relate to the issues in the Complaint not be made public for the same reasons. Accordingly, Blackwater respectfully requests that its request be given your consideration.

Yours truly,

Joseph E. Schmitz
Chief Operating Officer &
General Counsel

cc: Honorable Tom Davis, Ranking Member

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

MAR 0 5 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Waxman:

At the February 7, 2007, hearing entitled Iraq Reconstruction: Reliance on Private Security Contractors, you and Representative Elijah Cummings asked a series of questions regarding the number of private security contractors in Iraq. My response to each of the questions follows.

The first question asked how many private security contractors are there in Iraq right now. A Government Accountability Office report issued in July 2005 entitled "Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers" identified 60 private security companies operating in Iraq. The Private Security Company Association of Iraq (PSCAI) website (www.pscai.org) includes a list of 177 private security companies operating in Iraq; although not all of these companies are members of PSCAI. As of January 5, 2007, the U.S. Army has 5,925 private security contractor personnel operating under 29 private security contracts in Iraq involving 15 private security companies. Other Department of Defense (DoD) Services, other agencies of the U.S. Government, non-governmental organizations and humanitarian groups, and private companies doing business in Iraq have also awarded contracts for private security services. As required by DoD Instruction 3020.41, the Office of the Undersecretary of Defense for Acquisition, Technology and Logistics (USD(ATL)) has been working with U.S. Central Command (CENTCOM) to identify all contractors working in Iraq. Your question has been referred to them for response.

You and Representative Cummings also asked for the number of private security contractors and subcontractors working under Department of Defense contracts in Iraq, as well as the total cost of these contracts and subcontracts. Your question has been referred to USD(ATL) and CENTCOM for response. Under the purview of the U.S. Army, the Joint Contracting Command – Iraq/Afghanistan (JCC-I/A) has eleven prime contracts with private security contractors. A list of the contracts, name of the contractor, value of the contract and number of armed personnel working under each of the contracts is attached. The total value of these eleven contracts is $416M. The U.S. Army does not have privity of contract with subcontractors. Therefore, we are unable to provide you with the number of private security subcontractors operating in Iraq.

The last question asked how many contractors we have at the Department of the Army involved in Iraq. As of January 5, 2007, there are 96,130 contractor employees operating under 1,960 U.S. Army contracts in Iraq. This number of contracts does not include supply contracts.

Thank you for the opportunity to provide you with additional information on the U.S. Army's mission in Iraq. An identical letter has been sent to Representative Cummings.

Sincerely,

E. Ballard
Deputy Assistant Secretary of the Army
(Policy and Procurement)

Attachment

[illegible]	[illegible]	[illegible]	[illegible]
W91GY0-07-M-0247	Raymond Associates	$ 823,991.00	32
W91GY0-07-M-0264	Triple Canopy	$ 772,297.38	45
W91GY0-07-M-0188	EODT	$ 6,121,656.00	332
W91GEU-07-P-0147	PWC Logistics	$ 30,000.00	18
W91GER-07-M-0004	Triple Canopy, Inc.	$ 24,837.02	12
W91GER-06-D-0001-0003	SOC-SMG, Inc	$ 8,251,067.00	187
W91GET-06-C-1020	Babylon Gates	$ 2,328,000.00	26
W91GER-06-D-0010	Global Strategies Group, LLC	$ 152,083.00	363
W91GER-06-D-0001	EODT Technology, Inc.	$ 14,814,965.00	200
W27P4B-05-C-0006	ERSM LIMITED	$ 598,793.50	4
W911SO-04-C-0003	AEGIS Defense Services LTD	$ 382,158,660.00	986
Total:		$ 416,076,349.90	2205

02/06/2007 20:20 FAX 001/003

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

TOM DAVIS, VIRGINIA
RANKING MINORITY MEMBER

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

Majority (202) 225-5051
Minority (202) 225-5074

FACSIMILE TRANSMISSION

Date: 2/6

To: Casey

From: Jenny Gu

Phone:

Fax: 5-0316

There will be a total of 3 pages, including cover page.

Comments:

If there are any questions or problems regarding this transmission, please call the sender at 202-225-5074

Please Note: The information on this facsimile is confidential and is intended only for the use of the person named above. If this facsimile has come to you in error, please call the sender at the number given above.
Any distribution of this facsimile is strictly prohibited.

SECRETARY OF THE ARMY
WASHINGTON

FEB 06 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter dated December 7, 2006, to the former Secretary of Defense, Donald H. Rumsfeld, and your January 22, 2007, letter to current Secretary of Defense, Robert M. Gates, requesting information about a possible contractual relationship between ESS Support Services Worldwide (ESS), Blackwater Security Services (Blackwater), and Kellogg, Brown and Root Services, Inc. (KBRS) under the Army's Logistics Civil Augmentation Program (LOGCAP-III) contract. The Office of the Secretary of Defense has asked me to respond to both of your letters.

When this issue was first brought to the U.S. Army's attention, the U.S. Army Materiel Command (AMC) researched the potential contractual relationship between these firms. Based on all available documentation in contract files and on correspondence from KBRS, AMC was unable to substantiate a link. This conclusion formed the basis for my letter of July 14, 2006, to you on this subject and was also the basis for testimony provided by the Deputy Assistant Secretary of the Army (Policy and Procurement), Ms. Tina Ballard, before the Committee on September 28, 2006.

Following the hearing, AMC's major subordinate command, the U.S. Army Sustainment Command (ASC), continued to pursue information on this important matter. As a result of extensive research, and U.S. Army correspondence with ESS/Compass Group and KBRS, ESS did confirm that they obtained security services. ESS built and operated DFAC facilities both as a direct contractor to the U.S. Government and as a subcontractor to KBRS and other companies. On January 30, 2007, we learned that ESS engaged Blackwater through Regency Hotel and that ESS employed private security primarily to protect its management employees traveling in Iraq and to transport currency to pay vendors and employees. Based on information we received from KBRS, we understand that these security costs, which were not itemized in the contracts or invoices, were factored into ESS' labor costs under its DFAC service contracts with KBRS under LOGCAP III.

The U.S. Army is continuing to investigate this matter and we are committed to providing full disclosure of the results of our investigations to the Committee. Contract

documents are being gathered and will be provided to your staff. We will continue to forward additional documents as they become available to us from KBRS and others.

Please be assured that we share your commitment to ensuring that contractors supporting the military and reconstruction efforts in Iraq comply with the terms and conditions of their contracts. I have asked my staff to work expeditiously toward addressing the issues. A similar response is also being sent to Representative Van Hollen.

Sincerely,

Francis J. Harvey

INDEPENDENT CONTRACTOR SERVICE AGREEMENT

THIS AGREEMENT is dated as of [redacted], 2004 and is by and between Blackwater Security Consulting, LLC, a Delaware Limited Liability Company ("BSC") and [redacted], an independent contractor residing at [redacted]

RECITALS

A. BSC is a Delaware Limited Liability Company that operates a business which provides security, protective, training and logistical and air support services in the United States and in foreign countries (the "Business"); and

B. Contractor is experienced in providing the Services utilized in the Business; and

C. BSC and a private entity or individual (the "Customer" or "Principal") have entered into a contract (the "Engagement") whereby BSC will conduct security and close protective operations in various locations, either domestically or overseas as they travel (collectively, the "Services"); and

D. Contractor has voluntarily agreed to serve as an independent contractor to BSC and to otherwise facilitate the Engagement; and

E. BSC desires to engage the services of Contractor and Contractor desires to provide services to BSC pursuant to the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the receipt and sufficiency of which is hereby acknowledged, the above recitals are incorporated in this Agreement, and the parties mutually agree as follows:

1. DEFINITIONS.

1.1 "Affiliate" shall mean any person, partnership, corporation, limited liability company, trust, member or other entity or association, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control of a shareholder or a shareholder's successor or assigns of BSC, including Blackwater Lodge and Training Center, Inc., Blackwater Target Systems LLC, Aviation Worldwide Services LLC ("AWS") and any and all of their Affiliates and shareholders, members or managers). The term "control" as used in the immediately preceding sentence, means, with respect to a corporation, the right to exercise, directly or indirectly, more than fifty percent (50%) of the voting rights attributable to the controlled corporation, and, with respect to any person, partnership, limited liability company, trust, other entity or association, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled entity.

1.2 "Air Service" or "Air Services" shall mean engaging in or providing services directly or indirectly as a pilot, navigator, flight engineer, mechanic or serving as a crew member in connection with any aircraft, rotorcraft, fight or other aviation transportation delivery or other aviation related services.

1.3 "Business Relationship" shall mean the employment, providing of services to or for and contracting with any individual or entity whose business is similar to that of BSC.

1.4 "Confidential Information" shall mean any and all information marked appropriately and exchanged between Contractor and BSC or Contractor and Customer and shall include any information which is confidential in nature concerning any matters affecting or relating to the business affairs of BSC or Customer, and their Affiliates, including but not limited to the following information:

1.4.1 the names, addresses, billing information, and requirements of any of BSC's or Customer's employees, clients, other Contractors, or suppliers contracting with BSC or Customer;

1.4.2 any and all information concerning the net worth, assets, liabilities, holdings, or present or future investments of BSC and any of its Affiliates;

1.4.3 any information concerning any and all proprietary technologies of BSC or Customer and any of its Affiliates;

1.4.4 any and all computer programs, software programs, system documentation, and manuals developed by BSC, Customer or any of their Affiliates in or for the operation of its business; and

1.4.5 Any and all information designated "Confidential" by BSC or Customer (by oral means, by writing or otherwise), including without limitation any and all reports, technical documents, maps, plans, recommendations, estimates, equipment, performance reports, subscriber lists, pricing information, studies, findings, inventions, ideas, drawings, specifications, parts lists, technical data, data bases, software in any form, flow charts, and other business and technical information. The Contractor agrees that the aforementioned categories of information are strictly confidential and/or trade secrets of BSC or Customer and that this Agreement is intended to protect and to include without limitation information, documents and programs that constitute Trade Secrets under any applicable State Statutes. The Contractor understands that use of this information by the Contractor in violation of this Agreement will result in irreparable damage to BSC or Customer. Contractor agrees not to use, or cause to be used, the aforementioned Confidential Information and trade secrets of BSC except for, and on behalf of, BSC. At the request of BSC, Contractor agrees to immediately surrender and deliver to BSC all tangible forms of the Confidential Information, trade secrets, documents, papers, and other records or property which Contractor may then possess or have under Contractor's control or which BSC provides to Contractor. Confidential Information shall not apply to any information which: (a) is disclosed in printed publications generally available to the public; (b) is disclosed in printed publications which become generally available to the public after disclosure through no fault of the Contractor; or (c)

Contractor can establish, by written documents, was in the Contractor's possession prior to the time of disclosure to Contractor by BSC.

1.5 "Commencement Date" shall mean the date that Contractor begins providing Services (defined herein) pursuant to this Agreement; it being specifically understood that there may be a gap in time between training and travel or training and Deployment.

1.6 "customer" shall mean any and all individuals, entities, corporations that have received any services from BSC prior to the Effective Date, including all individuals who have contracted services from BSC.

1.7 "Effective Date" shall mean the date when the last of BSC or Contractor signs this Agreement.

1.8 "Duty Station" shall mean Baghdad, Iraq and the surrounding regions /Countries or such other geographic place of performance as designated by BSC or Customer. Contractor acknowledges that the Contractor may be required to perform services pursuant to this Agreement in geographic locations other than the above-referenced location and that Contractor's Deployment to these alternative locations is a condition of this Agreement.

1.9 "Pay Period" shall mean a period of time equal to approximately thirty (30) days (or such other period as may be prescribed by BSC) during which Contractor shall be entitled to compensation in the amount set forth in Section 3.1 of this Agreement for services provided hereunder; provided, however, that payment for the last 30 days of a Deployment will be made to Contractor by BSC only upon Contractor's return to the U.S.

1.10 "Point of Hire" shall mean the city with an airport serviced by commercial airline carriers that is closest to Contractor's address as listed in the records of the Company.

1.11 "Restricted Activity" for the purposes of this Agreement shall mean any one or more of the following, without the prior written consent of BSC:

(a) engage in or provide, directly or indirectly, services for any other companies or entities managing, employing or contracting with or consulting for a competitor of BSC or any of its affiliates, successors, and assigns in order to provide similar services to Customer as is contemplated under this Agreement;

(b) join, be employed by, contract as an independent contractor for, or associate in a Business Relationship with individuals, companies or any entities, managing, employing or contracting with or consulting for a competitor of BSC or any of its affiliates, successors, and assigns in order to provide similar services to Customer as is contemplated under this Agreement; or

(c) accepting employment with or becoming a partner of or acquiring greater than a five percent (5%) ownership interest in any partnership, corporation or other entity engaged in the practice or managing the practice of Services

to a competitor of BSC or any of its affiliates, successors or assigns in order to provide similar services to Customer as is contemplated under this Agreement.

1.12 "Transportation Costs" shall mean all expenses incurred by BSC for the transportation of Contractor from Contractor's address of record to the Duty Station and return transportation from the Duty Station.

2. POSITION/SERVICES. Contractor accepts the position as a security team member, reporting directly to any supervisor as may be designated by BSC or Customer from time to time. Pursuant to the terms of this Agreement, Contractor shall perform the duties and responsibilities customarily associated with this position in accordance with the rules, regulations and directives of BSC and any International, Federal, State, Local, Governmental agency laws and regulations.

3. FEES.

3.1 As of the Commencement, Contractor shall be entitled to compensation for Services performed hereunder in an amount equal to the following:

Training Days:	$ 100 per day
Travel Days:	$150 per day
Per Diem:	Per JTR, for travel purposes only
Deployment Days	$ 500 per day Static Security Line Supervisor
	$ 500 per day Operations Support (T3)
	$ 600 per day Operations Support (T2)
	$ 600 per day PSD member (T2)
	$ 600 per day K9 member (T2)
	$ 625 per day PSD AIC
	$ 650 Site manager (C1)

(the "Fees"). "Detail Days" shall mean each day that Contractor spends more than 12 hours in support of a BSC supported Personal Security Detail or operation. Contractor understands and acknowledges that he shall only be entitled to earn Fees from the Commencement Date, followed by up to ten days of standby on non-contract basis, and for detail days. Payment will be sent by regular mail to the address set forth below Contractor's signature or such other means as has been agreed to among BSC and Contractor.

3.2 Contractor will be reimbursed a per diem at JTR rates during detail days for meals and incidentals as authorized by the BSC with its prior consent and at its sole discretion; provided, that, to the extent meals are made available to Contractor by Customer or BSC, Contractor will not be entitled to a per diem for any such day. Contractor shall submit expense receipts [and per diem claim vouchers] to BSC at the conclusion of Contractor's Deployment. BSC will provide certain equipment and weapons in connection with the Engagement; provided, however, that Contractor may, with prior approval from BSC,

bring any personal equipment (understanding that BSC shall not be responsible for any loss or damage to such property).

4. GEOGRAPHIC LOCATION. The geographic location of this Agreement shall be at the Duty Station or such other location as directed by BSC or Customer. Contractor understands that the geographic location of any Deployment may change at any time.

5. TERM. The term of this Agreement shall be from the Commencement Date until the Termination Date (as defined below) (the "Term"). This Agreement may be extended by the parties hereto or by BSC's successor or assign, by written instrument executed by all parties to this Agreement. "Termination Date" shall mean the earlier to occur of (i) the termination date of the Engagement with BSC by the Customer, (ii) the three year anniversary date of the date of this Agreement and (iii) the Noticed Termination Date (as defined below). It is understood and agreed to by the parties that this Agreement may be applicable and govern the relationship between BSC and Contractor for multiple Deployments, i.e., the Contractor need not re-execute a copy of this Agreement to be bound by the terms and conditions herein for all BSC related Deployments or in each case that Contractor provide services to BSC.

6. WORK / ROTATION SCHEDULE. The normal work week shall be defined as commencing at 0001 hours Monday and ending at 2400 hours the immediately following Sunday. Work hours during such weeks will be scheduled at the sole discretion of BSC and the needs of Customer, but Contractor will be working 7 days per week during a Deployment. It is currently contemplated that each Contractor will be deployed overseas pursuant to this Agreement for a period of at least sixty days (60) days when a contract is in place that must be supported, excluding any travel days (each such round trip upon return to the U.S., a "Deployment"). Contractor understands and agrees that he is not entitled to Fees for any minimum time period if the Engagement or Contractor's Services are otherwise terminated for any reason or no reason whatsoever by BSC or Customer.

7. TAXES. Except for any withholding obligations imposed on BSC by any State or Federal law of the United States of America, Contractor hereby agrees and acknowledges that Contractor is solely responsible for the payment of all taxes, fees, and payments of any nature whatsoever due to governmental entities of any country incurred by reason of Contractor's acceptance of compensation and providing the Services under this agreement. All travel expenses under this Agreement are considered taxable income and will appear on the Contractor's Form 1099. Thus, Contractor shall retain all expense receipts for tax purposes. Both BSC have the right to examine such receipts for the purposes of verifying invoices. Any and all [per diem vouchers or] expense reimbursements will be made at the end of the Deployment,

8. TRANSPORTATION. BSC agrees to provide economy class air transportation for Contractor from Point of Hire to Duty Station. Notwithstanding anything to the contrary set forth in this Agreement, BSC further agrees to provide return air transportation for Contractor from Duty Station to Point of Hire upon termination of this Agreement.

Contractor expressly agrees and acknowledges that the transportation provided pursuant to this Section shall be for travel which is authorized for Contractor and by BSC only.

9. GOVERNMENT FACILITIES ABROAD. Contractor hereby agrees and acknowledges that Contractor shall be personally liable for any charges or fees incurred by Contractor at facilities operated by the Customer or any other third party that is not directly related to the Engagement, i.e., no personal expenses will be reimbursed.

10. PERFORMANCE DURING HOSTILITIES. Contractor agrees and acknowledges that the Services performed in the Duty Station, pursuant to this Agreement have been identified as being essential to BSC's complete performance under the terms of the contract between BSC and the Customer and notwithstanding the existence of hostilities, or a state of war, whether declared or undeclared, Contractor agrees to perform his or her assigned duties until released from such duties by the Contractor's supervisor or the supervisor's designated representative.

11. CONTRACTOR ACKNOWLEDGMENT, RELEASE AND WAIVER.

11.1 Acknowledgment. Contractor agrees and acknowledges that due to the hazardous nature of the Duty Station and the Services to be provided hereunder, Contractor hereby expressly and voluntarily agrees to assume any and all risks of personal injury including, without limitation, death and disability which may result from Contractor providing Services pursuant to this Agreement. Contractor understands and acknowledges that the Duty Station is volatile, hostile and extremely dangerous and in some instances, military forces may be conducting continuing military operations in the region. Contractor understands and acknowledges that by voluntarily agreeing to participate in the Engagement, he is voluntarily, expressly and irrevocably assuming any and all known and unknown, anticipated and unanticipated risks which could result in physical or emotional injury, paralysis, death, or damage to himself, to his property, or to third parties, whether or not such injury or death is caused by other independent contractors to BSC, known and unknown domestic and foreign citizens or terrorists or U.S. governmental employees. The risks include, among other things and without limitation, the undersigned being shot, permanently maimed and/or killed by a firearm or munitions, falling aircraft or helicopters, sniper fire, landmine, artillery fire, rocket propelled grenade, truck or car bomb, earthquake or other natural disaster, poisoning, civil uprising, terrorist activity, hand to hand combat, disease, poisoning, etc., killed or maimed while a passenger in a helicopter or fixed wing aircraft, suffering hearing loss, eye injury or loss; inhalation or contact with biological or chemical contaminants (whether airborne or not) and or flying debris, etc. Contractor fully appreciates the dangers and voluntarily assume these risks as well as any other risks in any way (whether directly or indirectly) connected to the Engagement. Contractor understands and agrees that Contractor is solely responsible for obtaining any and all liability insurance, short and long term disability, workers compensation, medical or dental benefits and medical evacuation insurance and therefore understands and

agrees that BSC is not responsible for obtaining any such insurance on Contractor's behalf. Contractor hereby expressly agrees and acknowledges that the Fees without additional benefits which may be provided to Contractor, is full and fair consideration for Contractor's covenants hereunder.

11.2 Release. Except as to any contractual benefits expressly provided herein, Contractor, on behalf of Contractor and Contractor's spouse, heirs, administrators, estate, personal representatives, successors and assigns (collectively referred to as "Contractor's Group"), hereby releases and forever discharges BSC, AWS and all of their agents, owners, shareholders, officers, members, managers, employees, directors, subcontractors, Affiliates and representatives, successors and assigns (collectively referred to as "Releasees") from any and all claims, judgments, awards, actions and causes of action which may be asserted now or in the future by Contractor's Group for any liability whatsoever for accident, injury (including without limitation, death or disability), losses, loss of consortium, expenses, loss of income and other damages based upon or in any way arising from Contractor's performance of Services pursuant to this Agreement and the transportation of Contractor, including, without limitation, loss of life, loss or damage to property, irrespective of where (or by whom) such accident, injury, loss of life, loss or damage to property occurs, whether as a result of negligence, gross negligence, omissions or failure to guard or warn against dangerous conditions, use, structure or activity, or any other cause, arising from Contractor's participation in the Engagement or any other activity on or off of Releasees' premises or Contractor's use of BSC, Customer equipment and facilities even if such injury was caused in whole or in part by the negligence of Releasees.

11.3 Covenant Not to Sue. The Contractor further agrees and covenants not to file, prosecute, bring, maintain or in any way proceed on any claim, suit, civil action, complaint, arbitration or administrative action or proceeding of any kind in any municipal, state, federal agency, court, or tribunal against Releasees with respect any of the foregoing facts, occurrences, events, transactions, damages, injuries, claims, causes of action and other matters released in Section 11.2.

11.4 Liquidated Damages. The parties hereto expressly agree that in the event of Contractor's death or injury based upon or in any way arising from Contractor's performance of Services pursuant to this Agreement and the transportation of Contractor, even if such injury was caused in whole or in part by the negligence of Releasees, Contractor's Group has no recourse whatsoever against BSC. Contractor understands and agrees that if he is hurt or killed during Contractor's performance of Services pursuant to this Agreement or the transportation of Contractor, Contractor has no recourse whatsoever against Releasees.

12. LIMITATIONS ON AUTHORITY. Unless BSC has given Contractor its express written consent, Contractor has no actual, apparent, or implied authority to:

12.1 Pledge the credit of BSC or any of BSC's other Contractors.

12.2 Bind BSC under any contract, agreement, note, mortgage or otherwise.

12.3 Release or discharge any debt due to BSC unless BSC has received the full amount thereof.

12.4 Sell, mortgage, transfer or otherwise dispose of BSC's assets.

13. CONDUCT OF CONTRACTOR. Contractor will directly report to the Customer or BSCs' leaders, as the case may be, who have been appointed from time to time by Customer or BSC. Contractor agrees and acknowledges that Contractor shall comply with all laws and regulations of the United States, any country where Contractor is a citizen or resident and the host country, including but not limited to laws related to currency, black market, and drug and alcohol use. Contractor shall abide and obey local customs and shall at all times exhibit the highest moral and ethical conduct. Personal attire and hygiene shall be maintained in accordance with BSC or Customer policies. Contractor agrees and acknowledges to abide by all rules and regulations of BSC including BSC's Drug Policy and any other policies and procedures set forth by BSC or Customer. Contractor hereby consents to pre-deployment and periodic random drug testing in connection with the Engagement and the performance of Services hereunder. Contractor has been briefed on the rules of engagement and has reviewed and understands such rules and regulations pertaining to the use of force. The Contractor understands and agrees that introduction, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverages or controlled substances is strictly prohibited during the Engagement.

14. CONTRACTOR REPRESENTATIONS AND WARRANTIES. To induce BSC into entering into this Agreement, Contractor hereby represents and warrants as follows:

14.1 Contractor is in good health and is physically capable of performing his obligations under this Agreement. Contractor agrees and acknowledges that this Agreement is contingent upon Contractor remaining in good physical and mental health as necessary to fully perform his obligations under this Agreement.

14.2 If Contractor is a pilot, Contractor is a duly licensed aircraft pilot by the Federal Aviation Administration for Contractor's position and Contractor's license is current and active and no legal, administrative or other proceedings which may affect Contractor's ability to perform services hereunder are pending or contemplated as of the Effective Date of this Agreement. Further, Contractor's medical certificate is current as described by Federal Aviation Regulation Part 67 ("FAR"), if required for Contractor's position.

14.3 Contractor has no prior arrest or criminal convictions and has never been charged, indicted or convicted of a domestic violence crime of any kind (albeit a misdemeanor or a felony).

14.4 There is no other reason which would prevent Contractor from fully performing Contractor's obligations pursuant to this Agreement.

14.5 Contractor has his own liability, short and long term disability insurance, life insurance, etc.

15. RESTRICTIVE COVENANTS.

15.1 Confidential Information. The Contractor shall not, at any time during the period of providing Services under this Agreement and for a period of five (5) years after termination of this Agreement (or such additional time as required by law) for any reason, including the expiration of the term of this Agreement, either directly or indirectly, divulge, publish, disclose or communicate to any person, firm, or other entity, except as part of Contractor's duties as described in this Agreement, in any manner whatsoever, or appropriate for the Contractor's personal benefit or a benefit of a third party, whether or not the Contractor receives remuneration, any Confidential Information.

15.2 Non-Competition/Non-Solicitation Restrictions. While the Contractor is providing Services to BSC, and for a period of eighteen (18) months from the date of termination of the Contractor's period of performing Services or the expiration of the term of this Agreement, the Contractor shall not, directly or indirectly, whether as a consultant, agent, advisor, sole-proprietor, Contractor, independent contractor, partner, stockholder, owner, or in any other capacity individually, or for the benefit of any person, firm, corporation, or other entity:

15.2.1 compete with BSC by engaging in a Restricted Activity; or,

15.2.2 call upon, solicit, divert, take away, deliver to, canvas, contact, sell, provide services of any kind, or otherwise deal with any Customers of BSC; or,

15.2.3 assist any other individual or entity in soliciting, contacting, diverting, providing services of any kind, selling, or calling upon any Customers of BSC; or

15.2.4 hire, employ, solicit, engage, or associate in any business activity with any individuals who were Contractors of BSC during the time period in which the Contractor was providing services to BSC.

15.3 No Compensation Required. The restrictions set forth in this Agreement shall apply whether or not the Contractor receives compensation or consideration for the Services or acts which would otherwise violate the terms of this Agreement. Additionally, the covenants on the part of the Contractor set forth in this Section (and all Subsections hereof) shall be, and hereby are, deemed to be independent covenants of this Agreement which shall expressly survive termination of this Agreement or a determination that other provisions of this Agreement are invalid or unenforceable; or that BSC has breached the terms of this Agreement.

15.4 Contractor Acknowledgment. Contractor hereby acknowledges and agrees that: (a) this Agreement and the restrictions set forth herein are necessary for the protection of the legitimate business interest of BSC and are intended to be construed and enforceable as valid restraints pursuant to any applicable State Statute; (b) the execution and delivery of this Agreement is a mandatory condition precedent to entering into this Agreement and the providing of Services by Contractor hereunder; (c) the scope of this Agreement and the restrictions are reasonable in time, scope and geography; (d) Contractor does not have any intention of competing, soliciting or disclosing Confidential Information as restricted herein within the scope, area and time limits set forth herein above; (e) Contractor recognizes that a violation of any provision of this Agreement would be deleterious to and could cause severe economic impact on a portion of or all of BSC's business, and that such violation would be an unfair competition against BSC; (f) Contractor represents that upon termination of providing Services to BSC hereunder, the Contractor's experience and capabilities are such that the Contractor can obtain reasonable employment commensurate with the Contractor's education, training, and experience that will not violate the terms of this Agreement.

15.5 Adjustment. If any provision of this Agreement is determined or adjudged by a court to be invalid or unenforceable, the same shall in no way affect any other provision of this Agreement, the application of such provision in any other circumstances, or the validity or enforceability of this Agreement. The parties to this Agreement intend for this Agreement to be enforced as written. If any provision, or part thereof, however, is held to be unenforceable because of the duration or scope thereof, or the area covered thereby, all parties agree that the court or arbitrator (if applicable) making such determination shall have the power to reduce the duration and/or area or scope of such provision to the extent necessary for such provision to be then enforceable. The existence of any cause of action of Contractor against BSC shall not constitute a defense to BSC's enforcement of these restrictive covenants.

15.6 General Remedies. The Contractor hereby acknowledges and agrees that BSC shall be entitled to all equitable remedies, including, without limitation, specific performance and injunctive relief to enforce the terms and provisions of this Agreement and the restrictive covenants set forth herein. Contractor does hereby waive any proof that such breach would cause irreparable injury to BSC or that there is no adequate remedy at law.

15.7 Liquidated Damages. It is expressly agreed by and between the parties to this Agreement that it is impractical and extremely difficult to fix actual damages which may result from the Contractor's failure to comply with the provisions of the Restrictive Covenants in this Agreement for one or more of the following reasons: (a) the difficulty of BSC to prevent a breach of this Agreement by the Contractor; (b) the difficulty of BSC to calculate actual damages and loss of

business resulting from a breach by the Contractor in violation of this Agreement; (c) the difficulty to ascertain the impact of a breach of this Agreement on BSC's Customer and business; and (d) the difficulty that BSC may experience in obtaining timely injunctive relief. Therefore, it is expressly agreed by and between the parties that in the event the Contractor violates the terms or provisions of the Restrictive Covenants contained in this Agreement, then BSC shall be entitled to receive liquidated damages from the Contractor and the Contractor shall pay within five (5) days of notice from BSC, the total sum of Two Hundred Fifty Thousand and No/100 Dollars ($250,000.00). The liquidated damages shall be due and payable in a lump sum to BSC. It is expressly acknowledged by the Contractor that said payment shall not be interpreted nor construed as a penalty but is in fact a good faith attempt to fix damages which BSC will suffer in the event of a breach of the Restrictive Covenants. It is also agreed that this provision for liquidated damages shall not be construed to restrict BSC's right to injunctive relief but shall be BSC's exclusive remedy at law for damages.

16. TERMINATION.

16.1 Termination Without Cause and Without Notice. Contractor hereby acknowledges that BSC may terminate this Agreement and Contractor's Services hereunder without notice at any time with or without cause without advance notice for any reason or no reason whatsoever. In the event that Contractor is discharged pursuant to this Section, Contractor shall be entitled to compensation as provided herein for services provided to the date and hour of discharge only; provided that Contractor shall not be entitled to receive his final compensation until after returning to the U.S. The Contractor shall be responsible for reimbursement to BSC for any advanced amounts for transportation, per diem or any other costs described in Sections 3, 8, 9, 15.7, and 16 and that such amounts are subject to the provision of Section 16.4 herein.

16.2 Termination by Contractor. Contractor may terminate this Agreement only in the event that BSC fails to pay Contractor any undisputed compensation amount; provided, however, that Contractor provides BSC with written notice of such failure and BSC fails to make payment within ten (10) days from the date BSC receives written notice. Contractor hereby agrees and acknowledges that because of the nature of the Services provided to Customer and the resulting obligations of BSC to third parties, Contractor shall not have the right to terminate this Agreement without cause and Contractor hereby expressly waives the right to assert in any action or proceeding that this Agreement is lacks mutuality of obligations between the parties. In the event that Contractor voluntarily (i.e., not at the direction of BSC or Customer) refuses to fulfill his minimum Deployment commitment (as set forth in Section 6), Contractor shall have an amount equal to $200.00 times the number of days short of his sixty (60) day Deployment commitment deducted from his final payment. The parties understand that BSC may cancel this Agreement at any time for any reason or no reason at all upon notice to the other party (the "Noticed Termination Date"); provided, however that (i) if Contractor voluntarily refuses to fulfill his minimum Deployment commitment, such date shall be

considered the Noticed Termination Date and Contractor shall be penalized as set forth above and (ii) upon termination of this Agreement, termination of Services or at the end of a Deployment, as the case may be, Contractor will be required to return to the United States before he is entitled to payment of any outstanding Fees.

16.3 Termination Does Not Affect Restrictive Covenants. Notwithstanding anything to the contrary contained in this Agreement, the termination of this Agreement by either party for any reason shall not affect the validity or enforceability of the restrictive covenants set forth in Sections 15.1 through 15.7. All provisions shall expressly survive the termination of this Agreement.

16.4 Set-Off. Contractor hereby agrees and acknowledges that BSC shall have the right to set-off and deduct from any salary and bonus otherwise due the Contractor an amount equal to any indebtedness of the Contractor to BSC and any and all losses, damages, Transportation Costs, and advanced per diem amounts pursuant to Sections 3, 8, 9, 15.7, and 16, and any other costs, expenses and attorney fees incurred by BSC as a result thereof.

16.5 BSC Assets. Contractor agrees that upon termination providing Services to BSC under this Agreement, all proprietary interests of BSC and its business assets, tangible or intangible, which Contractor deals with or develops, shall remain the sole or exclusive property of BSC and in no event shall Contractor acquire any interest therein or right to use same without the express written permission of BSC. Contractor agrees that in the event he ceases to provide services to BSC, he shall promptly return to BSC, all documents, forms, contracts, lists, maps, completed work or work in progress relating to the affairs of BSC and any personal property of BSC in his possession at the time of termination. All title to supplies, financial records, maps, charts, records, Customer information, equipment and furnishing shall remain the sole property of BSC.

17. INDEMNIFICATION. Contractor hereby agrees to indemnify and hold harmless BSC, its shareholders, officers, directors, Contractors, Affiliates, representatives, successors and assigns from any and all claims, judgments, awards, actions, causes of action, liabilities, asserted by anyone for damages, debts, costs, expenses, obligations and liabilities relating to or in any way arising from the following:

17.0.1 Contractor's failure to pay taxes as set forth in this Agreement;

17.0.2 Contractor's use of facilities or equipment owned and operated by BSC, Blackwater Lodge and Training Center, Inc., AWS or Customer;

17.0.3 Contractor's violation of Sections 12 and 16 hereof;

17.0.4 Contractor's breach of any restrictive covenants set forth herein;

17.0.5 Contractor's breach of any of Contractor's representations and warranties set forth in this Agreement;

17.0.6 Any of the Liabilities for which Contractor has agreed to hold harmless BSC herein;

17.0.7 Contractor's failure to obtain any protective insurance, including, medical and dental insurance, short and long term disability insurance, workers compensation insurance, life insurance or medical evacuation insurance; and

17.0.7 Contractor's breach of any of the terms of this Agreement.
The Indemnification procedures identified in Schedule 17 are attached hereto and deemed a part of this Agreement.

18. DRUG TESTING. Contractor hereby agrees and acknowledges that it is a condition of providing Services to BSC under the terms of this Agreement that all Contractors refrain from using drugs on and off the job. For purposes of assuring compliance with this Section, Contractor hereby consents to be tested for among other things, any or all of the following substances: (i) alcohol; (ii) amphetamines; (iii) cannabinoids; (iv) cocaine; (v) phencyclidine (PCP); (vi) methaqualone; (vii) opiates; (viii) barbiturates; (ix) benzodiazepines; (x) synthetic narcotics including, without limitation methadone and propokypene , upon request by BSC.

19. NOTICES. Any notice, request, demand, consent, approval or other communication required or permitted under this Agreement (collectively a "notice") shall be (a) in writing, and (b) addressed by the sender to the other party at the address and in the manner set forth below:

If to BSC: Blackwater Security Consulting LLC
Attn: Brian Berrey, Director
850 Puddin Ridge Road
Moyock, NC 27958
Fax No.: (252) 435-6388

If to Contractor: To such Contractor's residential address on file with BSC. Except as otherwise provided in this Agreement, each notice shall be effective and shall be deemed delivered on the earlier of: (i) its actual receipt, if delivered personally, by telefax, courier service, or, (ii) on the third (3rd) day after the notice is postmarked for mailing by first-class, postage prepaid, certified or registered, United States mail, with return receipt requested (whether or not the return receipt is subsequently received by the sender).

20. MISCELLANEOUS PROVISIONS.

20.1 Law/Exclusive Venue/Arbitration. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina, applicable to contracts made and to be fully performed therein, excluding its conflict of laws principles. Contractor and BSC hereby agree that any dispute regarding interpretation or enforcement of any of the parties' rights or obligations under this Agreement shall be

resolved by binding arbitration according to the rules of the American Arbitration Association and shall be conducted in Currituck or Camden County in North Carolina. The arbitrators may award attorneys fees to the prevailing party in any arbitration proceeding. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties according to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in the courts noted above and enforced in accordance with rules of the American Arbitration Association. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action of a summary nature where the relief sought is predicated on there being no dispute with respect to any fact or relief of an injunctive nature. Contractor hereby waives any rights to seek removal of any dispute to the state or federal courts.

20.2 Entire Agreement. This Agreement, and any agreements incorporated herein, contain the entire agreement of the parties on the subject matter hereof, and replace any prior agreement or agreements between BSC and Contractor in their entirety. This Agreement may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought. The parties hereto waive any right to assert in any proceeding that they were induced to enter into this Agreement by any promise, fact, occurrence, warranty, statement, contract, representation, or agreement (collectively "Representation") which is not expressly set forth in this document and all such Representations are merged herein.

20.3 Time. For all purposes of this Agreement time is of essence.

20.4 Counterparts/Facsimile. This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall together constitute and be one and the same instrument. A telefaxed copy of this Agreement and all signatures thereon shall constitute an original for all purposes.

20.5 Construction of Agreement. This Agreement has been prepared by the attorneys for BSC and the parties have read and negotiated all of the language used in this Agreement. The parties acknowledge and agree that because all parties (and their counsel to the extent Contractor requested that they review the Agreement) participated in negotiating and drafting this Agreement, no rule of construction shall apply to this Agreement which construes any language, whether ambiguous, unclear or otherwise, in favor of, or against any party by reason of that party's role in drafting this Agreement.

20.6 Termination of Prior Contract. Contractor agrees and acknowledges that any prior contract between BSC and Contractor is hereby terminated. Notwithstanding the foregoing, all restrictive covenants regarding proprietary and confidential information contained in any prior contract shall remain in full force and shall binding on Contractor.

20.7 Commission Warranty. Contractor represents and warrants to BSC that Contractor has not engaged the services of any broker, agent, employment agency or other individual entity which will or is entitled to claim any commissions, fees or other amounts in connection or in any way relating to this Agreement or his Services hereunder. Contractor shall defend, indemnify and hold BSC harmless from any and all fees, commission claims, causes of action, attorney fees, obligations or liabilities of any agent, broker or employment agency in any way relating to Contractor's association with BSC pursuant to this Agreement.

20.8 Headings. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning hereof.

20.9 Gender. Any reference herein to the masculine, the feminine or the neuter shall include the masculine, the feminine and the neuter, and any reference to the singular or plural shall include the opposite thereof, as the context so requires.

20.10 Waiver of Jury Trial. The parties hereto knowingly, voluntarily, and intentionally waive the right any of them may have to a trial by jury in respect to any litigation arising out of, under, or in connection with this Agreement and any other agreements contemplated to be executed in connection herewith, or any course of conduct, course of dealings, statements (whether verbal or written), or actions of any party (including, without limitation, any action to rescind or cancel this Agreement and any claims or defenses asserting that this Agreement was fraudulently induced or is otherwise void or voidable); this waiver being a material inducement for BSC to enter into this Agreement with Contractor.

20.11 Legal Expenses. In the event BSC is required to take action against Contractor to enforce the term, covenants and conditions of this Agreement and Release, or to mediate an action brought by the other party, BSC shall be reimbursed by Contractor for such costs as may be incurred in such action, including any appeal there from, including reasonable attorney's fees, costs and other fees, not to exceed insurable limits.

20.12 Execution of Documents. If, during the performance under this Agreement, the Contractor assumes the custody of BSC funds or takes possession of property of any nature whatsoever and wherever situated, which property has in fact been purchased with monies of BSC, the Contractor hereby recognizes and acknowledges the existence of a trust relationship, either express or constructive, and agrees to execute whatever documents that may be required by BSC to evidence this relationship.

20.13 Recital. The parties hereby acknowledge and agree that the terms of this Agreement and Release are contractual and not a mere recital and there are not any other agreements, understandings or representations made by BSC except as expressly stated in this Agreement and Release. Further, Contractor agrees that if any provision of this Agreement and Release is found to be unenforceable, the remaining terms shall remain in full force and effect.

20.14 Non-Publicity. This Agreement and the Engagement and all aspects associated with the Engagement is classified. It is a material condition of this Agreement (and a legal obligation of Contractor) that the Contractor shall not disclose any information whatsoever relating to the Engagement or use or allow to be used any aspect of this Agreement for publicity or advertisement purposes. It is further understood that this obligation does not expire upon completion or termination of this Agreement, but continues indefinitely. It is further agreed that this contractual relationship shall not be disclosed except as allowed by law or regulation.

20.15 Independent Contractor. Contractor acknowledges that it is solely an independent contractor. Nothing contained in this Agreement shall be deemed to constitute either BSC, the Contractor or Customer as an agent, representative, partner, or joint venture or employee of the other party for any purpose. Neither party can bind the other to any agreement with anyone else nor can either party can bind the other to any agreement that compels the other to divulge information regarding agreements, contracts or obligations to/with outside parties. Contractor understands that he is not entitled to any employee benefits from BSC, including workers' compensation benefits, life insurance, long term disability, health and dental benefits, participation in 401k plan or any other benefits.

20.16 Waiver. By signing this document, Contractor acknowledges that if Contractor is hurt or his property is damaged while providing Services hereunder, the intent is that Contractor and Contractor's Group is bound by this Release and Indemnification and therefore will be found by a court of law to have waived his right to maintain a lawsuit against BSC on the basis of any claim from which Contractor has released them herein.
20.17 Survival. The provisions of Sections 1, 7, 8, 9, 11, 12, 14, 15, 16.3, 16.4, 16.5, 17, 18, 19 and 20 (and all subsections thereof) of this Agreement shall survive the execution of and any termination of this Agreement.

[redacted]

Brian Berrey, Director
BLACKWATER SECURITY CONSULTING LLC

Signature: [redacted]
Print Name: [redacted]
Address: [redacted]
Phone: [redacted]

Emergency Contact Information
Name: [redacted]
Phone [redacted]
e-mail: [redacted]
Mother's maiden name: [redacted]

SCHEDULE 17
INDEMNIFICATION PROCEDURES
Any party claiming indemnification under this Agreement is referred to as the "Indemnified Party" and any party against whom any such claim is asserted is referred to

as the "Indemnifying Party". All claims for indemnification by an Indemnified Party under this Section shall be asserted and resolved as follows:

If any claim, for which an Indemnifying Party would be liable for damages to an Indemnified Party hereunder, is asserted against or sought to be collected from such Indemnified Party by a third party (a "Third Party Claim"), the Indemnified Party, promptly after the Third Party Claim is so asserted, shall notify the Indemnifying Party of such Third Party Claim, enclosing copies of all papers served, (the "Claim Notice"). Notwithstanding the foregoing, the Indemnifying Party shall be obligated to indemnify the Indemnified Party with respect to any such Third Party Claim except to the extent that a failure to promptly notify the Indemnifying Party in accordance with the foregoing provisions of this Section actually prejudices the Indemnifying Party's ability to defend against the Third Party Claim. The Indemnifying Party shall have five (5) days from the delivery of the Claim Notice (the "Notice Period") in which to notify the Indemnified Party whether the Indemnifying Party disputes the obligation to provide an indemnity for such Third Party Claim or whether the Indemnifying Party desires, at the sole cost and expense of the Indemnifying Party, to defend the Indemnified Party against such Third Party Claim.

If the Indemnifying Party notifies the Indemnified Party within the Notice Period that the Indemnifying Party does not dispute its liability to the Indemnified Party, then the Indemnifying Party shall have the right to defend, at its sole cost and expense, such Third Party Claim by all appropriate proceedings, which proceedings shall be diligently prosecuted by the Indemnifying Party to a final conclusion or settlement. The Indemnifying Party shall have full control of such defense and proceedings, including any compromise or settlement thereof; provided, however, that the Indemnified Party shall be authorized, at its sole cost and expense, to file during the Notice Period any motion, answer or other pleading which the Indemnified Party and the Indemnifying Party shall deem necessary or appropriate to protect the respective interests of the Indemnified Party and the Indemnifying Party; provided, further, however, that if requested by the Indemnifying Party, the Indemnified Party agrees, at the sole cost and expense of the Indemnifying Party, to cooperate with the Indemnifying Party and its counsel in contesting any Third Party Claim which the Indemnifying Party elects to contest, or, if appropriate and related to the Third Party Claim in question, in making any counterclaim against the person or entity asserting the Third Party Claim or any cross-complaint against any person or entity. The Indemnified Party may participate in, but not control, any defense or settlement of any Third Party Claim controlled by the Indemnifying Party pursuant to this Section, and, except as provided in the preceding sentence, the Indemnified Party shall bear its own costs and expenses with respect to such participation.

If the Indemnifying Party fails to notify the Indemnified Party within the Notice Period that the Indemnifying Party does not dispute its liability to the Indemnified Party and that the Indemnifying Party desires to defend the Indemnified Party pursuant to this Section, or if the Indemnifying Party fails to diligently and promptly prosecute the Third Party Claim or to settle it, or if the Indemnifying Party fails to give any notice whatsoever within the Notice Period, then the Indemnified Party shall have the right to defend, at the sole cost and expense of the Indemnifying Party, the Third Party Claim by all appropriate

proceedings, which proceedings shall be promptly and vigorously prosecuted by the Indemnified Party to a final conclusion or settlement, in the discretion of the Indemnified Party. The Indemnified Party shall have full control of such defense and proceedings, including any compromise or settlement thereof. Notwithstanding the foregoing provisions, if the Indemnifying Party has notified the Indemnified Party within the Notice Period that the Indemnifying Party disputes its liability to the Indemnified Party and if such dispute is resolved in favor of the Indemnifying Party by a final, non-appealable order of a court of competent jurisdiction, then the Indemnifying Party shall not be required to bear the costs and expenses of the Indemnified Party's defense or of the Indemnifying Party's participation therein at the Indemnified Party's request, and the Indemnified Party shall be obligated to reimburse the Indemnifying Party in full for all costs and expenses incurred in connection with such litigation on demand. The Indemnifying Party may participate in, but not control, any defense or settlement controlled by the Indemnified Party pursuant to this Section, and the Indemnifying Party shall bear its own costs and expenses with respect to such participation.

In the event any Indemnified Party shall have a claim against any Indemnifying Party hereunder which does not involve a Third Party Claim being asserted against or sought to be collected from the Indemnified Party by a third party, then the Indemnified Party shall notify the Indemnifying Party of such claim by the Indemnified Party, specifying the nature of and the specific basis for such claim and the amount of or the estimated amount of such claim (the "Indemnity Notice"). If the Indemnifying Party does not notify the Indemnified Party within twenty (20) days from the delivery of the Indemnify Notice that the Indemnifying Party disputes such claim, the amount or estimated amount of such claim specified by the Indemnified Party shall be conclusively deemed a liability of the Indemnifying Party hereunder. However, if the Indemnifying Party has timely disputed such claim, as provided above, then such dispute shall be resolved by mutual agreement of the Indemnified Party and the Indemnifying Party or by litigation in any appropriate court of competent jurisdiction.

Chairman WAXMAN. Please proceed however you wish, and thank you very much for being here.

STATEMENTS OF KRISTAL BATALONA, DAUGHTER OF BLACKWATER EMPLOYEE WESLEY BATALONA; KATHRYN HELVENSTON-WETTENGEL, MOTHER OF BLACKWATER EMPLOYEE STEPHEN HELVENSTON; RHONDA TEAGUE, WIFE OF BLACKWATER EMPLOYEE MICHAEL TEAGUE; AND DONNA ZOVKO, MOTHER OF BLACKWATER EMPLOYEE JERRY ZOVKO

STATEMENT OF KATHRYN HELVENSTON-WETTENGEL

Ms. HELVENSTON-WETTENGEL. I would like to start off by sincerely thanking the committee for inviting each of the families of the four men who were killed in Fallujah. Although everyone remembers those images of the bodies being burned, beaten, dragged through the streets, and ultimately hung up from a bridge, we continue to relive that horror day after day, as those men were our fathers, sons, and husbands.

Following that horrific incident on March 31, 2004, we turned to Blackwater for answers. What we received was appalling. We were told that the information surrounding the circumstances in which our loved ones were killed was confidential. When we insisted on seeing the report concerning the incident, Blackwater told us that we would have to sue them to get it.

Having just lost the most important people in our lives, a lawsuit was the last thing on our minds. Instead, our focus was concentrated on finding out just what happened. However, the people in the best position to tell us what happened refused to do so. It was not as if Blackwater was claiming that it did not know what happened; but instead Blackwater concealed the information from us that we needed so desperately to understand why our loved ones were dead.

Imagine having the people so near and dear to your hearts killed overseas in a foreign country, and then having his or her employer tell you that the details are confidential and that it would take a lawsuit to turn the information over.

There is no accountability for the tens of thousands of contractors working Iraq and abroad. Private contractors like Blackwater work outside the scope of the military's chain of command and can literally do whatever they please without any liability or accountability from the U.S. Government.

They also work in countries like Iraq which are not currently capable of enforcing the law and prosecuting wrongful conduct such as murder. Therefore, Blackwater can continue accepting hundreds of millions of dollars in taxpayer money from the Government without having to answer a single question about its security operators.

It is our understanding that Blackwater has lost more operators than any other U.S. security company working in Iraq. The inherent flaw in the manner in which private contractors are being used is that there is no accountability or oversight. If the U.S. military was performing the job that is now farmed out to the private sector, there would always be someone to answer to, all the way up to the President of the United States. More importantly, those in

the chain of command would be looking out for the best interest of the soldiers and their country.

In the case of Blackwater, the people making critical decisions are those in corporate America, whose focus is often on cutting cost and making profit. When the decision was made to save millions of dollars by not buying armored vehicles, our husbands, fathers, and sons were killed. Blackwater gets paid by the number of warm bodies it can put on the ground in certain locations throughout the world. If some are killed, it replaces them at a moment's notice. What Blackwater fails to realize is that the commodity it trades in is human life.

While it may be just a statistic to Blackwater, the four men killed in Fallujah were exceptional Special Forces who collectively gave decades of military service to our country. My son Scotty became the youngest Navy Seal ever at the age of 17. He was fluent in five dialects of Spanish. He served as a Navy Seal from Europe to Central and South America. He helped train embassy staffs and even set up the security for President Ronald Reagan's summit meeting in Venice, Italy.

Before leaving the Navy, Scott rose to the level of teaching Navy Seal courses and was ultimately offered a commission. Scott was also a Gold Medal winner at the World Pentathalon. That year he won two golds, a silver, and a bronze out of five events.

Mike Teague served in the U.S. Army for 15 years in the 160th Special Operations Community. He had deployed in Panama, Grenada, Spain, Somalia, and other places that constantly immersed him in covert operations. As a civilian, Mike taught gun training classes for the State of Tennessee, provided security for high-profile celebrities and athletes, and worked as a police officer for the Federal Reserve. He was reactivated during the war in Iraq and spent 12 months in the Army Special Forces in Afghanistan.

Jerry Zovko and Wesley Batalona were similarly former Special Forces with the U.S. Army. Jerry was a member of the U.S. Army's 82nd Airborne Division and the Army Rangers. He served in Bosnia, and the Sinai Peninsula.

Wesley joined the Army after high school and quickly became an Army Ranger. He gave 20 years of service to our country by serving all around the world.

The talents of highly skilled Special Forces personnel do not always translate well into civilian life; however, Blackwater provided the high-paying alternative to the routine jobs that former military personnel usually resort to. Blackwater offered our men $600 per day to work private security in Iraq. More importantly, Blackwater also promised our men certain protections which were critical in determining whether to accept such a high-paying job to work in a war zone.

Our four men were told that they would be working in armored vehicles with no less than six operators in each detail. There were supposed to be at least three people in each vehicle. This would have provided a driver, a navigator, and a rear gunner. They would have heavy machine guns to fight off any attacks.

Our men were also told that they would be able to learn the routes through Iraq prior to going on any missions, and to conduct

a risk assessment of each mission to determine if it was too dangerous to go.

Blackwater did not provide our men with any of these protections. It is undisputed that they did not have armored vehicles, they did not have a team of six, they did not have three people per vehicle. They did not have a rear gunner. They did not have heavy machine weapons. They were not able to conduct a risk assessment of the mission. They did not have a chance to learn their routes before going on the mission. In fact, when Scotty asked for a map of the route, he was told, "It is a little too late for a map now."

Ultimately, all four men died before the contract they were working under was even scheduled to begin.

Lack of preparation and the strive to make as much money as quickly as possible, even if not 100 percent ready, is Blackwater's style of business. This style was confirmed just last month when Blackwater's president, Gary Jackson, told the Harvard Business Review, "I constantly push for the 80 percent solution that is executable now over the 100 percent solution we might be able to devise in another 3 weeks." An 80 percent solution means that 20 percent of the operators are dead. Blackwater actually lost 9 of its 34 operators in just over 2 months. That means that only 74 percent survived, which is pretty close to Blackwater's goal of 80 percent.

Our men were told that they would be performing work that would make a difference, such as guarding Ambassador Paul Bremer. Instead, they died escorting empty trucks that were going to pick up kitchen equipment.

Once the men signed on with Blackwater and were flown to the Middle East, Blackwater treated them as fungible commodities. For example, Scotty was physically and verbally attacked one night by a Blackwater program manager when Scotty indicated that he was not well enough to leave the following morning on the mission. Despite two other Blackwater operators offering to go in Scott's place, the Blackwater manager burst in to Scott's room late at night, confiscated his weapon, and told Scotty that if he personally did not go on the mission the following day, he would be fired.

It was under this threat of being fired and abandoned in Iraq that forced Scott to leave for Baghdad the following morning. However, late that night Scott sent his last e-mail. It was addressed to the owner, president, and upper management of Blackwater Security. The treatment of the security operators was so bad that after working for Blackwater for just 11 days Scott felt compelled to write an e-mail to the owner and president of the company that began, "It is with deep regret and remorse that I send you this e-mail. During my short tenure here with Blackwater I have witnessed and endured some extreme unprofessionalism."

In this lengthy e-mail, Scott detailed all of the problems with the entire program and the treatment of the operators. There was no response from Blackwater's management to this call from help. Instead, our men were dead 4 days later.

After the incident, Blackwater held a small memorial service for our men and the other Blackwater operators who were killed. During our time at the Blackwater compound, there were guards as-

signed to each of the families. The guards were with us at all times and did not let us speak with the other family members in private.

Ultimately, Blackwater refused to tell us anything about how our men died. For 6 months after the incident, Blackwater did not return telephone calls or inquiries about the incident. Ultimately, I tracked down a direct number for Blackwater's owner, Erik Prince. When I called it, Mr. Prince actually answered the phone. We had a brief conversation, and I asked Mr. Prince for a copy of Scott's contract and the incident report. He told me that I should receive them within a couple of weeks. No documents ever came.

Although Blackwater told us that we would have to file a lawsuit to obtain a copy of the incident report, Blackwater has done everything possible to prevent the disclosure of any information. During the past 2 years that the lawsuit has been pending, Blackwater has not answered a single question or produced a single document. Instead, Blackwater has appealed every single ruling all the way up to the U.S. Supreme Court. When we attempted to take the deposition of a key witness, Blackwater sent him out of the country just days before his deposition. When he recently returned to the United States after working for Blackwater for the past 2 years, we obtained another court order to take his deposition. Blackwater has now appealed that order, as well.

Thus far in our legal quest Blackwater has hired five different law firms to fight us, including such politically connected lawyers as Fred Fielding, White House counsel, and Kenneth Starr. It appears that Blackwater will go to any lengths to prevent us from finding out why our men were killed and to avoid any accountability for its actions.

Through it all, Blackwater has never denied that it was obligated to provide our men with certain protections. More importantly, Blackwater has never denied that it did not provide our men with these protections. Instead, Blackwater has simply said that it cannot be sued for its conduct.

As appalling as it may seem, Blackwater also recently filed a $10 million claim against us for bringing our lawsuit.

First and foremost, we are seeking answers from Blackwater as to how and why our loved ones are dead. Why were they not in armored vehicles? Why were they not in a team of six? Why were there not three operators in each vehicle? Why were there not provided heavy weapons? Why were they not permitted to learn the routes in Iraq before going on their mission? Why were they not allowed to gather intelligence from the outgoing security company?

Why was a risk assessment not performed prior to that mission? Why were they not given 24 hours notice before their mission? Why were they lost in the middle of Iraq? Why did they drive through the center of Fallujah at a time when even U.S. military would not go through? Why were they lied to about the weapons and protections they would have? In short, why did Blackwater choose to make a profit over the safety of our loved ones?

Second, we are seeking accountability for the wrongful conduct of Blackwater. Private contractors such as Blackwater are being paid millions of dollars of our taxpayer money to line their own pockets and jeopardize the safety of the men and women working for them. There needs to be accountability for their conduct. While

Blackwater is a private North Carolina company and should be held to answer to a North Carolina jury, the Government should also create some type of accountability and oversight for private contractors.

Third, we are seeking to prevent other families from receiving that dreadful telephone call explaining that the father, a son, or a husband has been killed. If the message is sent throughout the industry that private contractors will be held accountable for their wrongful conduct abroad, the companies may devote more attention to the safety of their workers and less to the amount of their profits.

Having lost those close to our hearts and then having experienced the callous indifference of Blackwater, we sincerely hope that Congress will take action by creating accountability for the private contractors and not continue to allow them to make millions of dollars at the cost of the American lives.

[The prepared statement of the Blackwater family members follows:]

U.S. HOUSE OF REPRESENTATIVES

Committee on Oversight and Government Reform
Wednesday, February 7, 2007
2154 Rayburn House Office Building
Washington, DC

TESTIMONY OF KATHRYN HELVENSTON-WETTENGEL, RHONDA TEAGUE, DONNA ZOVKO AND KRISTAL BATALONA

We would like to start off by sincerely thanking the Committee for inviting each of the families of the four men who were killed in Fallujah, Iraq, while working for Blackwater Security Consulting, to this hearing. Although everyone remembers those images of the bodies being burnt, beaten, dragged through the streets and ultimately hung up from a bridge, we continue to re-live that horror day after day, as those men were our fathers, sons and husbands.

Following that horrific incident on March 31, 2004, we turned to Blackwater for answers. What we received was appalling. We were told that the information surrounding the circumstances in which our loved ones were killed was "confidential." When we insisted on seeing the report concerning the incident, Blackwater told us that we would have to sue them to get it.

Having just lost some of the most important people in our lives, a lawsuit was the last thing on our mind. Instead, our focus was concentrated on finding out just what happened. However, the people in the best position to tell us what happened refused to do so. It was not as if Blackwater claimed that it did not know what happened, but instead Blackwater concealed the information from us that we needed so desperately to understand why our loved ones were dead. Imagine having the person so near and dear to your heart killed overseas in a foreign country, and then having his or her employer tell you that the details are "confidential" and that it would take a lawsuit to turn the information over.

There is no accountability for the tens of thousands of contractors working in Iraq and abroad. Private contractors like Blackwater work outside the scope of the military's chain of command and can literally do whatever they please without any liability or accountability from the U.S. government. They also work in countries like Iraq, which are not currently capable of enforcing the law and prosecuting wrongful conduct, such as murder. Therefore, Blackwater can continue accepting hundreds of millions of dollars in taxpayer money from the government, without having to answer a single question about how its security operators are killed. It is our understanding that Blackwater has lost more operators than any other U.S. security company working in Iraq.

The inherent flaw in the manner in which private contractors are being used is that there is no accountability or oversight. If the U.S. military was performing the jobs that it now farms out to the private sector, there would always be someone to answer to—all the way up to the President of the United States. More importantly, those in the chain of command would be looking out for the best interests of the soldiers and the country.

In the case of Blackwater, the people making critical decisions are those in corporate America, whose focus is often on cutting costs and making a profit. When the decision was made to save millions of dollars by not buying armored vehicles, our husbands, fathers and sons were killed. Blackwater gets paid for the number of warm bodies it can put on the ground in certain locations throughout the world. If some are killed, it replaces them at a moment's notice. What Blackwater fails to realize is that the commodity it trades in is human life.

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> "I constantly push for the 80% solution that is executable now, over the 100% solution we might be able to devise in another three weeks."

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Once the men signed on with Blackwater and were flown to the Middle East, Blackwater treated them as a fungible commodity. For example, Scott Helvenston was physically and verbally attacked one night by a Blackwater program manager, when Scott indicated that he was not well enough to leave the following morning on a mission. Despite two other Blackwater operators offering to go in Scott's place, the Blackwater manager burst into Scott's room late one night, confiscated his weapon, and told Scott that if he personally did not go on the mission the following day, he would be fired. It was under this threat of being fired and abandoned in the Iraq that forced Scott to leave for Baghdad the following morning.

However, late that night, Scott sent his last email. It was addressed: "To the Owner, President and Upper Management of Blackwater Security." The treatment of the security operators was so bad that after working for Blackwater for just 11 days, Scott felt compelled to write an email to the owner and president of the company that began:

> "It is with deep regret and remorse that I send you this e-mail. During my short tenure here with Blackwater I have witnessed and endured some extreme unprofessionalism."

In this lengthy email, Scott detailed all of the problems with the entire program and the treatment of the operators. There was no response from Blackwater management to this call for help. Instead, our men were dead four days later.

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guards assigned to each of the families. The guards were with us at all times and did not let us speak with the other families members in private. Ultimately, Blackwater refused to tell us anything about how our men died.

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Thus far in our legal quest, Blackwater has hired five different law firms to fight us, including such politically connected lawyers as Fred Fielding (now White House counsel) and Kenneth Starr. It appears that Blackwater will go to any lengths to prevent us from finding out why our men were killed and to avoid any accountability for its actions.

Through it all, Blackwater has never denied that it was obligated to provide our men with the protections listed above. More importantly, Blackwater has never denied that it did not

provide our men with those protections. Instead, Blackwater has simply said that it can't be sued for its conduct, no matter how wrongful or malicious. As appalling as it may seem, Blackwater also recently filed a $10 million claim against us for bringing our lawsuit.

First and foremost, we are seeking answers from Blackwater as to how and why our loved ones died.

- Why were they not in armored vehicles?
- Why were they not in a team of six?
- Why were there not three operators in each vehicle?
- Why were they not provided heavy weapons?
- Why were they not permitted to learn the routes in Iraq before going on their mission?
- Why were they not allowed to gather intelligence from the out-going security company?
- Why was a risk assessment not performed prior to their mission?
- Why were they not given 24 hours notice before their mission?
- Why were they lost in the middle of Iraq?
- Why did they drive through the center of Fallujah at a time when even the U.S. military would not go through there?
- Why were they lied to about the weapons and protections they would have?
- Why did Blackwater not listen to its own manager in charge in Kuwait who warned of all of the problems well in advance of the deaths of our men?

In short, why did Blackwater choose to make a profit over the safety of our loved ones.

Second, we are seeking accountability for the wrongful conduct of Blackwater. Private contractors such as Blackwater are being paid millions of dollars of our taxpayer money to line their own pockets and jeopardize the safety of the men and women working for them. There needs to be accountability for their conduct. While Blackwater is a private North Carolina company and should be held to answer to a North Carolina jury, the government should also assure the same accountability and oversight for other private contractors operating abroad.

Third, we are seeking to prevent other families from receiving that dreadful telephone call explaining that a father, son or husband has been killed. If the message is sent throughout the industry that private contractors will be held accountable for their wrongful conduct abroad, the companies may devote more attention to the safety of their workers and less to the amount of their profits.

Having lost those close to our hearts, and then having experienced the callous indifference of Blackwater, we sincerely hope that Congress will take action by creating accountability for private contractors and not continue to allow them to make millions of dollars at the cost of American lives.

Respectfully submitted,

Kathryn Helvenston-Wettengel,
Rhonda Teague,
Donna Zovko and
Kristal Batalona

Chairman WAXMAN. Thank you very much for that statement on behalf of all of you. I know that up here we have the Democrats and we have the Republicans. I don't know whether you are Democrats or Republicans. I don't know whether your sons or husbands or family members were Democrats or Republicans. And it doesn't make any difference.

Ms. HELVENSTON-WETTENGEL. No, it doesn't.

Chairman WAXMAN. They were American patriots. They were veterans of our armed services. We want to know some of the things that you want to know, because we ought to know what is happening with our young men and women who are in the military and who are in the front line risking their lives working for private contractors paid by the U.S. taxpayers.

So we want to get some of the answers to some of the same questions, but we have an obligation beyond that to the taxpayers of this country to know how this whole operation works. You have a contractor, a subcontractor, and who is responsible. Who is accountable? If your loved ones had been members of the military put into battle, I can't imagine you would have had to go through all that you seem to have had to go through just to get answers to what happened to them. It is really inconceivable to me.

Ms. HELVENSTON-WETTENGEL. I agree. It is unconscionable.

Chairman WAXMAN. Let me ask you some questions, because we are trying to get a record which we will share with our colleagues and help us get the information that we need to try to understand what has been happening.

Some of these questions you may have the answers to and some you may not. I am asking anybody on the panel who wants to give us your views.

Were your family members traveling in armored vehicles the day in Fallujah when they were killed, to your knowledge?

Ms. HELVENSTON-WETTENGEL. They were Mitsubishi Pajeros with reinforced back bumpers.

Chairman WAXMAN. And how about the number of team members that were in each vehicle?

Ms. HELVENSTON-WETTENGEL. Well, when they originally started to pull out there were three. At the last minute, Dr. Justin McGuown pulled out the rear gunner in each vehicle claiming that they needed to have them there to help them do some clerical work.

Chairman WAXMAN. What was that third person supposed to do in the vehicle?

Ms. HELVENSTON-WETTENGEL. He was the one that would save them if they got in trouble. He was the one to protect them.

Chairman WAXMAN. Did they have machine guns?

Ms. HELVENSTON-WETTENGEL. I don't think Scotty ever got his own gun back. I don't think the navigators fired one bullet. The people in Fallujah literally just walked up to these vehicles and shot them at point blank range, but then what they did afterward was just so horrendous.

Chairman WAXMAN. Yes.

Ms. HELVENSTON-WETTENGEL. Scotty lived a short while after the initial shooting. I was told he was still alive when they tied him to the back of that truck and drug him through the streets of

Fallujah, and that was before they decapitated him, dismembered him, and torched him.

Chairman WAXMAN. Do you know whether they had—I assume——

Ms. HELVENSTON-WETTENGEL. I have no idea. I know they didn't——

Chairman WAXMAN. If there is any difference among the others, because what you are saying, I assume you are speaking for all of the——

Ms. HELVENSTON-WETTENGEL. Ask them.

Chairman WAXMAN. If there are any differences, please let us know.

Did they have maps of the area?

Ms. TEAGUE. Not that I am aware of. I am not aware that they had any maps.

Chairman WAXMAN. Did any of you know whether they had maps?

Ms. HELVENSTON-WETTENGEL. I was told Scott specifically asked for a map and he was told it was too late for a map.

Chairman WAXMAN. So it appears, from what all four of you know, is that they were not traveling in armored vehicles, they were traveling in teams of two in cars instead of three, and they didn't have a rear gunner, and they didn't have heavy machine guns, and they didn't have a map; is that correct?

Ms. HELVENSTON-WETTENGEL. That is my understanding.

Chairman WAXMAN. All of you agree. And you believe it was Blackwater's responsibility to provide these items to your family members; is that right?

Ms. HELVENSTON-WETTENGEL. Well, by just removing the armored vehicle, I was told gave Blackwater a profit of $1.5 million.

Chairman WAXMAN. Well, we don't know. That is something you have heard.

Ms. HELVENSTON-WETTENGEL. Yes.

Ms. TEAGUE. I am not sure of the profits gained by not providing these men with armored vehicles, but I have watched extensive footage of other contractors in Iraq taking heavy fire in fully armored vehicles. They can sustain 20 to 30 minutes. That is a possibility that our men could have gotten out, but we will never know because they did not have those.

Chairman WAXMAN. You have wanted to know information from Blackwater. What information did you want to get from Blackwater that you feel you still haven't received? I think, Ms. Zovko, you had some specific information; is that right?

Ms. ZOVKO. Questions.

Chairman WAXMAN. Questions?

Ms. ZOVKO. Not information, but questions. Why were they sent? What led them into the mission that they were going to or the job that they were on for 3 days or 4 days prior than the contract actually going into effect? Why not prepare them? Why not give them time to prepare and get to know the route, all of these things that they were supposed to have been allowed to do prior to doing the job. There are 1,001 questions, and no answers.

Chairman WAXMAN. Did you talk to anybody from Blackwater?

Ms. ZOVKO. Did I? Yes, actually I did. On March 31st in the late evening I spoke to a young woman by the name of Susan who had, after three phone calls, confirmed that yes, Mr. Prince will be coming to our house to tell us that our son was dead, and had talked to her a couple of times about the body coming home, and then all of a sudden she disappeared. The only contact and good ears that I had there to listen to me were not there any more. I have lost contact with them. My son, Tom, had talked to Blackwater and had communicated with them more so than I did after that. I met with the Blackwater employees at the memorial that they had in October, which is 6 months after the death of my son, and after that nothing.

Chairman WAXMAN. In the joint statement, at least one of you was told sue Blackwater in order to get information. Is that something that was told to you?

Ms. ZOVKO. Yes, and told us to sue. I was under the impression that all of the families, the families of my Jerry's coworkers and the families of the other young men that were killed that worked for Blackwater in Iraq will have the opportunity to go into this boardroom meeting for answers and questions. Actually, that is the impression that I was under. Well, after lunch and after everything that we went through that we did at the Blackwater facilities, my husband, my son, and I were escorted to this meeting to where it was only the three of us and four of the Blackwater employees. There was no questions and answers really.

Chairman WAXMAN. Tell me about somebody telling you you have to sue them to get answers.

Ms. ZOVKO. My husband was asking where are my son's personal things, where are things that belonged to my son, how did my son die. And she said that was confidential. It was the information that if we wanted to know we needed to sue. And she actually was sitting at this part of the table at the end of the table, or head of the table. We were on the side. She stood up and she said that if we wanted to know that, that we needed to sue. That was confidential.

Chairman WAXMAN. And was there anybody else there in that room from Blackwater?

Ms. ZOVKO. Yes, there was Mr. Rush.

Chairman WAXMAN. That is Mike Rush?

Ms. ZOVKO. Yes.

Chairman WAXMAN. He's a very senior Blackwater official, according to our information. And he's the deputy director for operations at North Carolina headquarters. What did he have to say?

Ms. ZOVKO. Maybe at that time he wasn't so high in the position in chain of command, if you will, but, no, he was the person that we had met that had spent time with the families, and he was sitting there. He was sitting to the right of Ann, and right next to him was a gentleman by the first name of Dave that was the fastest gun, mind you, the fastest gun in Iraq. That was a joke. This is supposed to make me feel like smiling or laughing because we are sitting at this table and they are introducing this gentleman that just came back from Iraq and he was the fastest gun in Iraq.

But we were told to sue, and we had gotten no information. We did receive a copy of a flag that people that live near the Blackwater headquarters have made for our sons, or it could have

been the employees of Blackwater that were in Baghdad and Iraq, but it did have my son Jerry's name, Scotty's, Wes' and Mike's on that flag. That was the only thing that we have gotten out of that answers and question session with Blackwater.

Chairman WAXMAN. Thank you.

Ms. HELVENSTON-WETTENGEL. I would like to add something about that flag. It was crocheted by a 70 some year old woman that lived near the Blackwater compound, and she crocheted it. It was a very large flag. But Blackwater had nothing to do with that. She just wanted to do something and she thought that might help us feel better.

Chairman WAXMAN. Thank you.

Ms. HELVENSTON-WETTENGEL. But Blackwater had nothing to do with it.

Chairman WAXMAN. Thank you.

Mr. Davis, I want to recognize you.

Mr. DAVIS OF VIRGINIA. Thank you. I join Chairman Waxman in expressing our appreciation for their patriotism and trying to honor their memories in an appropriate fashion. I am having a hard time even understanding the contractual vehicle as we look at all of the documents, too, if this was an ESS LOGCAP or ESSEUR. They were a 4th or 5th year subcontractor, and I hope we can get to the bottom of that. But one question I have, as we understand it, families ought to be entitled to and receive compensation under the insurance that contractors are required to carry pursuant to the Defense Base Act. Have each of you received those benefits?

Ms. HELVENSTON-WETTENGEL. Widows and minor children receive those benefits.

Mr. DAVIS OF VIRGINIA. Correct.

Ms. HELVENSTON-WETTENGEL. I don't receive any.

Ms. TEAGUE. I personally never applied for those benefits. That has been brought to my attention several times as we have asked questions. That, to me, has nothing to do with who is accountable for not providing the things to my husband and those other men that they were promised for their protection.

Mr. DAVIS OF VIRGINIA. I agree.

Ms. ZOVKO. I received no benefits.

Mr. DAVIS OF VIRGINIA. OK.

Ms. BATALONA. My mother receives benefits.

Mr. DAVIS OF VIRGINIA. OK. Thank you. That is all my questions.

Chairman WAXMAN. Any questions?

Mr. DAVIS OF VIRGINIA. I will yield to Mr. Issa.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

I guess I have one opening comment. Although I don't think your testimony today is particularly germane to the oversight of this committee, I am deeply sorry for the losses that you have had. Camp Pendleton is the center of my District, and so Fallujah was particularly painful for all of us in the community there, because during the same period, obviously, the Camp Pendleton Marines were heavily engaged in a dangerous zone.

One question I have is the opening statement. Who wrote it?

Ms. HELVENSTON-WETTENGEL. It was a compilation of all four of us. We all sent in our thoughts and feelings to Dan Callahan and

he compiled it, because we were told we only had 5 minutes, and so we had to—I have my own personal statement that I——

Mr. ISSA. It was well written and I asked because it did appear as though it was written by an attorney who had obviously slipped in a lot of things that they believe would be facts in the lawsuit now pending, and certainly I think it is regrettable that a family should have to sue to get information.

I guess one question, all four of these men were experienced, seasoned people who understood the military and law enforcement; is that fair to say?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. ISSA. In a sense, and hearing some of the biographies, these were people who would have been able to set policy, set the terms, if you will. I see you shaking the head, but think about this before you answer. These are people who, in fact, trained other people, particularly Scotty, so, as I understand, what we are talking about are professionals, highly skilled, going into a combat situation with experience about combat. Would that be fair to say?

Ms. HELVENSTON-WETTENGEL. No experience would have protected them that day.

Mr. ISSA. But that is not the question. Were these four loved ones of yours——

Ms. HELVENSTON-WETTENGEL. They were very experienced. They were definitely.

Mr. ISSA. OK. I think it is important, because one thing that is legitimate to this committee's oversight is: Does Blackwater, who I don't know from Adam, basically, but do they hire top-notch, skilled professionals that come prepared with skills commensurate with those of the U.S. military if they are to do similar jobs.

Ms. HELVENSTON-WETTENGEL. May I answer that?

Mr. ISSA. Yes, please.

Ms. HELVENSTON-WETTENGEL. Well, they do hire very highly trained people, but they also are in Africa in these little villages hiring these men that make $30 a month and are told that if they die that their families will get $1 million. There is a man from Africa that came and interviewed me. I have done interviews from two of them from Korea because they are hiring there.

Mr. ISSA. Sure. But you are experts on your children, your husbands, your father, your loved ones. They were highly qualified, highly skilled.

Ms. HELVENSTON-WETTENGEL. They certainly were.

Mr. ISSA. They were the type that we should want to have doing security and assisting our military in this combat zone. Would that be fair to say for all four?

Ms. HELVENSTON-WETTENGEL. Those four were very highly trained, but I cannot say that is the case for all of Blackwater's employees.

Mr. ISSA. That is a great loss, obviously, to you and to the work——

Ms. HELVENSTON-WETTENGEL. Yes. I am a widow.

Mr. ISSA [continuing]. That they were doing. I'd like to thank you for the service they provided and again express our sympathies for their loss.

I yield back.

Chairman WAXMAN. I just want to take exception that it is not germane to our inquiry. If taxpayers are paying for layers and layers and layers of private bureaucracy, and if somebody who is getting taxpayers' dollars tells even highly trained American veterans that they are going to have body armor, they are going to have armed vehicles, and they are going to have special people with them to help them carry out their job, we ought to know whether they failed to do that, because of indifference or negligence or incompetence. That is very much our job in oversight. It seems to me sometimes those who are criticizing our oversight didn't think we were actually going to do oversight, and this is part of our job.

Ms. SCHAKOWSKY. Would the gentleman yield for just a second?

Chairman WAXMAN. Well, let me ask unanimous consent that Ms. Schakowsky, who is not a member of this committee, be able to sit with us. Without objection, that will be the order.

I do want to recognize Members who——

Ms. SCHAKOWSKY. Can I just, in that regard——

Chairman WAXMAN. Yes.

Ms. SCHAKOWSKY. I also wanted to take exception to the question about who wrote the testimony, because I think clearly the implication was that somehow these wonderful women couldn't possibly have written that wonderful heartfelt testimony and that it took a lawyer in order to put it together. I resent that very much and I wanted to just put that on the record. Thank you.

Ms. HELVENSTON-WETTENGEL. I do have my personal testimony, if you would like to see it.

Chairman WAXMAN. Well, whatever you have, we will be happy to receive for the record.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

In your testimony that was given, you had a written question that you wanted Blackwater to answer, and it essentially was: Why did Blackwater not listen to its own manager in charge in Kuwait who had warned of all the problems well in advance of the deaths of your relatives. Ms. Helvenston-Wettengel, who was this manager?

Ms. HELVENSTON-WETTENGEL. Justin McGuown was his immediate superior.

Mr. TIERNEY. I am sorry. I couldn't hear you.

Ms. HELVENSTON-WETTENGEL. His name was Justin McGuown. He was Scott's immediate superior.

Mr. TIERNEY. And what concerns did he raise with Blackwater?

Ms. HELVENSTON-WETTENGEL. John Potter.

Mr. TIERNEY. Mr. Potter? What concerns did Mr. Potter raise with Blackwater?

Ms. HELVENSTON-WETTENGEL. Apparently it is my understanding that the guarantees that were given to our four men were not allowed in a subcontract that was signed with ESS. In the ESS contract they deleted the word "armored."

Mr. TIERNEY. They deleted the word "armor?"

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. TIERNEY. From the vehicles and from the——

Ms. HELVENSTON-WETTENGEL. In the ESS contract that Blackwater signed after Scotty had signed his contract.

Mr. TIERNEY. And you have had some difficulty getting the answers to these questions from Blackwater, so what was their response to Mr. Potter's concerns, if you know?

Ms. HELVENSTON-WETTENGEL. Well, they fired him initially.

Mr. TIERNEY. They fired him?

Ms. HELVENSTON-WETTENGEL. Initially, yes, because he was very upset because the word "armored" was deleted, and he argued for that. He said we'd have to have armored vehicles. And he subsequently was fired.

Mr. TIERNEY. And have you had any communications with him since he was fired by Blackwater?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. TIERNEY. Yes.

Ms. HELVENSTON-WETTENGEL. And you know where he is?

Mr. TIERNEY. Yes.

Ms. HELVENSTON-WETTENGEL. OK. Now, you brought a lawsuit against the company, and their response was what?

Ms. HELVENSTON-WETTENGEL. They were outraged that we had the audacity to sue them. They claim that they cannot be sued because they are a Defense contractor.

Mr. TIERNEY. And did they take any action against you?

Ms. HELVENSTON-WETTENGEL. Personally, $10 million is something kind of personal.

Mr. TIERNEY. The countersuit?

Ms. HELVENSTON-WETTENGEL. Yes. That is pretty personal.

Mr. TIERNEY. And, if I understand it, their countersuit asserts that you had no right to sue them under the terms of the contract, and therefore you are responsible to them for $10 million?

Ms. HELVENSTON-WETTENGEL. Yes, basically.

Mr. TIERNEY. And where in the court process is that suit and countersuit right now? How far along are you?

Ms. HELVENSTON-WETTENGEL. That was fairly recently that they did that. I don't know how far it has progressed.

Mr. TIERNEY. If I discuss with you——

Ms. HELVENSTON-WETTENGEL. Well, after 3 years they have yet to give us any kind of document or deposition.

Mr. TIERNEY. That is exactly where I was going to go.

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. TIERNEY. So your lawyers have asked for written documents to be produced?

Ms. HELVENSTON-WETTENGEL. We have received nothing.

Mr. TIERNEY. And you have received nothing. Have you had depositions, times where you came in before——

Ms. HELVENSTON-WETTENGEL. At one point Mark Miles, who works with Dan on this case, he flew all the way to Norfolk, and he scheduled——

Mr. TIERNEY. All the way to Norfolk?

Ms. HELVENSTON-WETTENGEL. Norfolk. He had deposed a number of Blackwater employees and they just didn't show, and so Mark sat in his hotel room for 2½ days and he kept faxing their attorney saying at least give me the courtesy, if no one is going to show all the way through Friday, please just let me know, sign it, and I will go home. After I think it was the 3rd day they finally

gave him that courtesy, just that nobody that had been deposed would be there.

Mr. TIERNEY. In the course of your lawsuit do you know whether or not your counsel have sought to have documents produced by any Government agency, the Department of Defense, for instance, or taken any testimony from any Government individuals?

Ms. HELVENSTON-WETTENGEL. I have no knowledge. I am not saying that they didn't; I just have no knowledge of it.

Mr. TIERNEY. I want to thank all of you for your testimony today and say how sorry we all are. I think most people in this country, if not all, understand that, while your family members may have been serving as private individuals or citizens in this case, that they were working in the interest of our country, and we all feel that they deserve the same protections and regard as people in the military, whether from our own Department of Defense or from their contracting agent, so you have our sympathy.

Ms. HELVENSTON-WETTENGEL. They were all very proud, patriotic men——

Mr. TIERNEY. I am sure they were.

Ms. HELVENSTON-WETTENGEL [continuing]. Who loved their country.

Mr. TIERNEY. As are you. Thank you very much.

Ms. HELVENSTON-WETTENGEL. You are welcome.

Mr. TIERNEY. I yield back.

Chairman WAXMAN. Thank you, Mr. Tierney.

Mr. ISSA. Mr. Chairman, point of order.

Chairman WAXMAN. Yes?

Mr. ISSA. While I was out of the room voting in Judiciary I understand that there was what I would consider a disparaging comment implying that my question to the witness was related to having been a woman outside the ordinary course of business. Would that be correct?

Chairman WAXMAN. Well, it is not an adequate point of order, but do you want to make a statement?

Mr. ISSA. I would like to have the words taken down.

Chairman WAXMAN. We will check with the parliamentarian to see if that is appropriate in a committee. But meanwhile we have witnesses here and I want to pursue——

Mr. ISSA. I look forward to hearing their testimony.

Chairman WAXMAN. Mr. Westmoreland. Mr. Bilbray. Mr. Platts.

Ms. TEAGUE. Congressman Waxman.

Chairman WAXMAN. Yes.

Ms. TEAGUE. I would just like to go back for a second for a point simply to try to make it a little bit clearer about the Congressman's point that these were men that were highly skilled, familiar with combat, the kind of men you would want in these positions. I agree with that. But I don't know if this was made clear. All four of these men had not been with Blackwater. My husband had been with them literally—I put him on the plane March 26th. He arrived in Kuwait March 29th, and he was killed March 31st. Had never done a mission with Blackwater before. OK? Her son had been with Blackwater 11 days. Her son about 3 months, I believe.

Ms. BATALONA. Two weeks.

Ms. TEAGUE. Two weeks. So here you have four men, highly skilled, yes, understand combat, yes, but they are sent out on a mission, my understanding, no map, no prior time to assess the situation. Could someone that has not worked with this company for some time go with them or help them or sort of be, you know, take the lead in that? You are all very well versed in this community and in this building, but if you have never been here before wouldn't you need someone to show you a few things?

So whether they are highly skilled or not does not take away from providing them with maybe just the operations of that company. That is different from active military. There are several things that were different that they were not privy to.

Chairman WAXMAN. Thank you very much. That is a good clarifying point.

Mr. Platts.

Mr. PLATTS. Thank you, Mr. Chairman.

Ms. HELVENSTON-WETTENGEL. I would like to make one more statement.

Chairman WAXMAN. See if you can respond in the question period, and then if you want to make a statement I am sure that those of us who are proceeding with questions would be pleased to allow you to do that.

Mr. Platts.

Mr. PLATTS. Thank you, Mr. Chairman. No question. I would just convey my deep sympathies to you and your families on the loss and for the service of your loved ones to our Nation and to the cause of freedom.

Ms. HELVENSTON-WETTENGEL. I am having trouble hearing you, sir.

Mr. PLATTS. I said no question, I would just convey my sympathies to you and your families on your loss and to the sacrifices that your loved ones made to our Nation and to the cause of freedom.

Ms. HELVENSTON-WETTENGEL. Thank you.

Chairman WAXMAN. Thank you.

Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Chairman. I also want to thank Ranking Member Davis for helping on this.

First of all, I am very appreciative that you have come here today to help the committee with its work.

I do want to go to the germaneness issue because it has been raised by my colleague. First of all, we have a situation here where there is a growing tendency for the military or for the administration to subcontract out work that has traditionally been performed by our military, instead using private contractors. While the tangled web of subcontractors and sub-subcontractors has been noted here this morning, it certainly is germane when American citizens are put in a very difficult situation without adequate protection.

With respect to the gentleman's comments, he initially raised the fact that the germaneness may not be to this committee's jurisdiction but may instead be connected to a civil lawsuit. That was the gentleman's comments. And then the question was whether or not the opening statement of the witnesses here had been drafted by

a lawyer, presumably with the same lawsuit. That was the inference that was left here.

I have only been a Member here for 5 years. I have only sat through several hundred, maybe 1,000 hearings. That is the first time as a Member of Congress that I have heard any witnesses asked who wrote their opening statements. And I might say also that, if that question is a fair one, then you might ask how many Members up here at this table wrote their own opening statements. [Laughter.]

You might be surprised at those answers.

Ms. HELVENSTON-WETTENGEL. Good point.

Mr. LYNCH. But I do want to ask the witnesses this. There is an inference here by the attorney for Blackwater in a letter they have presented to us that by coming forward and filing a lawsuit on behalf of your loved ones—and, you know, I have been to Fallujah a couple of times. I have actually been under escort with Blackwater security forces in Afghanistan, as well, so I understand how brave your loved ones were and how patriotic they were, with the same fervor, same patriotism as those who serve in American military uniforms. I understand that. But the inference is there in the letter from Blackwater's counsel that, by their contract, somehow your husbands, sons, brothers gave away the right for you to sue in the event that negligence or extreme negligence caused their death. Can you tell me where that came from?

Ms. HELVENSTON-WETTENGEL. They were also guaranteed certain provisions. Had they had any of those provisions, I know in my heart they would be alive today. But the few minor things that they were promised when they took that employment were taken away from them, every single one of them. If they had that armored vehicle, if they had that rear gunner, if they had a map—I think it is referred to as a black zone or red zone. The military would not even go in there with the heaviest equipment over there, it was so dangerous.

Mr. LYNCH. And I do realize at this point when their caravan, their convoy had gone through Fallujah, the Marines hadn't been in to central Fallujah before your husbands and your loved ones took that convoy through.

But, with respect to the inference that there is a bar on their lawsuit because of the contract that your loved ones signed, is there any more information that you have on that? And I realize that there are allegations and there is certainly evidence that Blackwater didn't fulfill their part of the contract, but this bar on your lawsuit, is that—that is something that concerns me for other employees in the same situation that your loved ones were in. I want to try to make sure that there is no assertion to other families that they can't bring lawsuits because of something that was put in that contract.

Ms. HELVENSTON-WETTENGEL. I am not familiar with this bar that you refer to. I am not sure what that means.

Mr. LYNCH. OK. All right. That is fair enough.

Thank you, Mr. Chairman. I yield back.

Chairman WAXMAN. Thank you, Mr. Lynch.

Mr. Issa, you are recognized on your own time.

Mr. ISSA. Thank you, Mr. Chairman. Perhaps I will use a little of it to straighten out two things.

My understanding is that the U.S. Congress has put into law prohibitions on lawsuits for our Government contractors operating as agents of the U.S. Government in a combat zone.

Ms. HELVENSTON-WETTENGEL. Sir, I cannot answer any legal questions. I don't have the——

Mr. ISSA. I am not asking. I am making a statement just to set the record straight. I have reviewed some of that. That bar might be something that this and other committees should look at. Obviously, when a company bids, they bid based on the assumption that relevant U.S. law would be there. In other words, that their losses would be limited to whatever they contracted for in the case of a death.

Having said that, I did ask an appropriate question, I believe, of who wrote the opening statement for you, not because it is without any—I mean, it is very common for attorneys or organizations, in-house people to write opening statements.

Ms. HELVENSTON-WETTENGEL. Why are you dwelling on that?

Mr. ISSA. I am dwelling on that because, in fact, there is a real question, not as to whether or not we should oversee Blackwater and other contractors, but the role of having you three bereaved women here——

Ms. HELVENSTON-WETTENGEL. There are four of us.

Mr. ISSA. I am sorry. Thank you. You know, it is a good thing I learned to count early but not well. Having you here to tell us about your loss when, in fact, it is the subject of a lawsuit that is ongoing and, in fact, this committee has no jurisdiction here to change the outcome of your loss today or to settle your lawsuit——

Ms. HELVENSTON-WETTENGEL. And why is that? We are subcontracting out our war. I understand there are 100,000 contractors over there and there doesn't seem to be a law that applies. They literally can get away with murder, and it is happening over and over again. It just happened to our four men. It is like the Wild West over there, and there is no accountability.

Mr. ISSA. I would gather that all four of you would like us to cease using contractors wherever possible? You think it inappropriate? Is that spoken for all of you?

Ms. HELVENSTON-WETTENGEL. I have found it difficult to understand why they do, because they are paid so much more than the military, and the military resents them for that. They are taking jobs that the military had been trained to do and they are giving it to Blackwater and they are being paid enormous amounts of money, and it is like a secret army over there that the majority of Americans aren't aware of. But if you are going to subcontract out this war, then there needs to be some laws that apply to these people.

Ms. TEAGUE. Sir, I would like to comment.

Mr. ISSA. Yes, please.

Ms. TEAGUE. I think these questions are a bit leading, but I would still like to comment. I think there is a need for contractors and subcontractors in this war. I have felt that. I didn't want my husband to leave home again and work with Blackwater. It wasn't necessarily because it was Blackwater. I did not know as much

about Blackwater. I was tired of my husband being gone. He felt it was his calling and it was what he should do. I don't feel that it necessarily calls for there to be no contractors, no subcontractors, but you just made a point, a very valid point. When these contractors bid jobs with the Department of Defense and they do so under maybe some understanding that they are above the law and that they can do this, do they also have to account for where all those billions of dollars go? I don't see where any of that is spent. I have never heard or had any account of where it is at.

Mr. ISSA. Well, that is something that is—I appreciate that. That is something that is very germane to this committee and something that we are very interested in. As you probably know, we are going to have Blackwater's counsel here next. That will be one of the questions is the money.

I would like to make a small enclosure into the record. During the same time that your loved ones were there, March to August 2004, one of my legislative assistants was there with one of the provisional ministers in an unarmored vehicle with only a guard/driver, the three of them in a car outside the green zone. It appears as though this has been a war that we thought wasn't a war, then we thought it was a war, then we thought it wasn't a war, and it is not uncommon for these loved ones to be lost or put into danger when people are saying they are not in danger. We had 3,000 people working in that sort of capacity that were working for $35,000 or $40,000 for the U.S. Government at the time as USAID and other provisional authority. This is something that is appropriate to this committee to see whether or not we should have those kinds of people in those kinds of zones with that kind of protection, and to that extent I thank you for your testimony, because I think, to the extent that we do understand whether we have appropriately used contractors is very germane to this committee.

I yield back.

Ms. HELVENSTON-WETTENGEL. The Blackwater has claimed from the beginning that they are exempt from all State and all Federal laws. How can that be? These are human beings they are dealing with, and they literally feel they cannot be sued, regardless of what they have done.

Chairman WAXMAN. Mr. Kucinich is going to ask some questions.

Mr. KUCINICH. Thank you very much, Mr. Waxman.

Just picking up on the comments of the witness, if that is what we are told is characterized as Blackwater's way of operating, then it is basically anything goes.

Ms. HELVENSTON-WETTENGEL. I am sorry?

Mr. KUCINICH. If Blackwater operates the way you say they operate, then it is basically anything goes, they aren't bound by any laws at all.

Ms. HELVENSTON-WETTENGEL. Exactly. That is the point I am trying to make.

Mr. KUCINICH. I just wanted to make sure that it came through boldly, because what you are saying is, you know, we see these witnesses effectively being impugned because they filed a lawsuit.

Let me ask you, the members of the families, were you motivated by money or were you motivated by accountability? Did you want to make sure that Blackwater was held accountable?

Ms. HELVENSTON-WETTENGEL. I will not get one cent from this lawsuit. I refuse to take a penny.

Ms. TEAGUE. I would like accountability, sir, from the beginning.

Ms. BATALONA. Same here.

Mr. KUCINICH. Ms. Zovko.

Ms. ZOVKO. Same here. Just let them face what they have done and let them not do it to anyone else. Be accountable for what they have done.

Ms. HELVENSTON-WETTENGEL. What I don't understand is how our Government can hire corporations like Blackwater knowing that they refuse accountability. I mean, what does that say about us as a country, as a Nation?

Mr. KUCINICH. See, this needs to be known. This is about a matter of the heart here. This isn't about people trying to get money, because when you see what these families have gone through and even the courage it takes for them to come forward today, this committee is very appreciative of your being here.

I have a quick couple of questions that I want to ask the members of the panel here. The practice of contracting out military operations in a war zone to private security contractors, it is troubling. I will tell you why. When the Government first began turning to contractors on the battlefield it was to provide meals and laundry and other services so the troops could focus on the fighting. It was so our soldiers could be what they call the tip of the spear. But today we are hiring out contractors to be that tip of the spear.

Now, here is what the head of Blackwater said last December about his company's role. "We are trying to do for the national security apparatus what FedEx did for the Postal Service. They did many of the same services that the Postal Service did better, cheaper, smarter, and faster by innovating, which the private sector can do much more effectively." That is a direct quote.

Ms. HELVENSTON-WETTENGEL. Was that Blackwater?

Mr. KUCINICH. Pardon?

Ms. HELVENSTON-WETTENGEL. Is that from Blackwater?

Mr. KUCINICH. That is Erik Prince.

Ms. HELVENSTON-WETTENGEL. OK.

Mr. KUCINICH. And so he makes clear that the private sector has a fundamentally different goal than our military. It is the private sector that wants to make money. That is why some people could be seeing the world in their own image, claiming that you are here to make money. The private sector wants to make money. There is nothing wrong with that unless it comes in conflict with the goals of our military.

Each of your loved ones spent years as the best of the best, the most elite in the U.S. military, each of them, and you were accustomed to military culture, so here's the question. Ms. Zovko or Ms. Helvenston-Wettengel, what were some of the differences that you noticed between the U.S. military and Blackwater or a for-profit business entity? For example, when your families were on active duty what was the military more interested in, the safety of the troops or how cheap they could carry out the mission? I would like to hear your response to that.

Ms. HELVENSTON-WETTENGEL. Donna, do you want to go first?

Ms. ZOVKO. Well, I know when my son Jerry was in the Army he was the best that he could be. He loved it, and he was taken care of and protected. He was to do his job, but he was given the tools to do it with. He was the best of the best in the world, 82nd Airborne, MP Company, Ranger. He didn't lack anything. His experience and his knowledge from the Army he was going to use with Blackwater, but they shot off his arms and his legs. They just let him out there to die. They did not provide anything for him. He had his discipline, he has his know-how, knowing the Middle East as he did, but they didn't give him the tools to work with. They just simply sent him out there to die. They did.

You know, if you do what your job requires you to do and if you are making the laws, you are not making them only for our country, for America, it is the world that we make because we are the No. 1. My son was the No. 1. Blackwater and other companies like Blackwater, they are recruiting from other countries and they are not paying them well enough or taking care of them well enough at all, so that needs to be seen. If we are going to police the world, then let's do it right. Let's start at home taking care of what we need to do here and go on with everything else.

Mr. KUCINICH. Ms. Zovko, first of all, to all of the witnesses, our deepest condolences to your family for what you have suffered. If you can make a final comment, Ms. Zovko, do you believe that Blackwater is more concerned about the safety of its personnel or how much profit it could make on the contract?

Ms. ZOVKO. It is profit. It is definitely profit, and I will go to my grave believing it was profit. They were not concerned about my son or his well-being or what he can do for them. It is what they could have charged for my son. Remember, our country had given the tools to my son to be who he was. He was an ex-Army person, a Ranger, the best of the best, and they used him to get him killed.

Mr. KUCINICH. Thank you. Thank you to all of the witnesses. Thank you.

Chairman WAXMAN. Thank you, Mr. Kucinich.

Mr. Shays.

Mr. SHAYS. Thank you, all four of you, for being here. We have had a number of hearings in the subcommittee that I have chaired over the last few years, and I have been to Iraq 15 times, and I say that because I have been outside the umbrella of the military, where I have literally gone in a taxi, where I have gone in a vehicle that, unfortunately, was white and four-wheel drive and was a signal, you know, there was probably a European in it. You knew intuitively the moment you got off the airplane in Iraq that you were in dangerous territory.

What I am wrestling with is this. First off, I want to tell you I find myself agreeing with a lot of different people who you disagree with and agreeing with you at the same time. All four of you have a right to be outraged. You lost your loved ones. You have an extraordinary right to be hurt. The reason we pay contractors what we pay them was so they could pay people who make much more there than here, and a lot of people who went to Iraq went because they could make more money, and they knew they were being put in harm's way. They could make two, three, four times as much.

Ms. HELVENSTON-WETTENGEL. Not if you are dead they can't. They can't make a thing.

Mr. SHAYS. Don't interrupt me, ma'am. Let me make my point and then you can make your point. It depends which contractor is there. You interrupt me before you know whether I agree or disagree. Just listen. And so people went there so, in fact, they could make additional money, and they knew they were in harm's way. What we wanted is to make sure we sent the best-trained people there, the contractors.

One of the things that is not in dispute is all four of your family members were skilled and knew the risk and knew what to do to deal with it. The issue is were they being given the kind of assistance they needed to do their job properly.

So one of the questions that is raising for me is: Did they have the capability to say hell, no, we are not going out there?

Ms. HELVENSTON-WETTENGEL. Scotty did say that, and he said he would be fired.

Mr. SHAYS. Please do not interrupt. So I am just throwing that out as an issue. Were they, in fact, capable? And if they did refuse, what would be the result? Would they be court martialed or would they be asked to say we don't want you to work here? And, frankly, if you are a skilled person you would say I don't want to work here. Were they forced under a threat of some kind of court martial not to carry out what they did?

So I am saying what is the value of what you are doing here in the course of this hearing is, one is we need to evaluate the role of contractors. They aren't the tip of the spear. The tip of the spear are the men and women in uniform who are going out and actively trying to root out the enemy. The whole purpose of contractors is to free up our military from, instead of doing security work, the whole purpose is to make sure that our military doesn't have to do the security work so they can be the tip of the spear.

And now I want to tell you where I have tremendous sympathy. This company should answer every question you have, every question. They should have immediately called you up, they should have let you know what happened, they should have said this is what we know, what questions can we answer. They should have assigned someone to you to help you get information, an ombudsman in the company. I will tell you, the moment I was in your shoes where I got pushed back, I would sue them. I would sue them. I would do anything I could to get the information. And so I am just going to throw that out for your comment.

I do want to say, in sympathy to Mr. Issa, his point is I asked this question on occasion to witnesses: Is this your statement or is this a statement drafted by your attorney? The reason is, when an attorney drafts a statement they are thinking of the lawsuit and what information they want to put in the public record. It is a very valid question. I know my colleague. It wasn't whether you as women or as bereaved people could write a statement. You could write a wonderful statement. The question is, as we look at it, is the committee being used properly to look at this, or are we furthering a private lawsuit.

So let me just say to you: Is it true, in fact, that you asked for information immediately and you got pushed back? And I would like everybody, not just one spokesman. I would like to ask you.

Ms. ZOVKO. Yes, sir, it is the truth. We were pushed back and not told the truth.

Ms. TEAGUE. Yes.

Ms. HELVENSTON-WETTENGEL. Blackwater lied to us.

Ms. BATALONA. Yes.

Mr. SHAYS. OK. and so the purpose, it seems to me, is that once they did that you had no choice but to take action against them. That is my view.

Ms. HELVENSTON-WETTENGEL. There was an earlier question in your statement, and it was regarding whether or not Scotty had a choice. An employee of Blackwater's went up to Scotty's room with two thugs, held him down, took his gun away from him, told him if he did not go on that mission he was on the streets of Baghdad that night, he would be on his own to get home, and he would pay back any moneys that Blackwater had paid him. So he didn't have a choice.

Mr. SHAYS. Let me just say that is an extraordinary statement to put on the record under oath. Just tell me how you know that to be true.

Ms. HELVENSTON-WETTENGEL. The person that was in the room at that time with Scotty told me.

Mr. SHAYS. So someone else who was there shared that information with you? And would you identify who that person was?

Ms. HELVENSTON-WETTENGEL. I can't. Also, Scotty's e-mail stated——

Mr. SHAYS. Ma'am, I need you to say—you said a person said. Who is that person? You need to ask your attorney?

Ms. HELVENSTON-WETTENGEL. The person was in Scotty's room. Can I answer that?

Chairman WAXMAN. Well, as I understand—first of all, your time is up. As I understand the question, you said there was a person who said he was in the room and he sent an e-mail to you and you believe it.

Ms. HELVENSTON-WETTENGEL. I know.

Chairman WAXMAN. I guess the real question is, even if he had not been told that information, are people assuming the risk of dying because their employees want to cut back on the payments to provide the security for their employees? This is a doctrine that——

Ms. HELVENSTON-WETTENGEL. Well, they took every—the few very minor things that they were guaranteed, they took every one of them away. Had they had any one of those they probably would be alive today. It seems to me it was kind of a personal, intentional thing. It was blatant.

Chairman WAXMAN. I understand what you are saying, and I just want—I know it is not my time.

Ms. HELVENSTON-WETTENGEL. I can give the name of this person.

Chairman WAXMAN. It doesn't make any difference.

Mr. SHAYS. A point of order, Mr. Chairman, please.

Chairman WAXMAN. What is your point of order?

Mr. SHAYS. My point of order is that I had time, you've taken it away, and now you are speaking without time and you are speaking on something that I was pursuing and leaving in question something, making a statement it doesn't matter. It doesn't matter to you; it matters to me. If I could have my time or if you could have legitimate time we could have——

Chairman WAXMAN. The gentleman's point of order is well taken. I now recognize Mr. Yarmuth for his time.

Mr. YARMUTH. Thank you, Mr. Chairman.

Thanks to all of you for being here today. I join the other members of the committee in offering our sympathies and our gratitude for your sacrifice and for being here.

I want to pursue for a second the train of thought of Mr. Shays, because he tried to draw a distinction between what would be characterized as providing security and other types of military activity. This may be something you may not be able to answer, but if so, say so. It seems to me that a lot of what our military is being asked to do in Iraq involves security; is that correct?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. YARMUTH. So my point, by way of a question, is: To the extent that you know, was the activity that your relatives were involved in distinguishable from what many of our military are doing in Iraq right now, our active military?

Ms. HELVENSTON-WETTENGEL. I don't know.

Mr. YARMUTH. You don't know? OK.

Ms. HELVENSTON-WETTENGEL. Well, I know Scotty was told he was going to be security for Paul Bremer and he would be working in the green zone. He never met Paul Bremer.

Mr. YARMUTH. He was told that by Blackwater?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. YARMUTH. So essentially, to the best of your knowledge, then, there really isn't a distinction between what your relatives were doing and what our active military are doing now, many of our active military?

Ms. HELVENSTON-WETTENGEL. The main distinction is that they were not given the equipment to do it.

Mr. YARMUTH. And they are being paid by a different employer.

Ms. HELVENSTON-WETTENGEL. Right.

Mr. YARMUTH. Immediately following the incident at Fallujah there was a New York Times story and in that New York Times story a man named Patrick Tooey, who is a high-level executive at Blackwater, apparently, was asked about the attack and was quoted as saying, "The truth is we got led into this ambush," and he then provided some details about the Iraqi Civil Defense Corps and how an escort had been arranged just east of the city, and so forth, so he seemed to know a fair amount of detail about the attack. Have any of you ever been contacted by Mr. Tooey? Did you try to get information from him?

Ms. HELVENSTON-WETTENGEL. No.

Mr. YARMUTH. No?

Ms. HELVENSTON-WETTENGEL. We have contacted them numerous times asking those very questions and they won't return our calls.

Mr. YARMUTH. So he was apparently willing to talk to the New York Times, but not to you?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. YARMUTH. Somewhere later in that article he talked about the fact that they were planning to conduct a more thorough investigation. Did you ever get any more information about subsequent investigation that they may have——

Ms. HELVENSTON-WETTENGEL. We have received no information, period.

Mr. YARMUTH. Thank you, Mr. Chairman. I yield back my time.

Chairman WAXMAN. Thank you, Mr. Yarmuth.

Mr. Hodes.

Mr. HODES. Thank you, Mr. Chairman.

Ladies, thank you for coming today. I want you to know how sincerely we appreciate your being here and the sacrifice that you have made. Having some familiarity with litigation in my former life, I know how tough it is to go through what you are going through with the push-back from the other side, and it takes a great deal of courage to do what you are doing in pursuing answers from this company.

We have watched over a period of years this intermingling of contractors with forces and the use of contractors growing by the U.S. military, especially in Iraq, and it is clear now that the numbers of Americans who are serving in Iraq, serving their country as your loved ones did, is actually much, much higher than the numbers that the military reports because they don't talk to us about the contractors, even though they are providing those services that your loved ones did, so this is really a very important issue in the way things work together.

And it doesn't matter to us whether your loved ones were in the Army or they were private contractors; they were Americans serving their country bravely, so we really understand and feel that.

I want to ask you what may be some basic questions about some information that you had or didn't have. Did your loved ones sign written contracts with Blackwater?

Ms. HELVENSTON-WETTENGEL. No.

Mr. HODES. There were no written contracts?

Ms. HELVENSTON-WETTENGEL. Are you asking us personally did we sign?

Mr. HODES. Yes. Not you. Did your sons and husbands sign written contracts with Blackwater?

Ms. HELVENSTON-WETTENGEL. I believe they did.

Mr. HODES. Do you have copies of those contracts?

Ms. HELVENSTON-WETTENGEL. Yes.

Mr. HODES. OK. And were you aware of whether or not there were any other discussions surrounding those contracts where Blackwater made representations to your loved ones about what they would have to protect themselves and what equipment they would have?

Ms. HELVENSTON-WETTENGEL. Your questions are long. Chris Berman, who was with Scotty, he signed the same contract and so he joined the same time Scotty did, so they were there together, and they were friends back in California, so a lot of this information comes directly from Chris Berman.

Mr. HODES. And your folks were told they would have armored vehicles, they would have protection, they would have machine guns, they would have what they needed to protect themselves from risk?

Ms. HELVENSTON-WETTENGEL. Correct.

Mr. HODES. Were they told anything about the various levels of subcontracts between Blackwater and these other companies that we have now heard about?

Ms. HELVENSTON-WETTENGEL. I don't know. I would doubt that would have transpired.

Mr. HODES. Sitting here today, can any of you say with any certainty what the relationships were between Blackwater and Fluor or KBR or ESS? Do you have any idea how that worked at all?

Ms. HELVENSTON-WETTENGEL. Well, I understand it is a pyramid type thing, and usually starts with Halliburton, then it goes to KBR, then Regency, then ESS, and then Blackwater, and then Blackwater prepares their invoice, adds on their 35 percent, it goes to ESS, they prepare theirs and add on 35 percent on top of Blackwater's 35 percent, and it just goes on and on.

Mr. HODES. So everybody gets a cut as it goes on up?

Ms. HELVENSTON-WETTENGEL. And it just keeps growing, too, because they are adding 35 percent on other 35 percents.

Mr. HODES. Do you know whether or not any of the companies, as things go up, exercised any oversight over Blackwater and how it was treating its employees?

Ms. HELVENSTON-WETTENGEL. I am not aware of any.

Mr. HODES. Do you know if the Defense Department, which ultimately was at the top of this pyramid, as you have called it, was monitoring what Blackwater was doing with its employees?

Ms. HELVENSTON-WETTENGEL. The only Defense paper I saw when Chris brought Scotty home and he gave me his personal things, there was something in there with the Defense Department heading, and it basically just said that they had no liability to Blackwater.

Mr. HODES. Do you think that someone should do more to watch over what is going on with the private security contractors, including Blackwater?

Ms. HELVENSTON-WETTENGEL. Yes. Most definitely.

Mr. HODES. And do you have any feelings as to whether or not it ought to be the Department of Defense which ought to be doing more to monitor what is going on with the contractors who are serving our country so bravely?

Ms. HELVENSTON-WETTENGEL. Well, since Blackwater's whole defense is if they had a Government contract with the Defense Department, yes, I think the Defense Department should establish some rules.

Mr. HODES. And do the rest of you agree with that statement?

Ms. BATALONA. Yes.

Ms. ZOVKO. Yes.

Ms. TEAGUE. I do.

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

Thank you, Mr. Chairman. I yield back my time.

Chairman WAXMAN. Thank you, Mr. Hodes.

Mr. Welch.

Mr. WELCH. Thank you, Mr. Chairman.

Welcome. You mentioned that there was a service at Blackwater—not at Blackwater, for your loved ones. Did all of you attend that?

Ms. HELVENSTON-WETTENGEL. Yes.

Ms. TEAGUE. I did not.

Ms. HELVENSTON-WETTENGEL. No, Rhonda didn't.

Ms. BATALONA. I didn't attend.

Mr. WELCH. Did your——

Ms. BATALONA. My mother did.

Mr. WELCH. Your mother did? OK. And there was a reference that there were guards, that each of you was separated from one another. I would like to ask you if you could each comment on that, and in your case comment on how your parent was treated there.

Ms. BATALONA. I know that my mom said somebody was with her. Somebody was with my mother, but I don't think she ever referred to them as guards, per se.

Mr. WELCH. She what?

Ms. BATALONA. She never referred to them as being guards.

Mr. WELCH. OK.

Ms. BATALONA. But she knew that they were always with her when—they never had alone time together with the family.

Mr. WELCH. Was she discouraged from spending time with the other families?

Ms. BATALONA. She seemed that way, yes, because whenever they went out to dinner they joined and if she went somewhere in the hotel they followed.

Mr. WELCH. Thank you. And how about you, Ms. Helvenston?

Ms. HELVENSTON-WETTENGEL. The same. They would walk me to my door to go to bed at night and there would be someone standing outside of that door in the morning. The last night we were all there we wanted to go out to dinner and just talk, and uninvited they chose to join us, a number of them, and so it was a pretty quiet dinner.

Mr. WELCH. Did that inhibit your conversation?

Ms. HELVENSTON-WETTENGEL. Well, one night, though, after the first night we were there after the guards left, I snuck out of the room and we all went down to Donna's room and we talked. They at least allowed us that.

Mr. WELCH. All right. And, Ms. Teague, you were not there?

Ms. TEAGUE. No. The time that it happened was my son's birthday, Mike's son. He was struggling and we opted not to attend.

Mr. WELCH. How old is your son?

Ms. TEAGUE. He is 19 now.

Mr. WELCH. All right. Ms. Zovko, how about you?

Ms. ZOVKO. Well, what they have shared, I did feel that they were there to watch over us to see, you know, not to communicate with the other people. For instance, this one thing, they have planted trees and made headstones for my son and for his coworkers, or, you know, people that worked for Blackwater that were killed in Iraq, and I ran out of film to take a picture. I just wanted a picture of my husband with the headstone and all of that. I was going to ask a lady that was there to take a picture for me so that, you know, I was going to give her my address to mail it to me.

Well, before you know it there was someone already there saying, "No, you don't have to do that. I will take the picture and I will send them to you." Well, he took the pictures but he never mailed the pictures to us.

Mr. WELCH. OK.

Ms. ZOVKO. That is there. I had my grandchildren there, and my daughter-in-law. We were all there, but there was no ease. They have told us that they didn't work for Blackwater when we came in.

Mr. WELCH. Yes.

Ms. ZOVKO. When we flew in. In reality, when we came into the headquarters the following day, the same people that said that did not work for Blackwater, that their wives worked for Blackwater, had the T-shirts of Blackwater on and standing at the entrance letting us in.

Mr. WELCH. Thank you. Just one quick question for each. I appreciate that. You are all strong women, made stronger by being together. If each of you could have asked a question of Blackwater to get one piece of information, what would each of you ask Blackwater to do to help you come to terms with the loss that you have suffered?

Ms. ZOVKO. The truth. The simple, plain truth. "Mrs. Zovko or Donna, this is what happened. This is how it happened. You couldn't see your son's body, but we are telling you that this is how it is." Do you know the remains of my sons were sent to me in 11 months. The first was in 10 days, and then what was left of him, 11 months later.

Ms. HELVENSTON-WETTENGEL. They sent his charred arm to her.

Ms. ZOVKO. Just the truth. I mean, basic truth. You know, we live in the best country in the whole wide world. Why can't we have the basics, what we were built on, the truth, you know, God and truth. That is all.

Mr. WELCH. Thank you.

Ms. ZOVKO. That is all. That is all, nothing else.

Mr. WELCH. Ms. Teague. Thank you.

Ms. TEAGUE. Very similar. I would like an account from start to finish of that day. Whether I want to hear it or see it, I would, every minute of it, every part of it, the truth.

Mr. WELCH. Thank you. Ms. Helvenston.

Ms. HELVENSTON-WETTENGEL. They showed such a callous disregard for life, and now they claim we have no rights? If we don't have the right to sue them, I don't know about you but I am outraged. Where is your outrage?

Mr. WELCH. Thank you. Ms. Batalona.

Ms. BATALONA. Like everybody else, I would also like the truth. Just a simple question of why. Why couldn't they give them the protection and the tools that he needed to complete his mission?

Mr. WELCH. Thank you.

Mr. Chairman, I yield whatever time I have.

Chairman WAXMAN. Thank you, Mr. Welch.

Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman.

Let me thank the ladies for being here today. I think it is essential to remind us that, no matter how good the intentions are, there

is always, in major efforts, major mistakes. Congress bears the responsibility of not just finding fault, but trying to find answers. We can't relieve you of the burden that you are going to bear the rest of your lives, and your loved ones, but we do bear the burden of trying to modify the process, to minimize the potential for this to happen again.

Ms. Teague, there was a lot of discussion here about the isolation of your loved ones from the rest of the rank and file of the employment of the group that was under Blackwater, and there were specific references to the fact of contractors going to Third World countries to find "inexpensive employees" to be able to provide the infrastructure, the support that your loved ones needed.

I will be very blunt with you. Do you think we should be looking at the fact that the people that are recruited to do American jobs may need to be Americans and should be required to be U.S. citizens so that it is U.S. citizens fighting side by side? Let me just poll you. Would you suggest that we just make it a matter of fact policy or consider a policy that says when an American contractor gets an American contract to go into these situations, they must hire U.S. citizens to do the job?

Ms. HELVENSTON-WETTENGEL. I think that would be very appropriate.

Ms. ZOVKO. I agree with that.

Ms. TEAGUE. I agree, but I think that there is also the intel part of that, which again falls on other people, but you have to have intel that involves, when you are in a foreign country, people that can integrate in that. But I do prefer and wish they were all American, but that is a problem that has to be addressed in that.

Mr. BILBRAY. Thank you very much. I appreciate that. I appreciate the very balanced approach of many of you on this issue. It is astonishing that you can be so level-headed and so cool with the kind of experience you have gone through. I appreciate that.

At this time, the gentleman from California, the time I yield to Mr. Issa.

Mr. ISSA. I thank the gentleman.

Following up a little bit on what Mr. Shays had asked about, there was a statement made that there is—I think there were four names named and a 35 percent markup each time. How did any of you know about that, or what do you know about that?

Ms. HELVENSTON-WETTENGEL. I have read just about every article that has come out regarding Blackwater since about 6 months after the incident. Jay Scahill has just finished a book. He has done such incredible research and he is so thorough. Jerry Price has been incredible.

Mr. ISSA. So it is from unclassified information. And if I did my arithmetic, basically your loved ones were paid about $200,000 annualized. That would mean, with 35 percent, it would be about $800,000 the Government would pay per person per year if four contractors did 35 percent markup? Is that roughly your understanding, from the readings you have had?

Ms. HELVENSTON-WETTENGEL. I haven't done the math, but all I know is Scotty didn't even get one paycheck.

Mr. ISSA. I understand. Are all of you aware that Secretary Bremer was guarded for his time in Baghdad by Blackwater?

Ms. HELVENSTON-WETTENGEL. Yes.

Ms. TEAGUE. Yes.

Ms. ZOVKO. Yes.

Mr. ISSA. That is not inconsistent?

Ms. HELVENSTON-WETTENGEL. I would venture a guess he had armored vehicles.

Mr. ISSA. In your reading, were you aware of all the write-ups about our military personnel, including the Marines from Camp Pendleton, who were short of armored humvees and as a result were driving around with tin-sided humvees at the time because there was a worldwide shortage of the armor capability?

Ms. HELVENSTON-WETTENGEL. Yes, I was aware they would scavenge around Iraq in these junkyards trying to armor their own vehicles, which is horrible. How could our Government send them over there and they become scavengers trying to protect themselves?

Mr. ISSA. I understand that, and it is regrettable, but it is documented that the U.S. military had the same problem of insufficient armored vehicles during that time.

Are you also aware that Mr. Waxman and Speaker Pelosi and myself were guarded by Blackwater as late as 2005, 2006 on our last—March 2005, when we were there, that they have guarded, I believe, 91 codels? Virtually every Congressman that went in and out were guarded by Blackwater in Iraq.

Ms. HELVENSTON-WETTENGEL. I wasn't aware of that.

Ms. ZOVKO. But what does that have to do with them——

Ms. HELVENSTON-WETTENGEL. What's the point?

Ms. ZOVKO [continuing]. Sending my son the way they did on the job that he was doing when he died. I mean, I didn't come here and say the people that work for Blackwater are not qualified to guard and protect. My son was one of them. The reason that I am here is because they did not supply to my son what he needed to do his job, what he was qualified for. So what they did, that is just fine. I hope that they keep on doing a great job. But that has nothing to do with the death of my son or preventing them from not doing it to someone else just because they are good at green zone and they are able to protect the people that come there, be it you or anyone else. They did not protect my son.

Mr. ISSA. Thank you, Mr. Chairman. I yield back as appropriate.

Chairman WAXMAN. The gentleman's time has expired.

Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman. Thank you for this hearing today.

It seems to me that, regardless of who they are technically working for, when Americans are killed in action in a war zone there should be a moral obligation to tell the family how it happened.

Ms. Zovko, what is it that you want to know from Blackwater, and what specific questions would you like to get the answers to? If you have a list, send it forward. Can staff go get the list for us, please.

Ms. ZOVKO. I want to know the truth about March 31, 2004. I want to know about the way that they knew of this contract coming up, that Blackwater is going to have the contract. They were working on having the things put together for the missions, and then

all of a sudden the last minute they do what they did and send these men on the mission as they did. I want to know about the contracts that Blackwater needed to fulfill with the other companies that they were subcontracting from. Why didn't they oblige? Why did they not provide what they needed to provide for these employees of theirs if these employees were going to do the job? Why did they do it 3 days before the day was ever to come for them to go into the effect? What was the hurry? What was the rush, and especially with not giving them what they needed to have? Why did it take so long for my son's body to come home? Why wasn't there someone in front of them with the heavier equipment, if they were not equipped, someone that was more equipped? If our military couldn't go in, how come Blackwater could send them? Why? Why? Don't you understand? What is the truth behind it? Is it the dollar or what is it, or were there really lives being saved by taking my Jerry's life? What is it? Tell me. I don't know.

Mr. CLAY. I don't have the answers for you, and hopefully the next panel can help shed some light on it, but it sounds like reasonable questions that deserve answers, and Blackwater should be willing to answer those questions. I am sure that the military, if these were active duty military, they would be willing to give you the answers.

Let me also ask you about Erik Prince, who is Blackwater's CEO. He is known to be a very private man who does not often go on the record to talk about his company, but I understand that two of you have spoken with him personally.

Ms. ZOVKO. Yes.

Mr. CLAY. And, Ms. Zovko, Mr. Prince came to visit you at your home in Ohio after news of Jerry's death. What do you remember about that visit?

Ms. ZOVKO. I remember being told that he would be there about 8. He came, accompanied by our sheriff's department. They escorted him to my son's house. Out of everything, my brothers-in-law and my sisters-in-law were there, my daughter-in-law, and myself, and my husband. All I can remember—I can still see him sitting across the table, my son's dining room table, telling me that if he thought I thought—his words—"if anyone could survive the war in Iraq, it would be Jerry." He actually told me and made me feel like he knew who my Jerry was, to find out later that he was just an employee that he did not know.

Mr. CLAY. It sounds as though they just looked at Jerry and the other employees as just that, employees——

Ms. ZOVKO. Just that, employees.

Mr. CLAY [continuing]. That didn't have a family attached to them or anything else.

Ms. ZOVKO. Just a figure, just someone to be able to charge the Government for services rendered from people the Government had educated and made who and what they were, you know. But their own choices, though, granted. My son went to work for Blackwater, you know. He chose to, because that is how he could contribute in fighting the war in Iraq. But Blackwater did him wrong, very, very, very wrong.

Mr. CLAY. And it seems that this war has gone awry.

Ms. ZOVKO. It does.

Mr. CLAY. And people have died unnecessarily that didn't have to, and in this case all under the name of profit.

Ms. ZOVKO. Yes. All.

Mr. CLAY. Thank you all for being here. Thank you for your testimony, and thank you for your insight.

Mr. Chairman, I yield back.

Chairman WAXMAN. Thank you for yielding back.

Someone asked whether this is germane of our job as Members of Congress. If our military wasn't providing sufficient equipment, armored vests, basic needs of our troops, that is germane to us. And if our subcontractors and contractors are not providing what they should be providing to our troops that they have hired to represent our interests, that also is in our interest, that is also germane to what we want to know.

Ms. Schakowsky, do you want to be recognized?

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I really appreciate the courtesy you have extended to me as someone who is not a member of this committee but has tried to drill down over time on the issue of private military contractors.

I want to say to you that I saw—I am not sure if it was all of you—on the film "Iraq for Sale," the Robert Greenwald film that I wish every Member of Congress would watch about the role of private contractors in Iraq. I really appreciate your raising the questions of accountability that you have, because that is really the policy, the questions we have. But one policy question I wanted to point out to you is the question of why should we hire companies like Blackwater if they are so much more expensive than the military. And Erik Prince actually answered that in a way that you may have heard. He said last year about the military, "So when they say ah, we need about 100 guys to do that job, we say actually you only need about 10 to do that job." I don't know if you have heard that quote before. You know, he's saying Blackwater needs only one-tenth the manpower to do the same job as the military. I wondered if anyone had a reaction to that.

Ms. HELVENSTON-WETTENGEL. If you would compare the time they were slaughtered, Blackwater had 400 employees in Iraq. By March 2004, I think almost 25 had already died, versus the military, the total military over there and the total military that have died. As I say, I have not done the math, but their percentage is much higher, and if he thinks it is only worth sending 10 men out, I would pretty much guarantee those 10 men would come back dead.

Ms. SCHAKOWSKY. You know, on June 13, 2006 Chairman Shays of the subcommittee you mentioned, we had a hearing.

Ms. HELVENSTON-WETTENGEL. I heard that entire hearing.

Ms. SCHAKOWSKY. At that hearing where we had the State Department, the Department of Defense, the USAID, I asked questions about how many contractors do we have there, how much does it cost, how much are we paying, what's the total number of dead and wounded. You know, your loved ones are not considered when the number——

Ms. HELVENSTON-WETTENGEL. They don't count.

Ms. SCHAKOWSKY. No. They are not counted.

Ms. HELVENSTON-WETTENGEL. They are so insignificant, they don't even count.

Ms. SCHAKOWSKY. We think that it is upwards of about 800, but we can't get that answer. I asked to see a Blackwater contract at that time. We wanted to know if any laws had been broken in the host country, U.S. laws, international laws, if disciplinary actions had been taken against any contractors. No one had an answer. That was in June.

In December 2006 the Government Accountability Office said there is little visibility over these contracts. We don't know.

So I just want you to know today I introduced a piece of legislation, the Iraq and Afghanistan Contractor Sunshine Act, to answer those questions. We need to know. Are your loved ones being asked to do jobs that are inherently governmental functions and given what any soldier, what any U.S. military uniformed person would be given? We need answers to these questions that you have been asking, as responsible Members of Congress.

I really want to thank you, because you put a face on this veil of secrecy of these troops that are there, or these personnel that are there carrying on these missions for our country, and we don't know a darned thing about them, and when they die we don't even report their deaths. We don't answer that.

I don't know if you want to respond to that, but I thank you so much.

Ms. HELVENSTON-WETTENGEL. Just thank you so much for that acknowledgement, because that is why we are here today. That is why. I appreciate so much, because my next question was after this hearing what happens next. What will you do with the information?

Ms. SCHAKOWSKY. I hope more sponsors to this legislation.

I yield back. Thank you, Mr. Chairman.

Chairman WAXMAN. Before we do that, I would just like to—if the gentlelady would yield?

Ms. SCHAKOWSKY. Yes.

Mr. SHAYS. I would just like to say I think it is a great summary of the value of your testimony today.

Ms. HELVENSTON-WETTENGEL. Thank you.

Mr. SHAYS. I, for one, would like to be put on your legislation.

Ms. SCHAKOWSKY. Thank you, Mr. Shays.

Mr. SHAYS. Thank you for yielding.

Ms. HELVENSTON-WETTENGEL. Thank you, sir.

Chairman WAXMAN. Before we have you leave and hear from the next panel, Mr. Shays did ask a question, and I saw you leaning back. I guess that is your lawyer. I think he should get an answer. We all want to get the answer to the question. Who was in the room with your son?

Ms. HELVENSTON-WETTENGEL. It was Chris Berman.

Chairman WAXMAN. Chris Berman?

Ms. HELVENSTON-WETTENGEL. Chris Berman was the youngest Navy Seal ever until Scotty came along, and they did these workout camps and workout videos together, and Scotty usurped him, and that record will hold forever, so they have this fun rivalry. So they went over together, and they had been friends prior to that.

Chairman WAXMAN. Mr. Shays, did you want anything else?

Mr. SHAYS. No, Mr. Chairman. I really appreciate you moving forward with that, and it is helpful for us to know, and I thank you.

Ms. HELVENSTON-WETTENGEL. OK.

Mr. SHAYS. Thank you, Mr. Chairman.

Chairman WAXMAN. I think it is important when we ask questions of witnesses we get answers, complete answers, and I appreciate that you gave us that.

Ms. HELVENSTON-WETTENGEL. Chris Berman now is in Kuwait City building armored vehicles. He finished his 2-month contract with Blackwater then left, came home, built the most heavily plated armored vehicle over there, and he can't build them fast enough, so Chris is making a difference.

Chairman WAXMAN. Thank you. Well, I think your testimony will make a difference, as well. I thank you very much for giving it.

Ms. HELVENSTON-WETTENGEL. Thank you.

Chairman WAXMAN. You can leave. We are going to now hear from the next panel. In this next panel we will receive testimony. First, we want to welcome Tina Ballard, the Deputy Assistant Secretary for Policy and Procurement for the U.S. Army. We also welcome Andrew Howell, general counsel for Blackwater USA; Steve Murray, the director of contracting for ESS Support Services Worldwide; George Seagle, the director of security for the Government and Infrastructure Division of KBR; and Tom Flores, the senior director for corporate security at the Fluor Corp.

It is our policy to swear in all the witnesses that appear before our committee, so I would like to ask our witnesses to please rise.

[Witnesses sworn.]

Chairman WAXMAN. The record will indicate that each of the witnesses answered in the affirmative.

We have your prepared statements, which will be part of the record in their entirety. We would like to ask each of the witnesses to give a summary of that testimony and try to keep within the 5-minutes that we allot. You may submit a longer written statement and the committee will include that statement in the official hearing record.

Ms. Ballard, why don't we start with you? We will go down in the list and have questions after each witness has testified.

STATEMENTS OF TINA BALLARD, ASSISTANT UNDERSECRETARY FOR PROCUREMENT AND POLICY, U.S. DEPARTMENT OF THE ARMY; ANDREW G. HOWELL, GENERAL COUNSEL, BLACKWATER USA; R. TIMOTHY TAPP, MANAGING DIRECTOR, BUSINESS OPERATIONS, REGENCY HOTEL AND HOSPITAL CO.; W. STEVE MURRAY, JR., DIRECTOR OF CONTRACTING, ESS SUPPORT SERVICES WORLDWIDE; GEORGE SEAGLE, DIRECTOR OF SECURITY, GOVERNMENT AND INFRASTRUCTURE DIVISION, KBR; TOM FLORES, SENIOR DIRECTOR, CORPORATE SECURITY, FLUOR CORP.; AND ALAN CHVOTKIN, SENIOR VICE PRESIDENT AND COUNSEL, PROFESSIONAL SERVICES COUNCIL

STATEMENT OF TINA BALLARD

Ms. BALLARD. Thank you. Thank you, Mr. Chairman, for this opportunity to again report to you on the U.S. Army contracts for reconstruction and troop support activities in Iraq. It is my privilege to represent U.S. Army leadership, as well as the dedicated military and civilian members of the contracting work force who have been at the forefront in Iraq.

Our work and our success to date would be impossible without the tremendous support the Army receives from you, the members of this committee. We thank you for your wisdom, your advice, and your guidance.

The Army contracting work force has two very different important missions in Iraq: to support reconstruction contracting and to provide support for the troops. The mission is also one of constant change. Over time the reconstruction has moved from large design/build contracts to firm fixed-price contracts with Iraqi firms in an effort to reduce security costs and to provide economic opportunity to the Iraqi people. The LOGCAP contract for troop support is also changing as we move away from one contractor, as currently exists under LOGCAP-III, to multiple contractors under LOGCAP-IV. Regardless of the contract vehicle, however, one thing has and will remain constant over time—our commitment to ensuring that our contractors comply with the terms and conditions of their contracts. There is no flexibility or negotiation or compromise in this commitment.

The last time I testified before this committee I was asked about a letter from the Secretary of the Army dated July 14, 2006. The letter from the Secretary was sent in response to allegations that there was as subcontractor relationship between Kellogg, Brown and Root Services, Inc., ESS worldwide Services, Regency Hotel & Hospital Co., and Blackwater Security Services. The Secretary's letter stated that, based on information provided by KBRS to the U.S. Army, KBRS had never directly hired a private security contractor in support of the execution of a statement of work under any LOGCAP-III task order. Additionally, the letter stated, "KBR has queried ESS and they are unaware of any services under the LOGCAP contract that were provided by Blackwater USA." I was asked if this letter was accurate. I responded that Secretary Harvey's letter was correct. I also committed to looking into this matter, and I have kept that commitment.

As a result of extensive research, the U.S. Army correspondence with ESS and KBRS, ESS recently confirmed to KBRS and the Army that they obtained security services. ESS built and operated dining facilities both as a direct contractor to the U.S. Government and as a subcontractor to KBRS and other companies. On January 30, 2007, we learned ESS engaged Blackwater through Regency Hotel, and that ESS employed private security, primarily to protect its employees and management traveling in Iraq, and to transport currency to pay vendors and employees.

Based on information we received from KBRS, we understand that these security costs, which were not itemized in the contracts or invoices, were factored into ESS labor costs under its DFAC service contracts with KBRS under LOGCAP-III.

The U.S. Army is continuing to investigate this matter and we are committed to providing full disclosure of the results of our investigations to the committee. If KBRS violated the terms of the LOGCAP-III contract and knowingly or unknowingly incurred costs for private security subcontractors under the LOGCAP-III, the U.S. Army will take appropriate steps under the contract terms to recoup any funds paid for those services.

The last time I testified before this committee I also listed a few reconstruction accomplishments of the Defense Department implementing agencies. Today I can add to that list. Twelve hospitals serving over 6,000 patients a day have been refurbished. Water treatment capacity now serves an estimated 2.2 million Iraqis. Electrical generation projects have added 1,420 megawatts to the power grid. Crude oil production has increased, though extenuating circumstances have kept production from reaching full production. And 839 schools providing classrooms for over 350,000 students have been constructed or rehabilitated.

Sir, in conclusion we are proud of the dedication, commitment, and hard work of our contracting work force in supporting our troops and rebuilding Iraq.

Thank you. I look forward to your questions.

[The prepared statement of Ms. Ballard follows:]

RECORD VERSION

STATEMENT BY

MS. TINA BALLARD
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(POLICY AND PROCUREMENT)

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

FIRST SESSION, 110TH CONGRESS

IRAQ RECONSTRUCTION: RELIANCE ON PRIVATE MILITARY CONTRACTORS AND STATUS REPORT

FEBRUARY 7, 2007

NOT FOR PUBLICATION
UNTIL RELEASED
BY THE COMMITTEE
ON OVERSIGHT AND
GOVERNMENT REFORM

Thank you for this opportunity to report to you on the United States Army's involvement in Iraq reconstruction and troop support, particularly with regard to U.S. Army contracts for reconstruction and troop support activities. It is my privilege to represent U.S. Army leadership as well as the dedicated military and civilian members of the contracting workforce who have been at the forefront in the rebuilding of Iraq. Our work and our success to date would be impossible without the tremendous support the Army receives from you, the Members of the Committee on Oversight and Government Reform. We thank you for your wisdom, advice, and guidance.

The U.S. Army contracting workforce has two very important missions in Iraq: to support reconstruction contracting and to provide support for the troops. Contracting to support reconstruction is carried out by the Joint Contracting Command – Iraq/Afghanistan (JCC-I/A) under the acquisition authority of the U.S. Army. JCC-I/A also provides support to the Multi-National Security Transition Command – Iraq (MNSTC-I) in training and equipping Iraqi Forces and to the U.S. Government's mission in Afghanistan. Support to U.S. and Coalition forces is provided under the Logistics Civil Augmentation Program (LOGCAP-III) contract under the auspices of the U.S. Army Material Command (AMC).

The mission in Iraq is one of constant change. Under the reconstruction, JCC-I/A has moved over time from large design/build contracts to firm fixed price contracts with Iraqi firms in an effort to reduce security costs and to provide economic opportunity to the Iraqi people. Support to Iraqi Forces has increased as we have worked to hand over the fight for freedom and the battle against the insurgency to the Iraqi Government. The LOGCAP contract is also changing as we move away from one contractor as currently exists under LOGCAP-III to multiple contractors under LOGCAP-IV.

Regardless of the contract vehicle, however, one thing has and will remain constant over time: our commitment to ensuring that all contractors who support the military and reconstruction efforts in Iraq comply with the terms and conditions of their contracts. There is no flexibility or negotiation or compromise in this commitment. We will use all appropriate provisions available to us under the Federal Acquisition Regulations to hold contractors accountable.

The last time I testified before this Committee, I was asked about a letter from the Secretary of the Army dated July 14, 2006. The letter from the Secretary was sent in response to allegations that there was a subcontractual relationship between Kellogg, Brown and Root Services, Inc. (KBRS), ESS Worldwide Services (ESS), Regency Hotel & Hospital Company (Regency), and Blackwater Security Services (Blackwater). The Secretary's letter stated that, based on information provided by KBRS to the U.S. Army, KBRS had never directly hired a private security contractor in support of the execution of a statement of work under any LOGCAP-III Task Order. Additionally, the letter stated, "KBR has queried ESS and they are unaware of any services under the LOGCAP contract that were provided by Blackwater USA." I was asked if that letter was accurate. I responded that Secretary Harvey's letter was correct, but that I would again look into the matter.

Following the hearing, AMC's major subordinate command, the U.S. Army Sustainment Command, continued to pursue information on this important matter. As a result of extensive research, and U.S. Army correspondence with ESS/Compass Group and KBRS, ESS recently confirmed to KBRS and the U.S. Army that they obtained security services. ESS built and operated dining facilities (DFAC) both as a direct contractor to the U.S. Government and as a subcontractor to KBRS and other companies. On January 30, 2007, we learned that ESS engaged Blackwater through Regency Hotel and that ESS employed private security primarily to protect its management employees traveling in Iraq and to transport currency to pay vendors and employees. Based on information

we received from KBRS, we understand that these security costs, which were not itemized in the contracts or invoices, were factored into ESS' labor costs under its DFAC service contracts with KBRS under LOGCAP III.

The U.S. Army is continuing to investigate this matter and we are committed to providing full disclosure of the results of our investigations to the Committee. If KBRS violated the terms and conditions of the LOGCAP-III contract and knowingly or unknowingly incurred costs for private security subcontractors under the LOGCAP-III contract, the U.S. Army will take appropriate steps under the terms of the contract to recoup any funds paid for those services.

The last time I testified before this Committee, I also listed a few reconstruction accomplishments of Defense Department implementing agencies. Today, I can add to that list. Of the $13.5 billion in Iraq Relief and Reconstruction funds apportioned to the Department of Defense, $10.462 billion or 77.4% has been disbursed. In addition, twelve hospitals serving over 6000 patients a day have been refurbished, water treatment capacity now serves an estimated 2.2 million Iraqis, electrical generation projects have added 1,420 megawatts to the power grid, crude oil production capacity has increased though extenuating circumstances have kept production from reaching full potential, and 839 schools providing classrooms for over 350,000 students have been constructed or rehabilitated. I would also like to add that according to the Special Inspector General for Iraq Reconstruction (SIGIR) over 80% of the projects in Iraq have met contract specifications.

In conclusion, we are proud of the dedication, commitment and hard work of our contracting workforce in supporting our troops and rebuilding Iraq.

Chairman WAXMAN. Thank you very much, Ms. Ballard.

Mr. Murray?

STATEMENT OF STEVE MURRAY

Mr. MURRAY. Chairman Waxman, Representative Davis, members of the committee, I am Steve Murray, the director of contracting for ESS Support Services Worldwide. I served over 20 years in the U.S. Army, retiring as a chief warrant officer. During my service, my mission often was to deliver food services and other logistics support to our troops. I carried out a similar mission as an employee of ESS.

ESS has extensive experience building and operating food service facilities in remote and challenging locations, such as mining camps and offshore in oil and gas drilling platforms, in Asia, Africa, and the Middle East. ESS provides a range of support services to its customers, including full food services, supply logistics management, transportation, vehicle maintenance, facilities management, and communications.

I joined ESS in June 2003, to oversee its contracting for operations in Kuwait and Iraq. In December 2002, ESS began to build and operate dining facilities known as DFACs to feed the American and other Coalition troops that were arriving in Kuwait at bases such as Camp Commando and Camp Coyote. Every day ESS served thousands of our soldiers and marines four full-service, high-quality meals: breakfast, lunch, dinner, and a midnight meal.

After Coalition forces moved into Iraq in March 2003, ESS followed our troops, making sure that they were soon eating hot meals instead of MREs. From 2003 to 2006, ESS built and operated DFACs at over a dozen sites in Iraq, including Baghdad, Fallujah, and Tikrit, as well as performing camp construction at Camp Taji and in Basrah. ESS also provided food services and facilities management to the Coalition Provisional Authority, as well as food services for civilians performing reconstruction work in Iraq.

ESS performed many of its services in Iraq as a subcontractor to KBR. We also delivered on numerous contracts directly for the Army, the Marine Corps, and the Department of State. All of the subcontracts that ESS entered with KBR were competitively awarded and were performed by ESS on a firm, fixed-price basis. Instead of being a cost reimbursable or cost-plus contract, ESS' contracts with KBR stated a bottom line, or a maximum not to exceed price for the services that ESS was contracted to provide. Except in unusual circumstances, if our costs were higher than anticipated that was our problem. We had agreed to a fixed price.

One of ESS' costs that was higher than we had anticipated for was for private security. Beginning in the middle of 2003, security conditions in Iraq compelled ESS to hire private security firms to move its personnel and supplies among DFACs. Without the aid of private security firms, ESS could not have performed its mission of feeding the troops.

ESS moved most of its supplies through sporadic military escorted convoys, and supplies often took days or even weeks to reach the DFACs, or simply never arrived at all. When necessary, ESS called on private security firms to provide well-trained, armed personnel who escorted supply trucks and ensured that food services

to the troops were not disrupted. Many other contractors did the same.

ESS also used private security firms to escort our managers and staff as they drove to and from DFACs and other sites. I traveled between sites with our private security providers on many occasions.

The military escorted convoy system was intended to move supplies, not people. We had over 100 ESS managers and over 1,000 ESS staff getting the job done at more than a dozen sites in Iraq. We could not have fed the troops if we could not get our people to and from the DFACs. We were determined to never compromise the safety of our personnel when they traveled between sites.

ESS used a number of different private security firms between 2003 and 2006, including Blackwater. We always made it clear to KBR and other parties that contracted with ESS that we were using private security firms.

I am proud of the work that I have performed for ESS and my country during my time in Iraq. I am glad to be here today to help this committee sort out the facts for the American people.

Thank you.

[The prepared statement of Mr. Murray follows:]

Testimony of W. Steve Murray, Jr.
Contracting Director
ESS Support Services Worldwide

Before the U.S. House of Representatives
Oversight and Government Reform Committee
Wednesday, Feburary 7, 2006

Chairman Waxman, Representative Davis, members of the Committee. I am Steve Murray, the Director of Contracting for ESS Support Services Worldwide. I served over twenty years in the United States Army, retiring as a chief warrant officer. During my service, my mission often was to deliver food services and other logistics support to our troops. In Iraq, I carried out a similar mission as an employee of ESS.

ESS has extensive experience building and operating food service facilities in remote and challenging locations, such as mining camps and off-shore oil and gas drilling platforms in Asia, Africa, and the Middle East. ESS provides a range of support services to its customers, including full food services, supply logistics management, transportation, vehicle maintenance, facilities management, and communications.

I joined ESS in June 2003 to oversee its contracting for operations in Kuwait and Iraq. In December 2002, ESS began to build and operate dining facilities, known as "DFACS," to feed the American and other coalition troops that were arriving in Kuwait at bases such as Camp Commando and Camp Coyote. Every day ESS served thousands of our soldiers and Marines four full-service, high-quality meals: breakfast, lunch, dinner, and a midnight meal.

After coalition forces moved into Iraq in March 2003, ESS followed our troops, making sure that they were soon eating hot meals instead of MREs. From 2003 to 2006, ESS built and operated DFACs at over a dozen sites in Iraq, including Baghdad, Fallujah, and Tikrit, as well as performing camp construction at Camp Taji and in Basrah. ESS also provided food services and facilities management to the Coalition Provisional Authority, as well as food services for civilians performing reconstruction work in Iraq.

ESS performed many of its services in Iraq as a subcontractor to KBR. We also delivered on numerous contracts directly for the Army, the Marine Corps, and the Department of State. All of the subcontracts that ESS entered with KBR were competitively awarded, and were performed by ESS on a firm fixed-price basis. Instead of being cost reimbursable or "cost-plus" contracts, ESS's contracts with KBR stated a bottom-line or maximum "not to exceed" price for the services that ESS was contracted to provide. Except in unusual circumstances, if our costs were higher than we anticipated, that was our problem – we had agreed to a fixed price.

One of ESS's costs that was higher than had been anticipated was for private security. Beginning in the middle of 2003, security conditions in Iraq compelled ESS to hire private security firms to move its personnel and supplies among DFACs. Without the aid of private security firms, ESS could not have performed its mission of feeding the troops. ESS moved most of its supplies through sporadic military-escorted convoys, and supplies often took days or even weeks to reach DFACs, or simply never arrived at all. When necessary, ESS called on private security firms to provide well-trained armed personnel who escorted supply trucks and ensured that food services to the troops were not disrupted. Many other contractors did the same.

ESS also used private security firms to escort our managers and staff as they drove to and from DFACs and other sites. I traveled between sites with our private security providers on many occasions. The military-escorted convoy system was intended to move supplies, not people. We had over one hundred ESS managers, and over one thousand ESS staff, getting the job done at more than a dozen sites in Iraq. We could not feed the troops if we could not get our people to and from the DFACs. We were determined never to compromise the safety of our personnel when they traveled between bases.

ESS used a number of different private security firms between 2003 and 2006, including Blackwater. We always made it clear to KBR and other parties that contracted with ESS that we were using private security firms.

I am proud of the work that I performed for ESS and for my country during my time in Iraq. I am glad to be here today to help this Committee sort out the facts for the American people.

Chairman WAXMAN. Thank you very much.
Mr. Howell.

STATEMENT OF ANDREW HOWELL

Mr. HOWELL. Chairman Waxman, Congressman Davis, members of the committee, my name is Andrew Howell, and I am general counsel of Blackwater USA, dedicated security professionals whose primary mission is to protect the lives of Americans in very dangerous places. More specifically, Blackwater professionals, most of whom are military veterans, voluntarily go in harm's way at the request, direction, and control of the U.S. Government. Chances are if and when you, as Members of Congress, and your staffs travel into Iraq, your lives will be protected for at least part of the trip by Blackwater.

Areas of Iraq are among the most dangerous places on Earth, where violence against Americans is endemic. Our people choose to put their lives on the line daily in the service of our country. On behalf of Blackwater, I thank them for their service, especially those wounded or killed in the line of duty. I express again our deepest condolences to the families of our fallen colleagues, both those who appeared here today and those who did not. Losing our teammates is the hardest reality of our profession.

Just 2 weeks ago we lost five good men who were shot down in Iraq protecting a diplomatic convoy. Our thoughts and prayers are with their familys. The U.S. Ambassador to Iraq said of the incident, "These five American citizens were our colleagues and worked on behalf of the U.S. Government. They represent the best of America, showing valor and courage in the work they did each day."

The State Department noted that, "These men played a critical role in our effort to bring a better way of life to the people of a country who had never experienced freedom and opportunity. We will always remember their courage, commitment, and ultimate sacrifice for their country."

Like the other good men we have lost in the line of duty, these men are heroes who embody the best of who we are and who we strive to be.

Our professionals serving today in Iraq are part of our Nation's total force. Just last month, before the Senate Armed Services committee, Lieutenant General Petraeus, the new commander in Iraq, said he counts contract security forces among the assets available to him to deal with the enemy insurgency.

To be clear, we do not engage in offensive operations, but our defensive security function helps to unburden more of those in uniform to do so.

With regard to the important policy issues we will discuss here today, we look forward to working with Congress so that the right laws, policies, and procedures are in place to ensure that private security contractors can support our Nation's essential security missions.

I hope you will understand that there are matters that I cannot discuss in an open forum such as this, especially matters relating to operational security or matters that our Government has classified.

I will endeavor to answer your questions as fully as possible with these restrictions in mind. However, my task is even more complicated. Our company comes before this committee today facing a lawsuit. As you know, committee staff provided us with a copy of a December 13th letter from plaintiff's counsel to Speaker Pelosi effectively requesting that Congress hold this hearing. I respectfully request careful consideration of the impact of asking in an open oversight hearing questions that were requested by one party in ongoing litigation.

Our hope is that this hearing will not delve into an incomplete and one-sided exploration of a specific battlefield incident, but rather will explore the important policy issue of whether death and should be benefits of contractors and service members should remain roughly the same as current congressional policy dictates.

At Blackwater we are proud to serve the United States. Our professionals are highly skilled and experienced. Yet, for all of the experience and training, no one can guarantee that they will be safe when they step into a war zone. Our enemy has ensured that.

Although our teammates have bled and even died in our mission of protecting other Americans, we have never lost a protectee, and our support for and dedication to our Nation remain strong.

I am prepared to answer whatever questions I can under these unfortunate circumstances.

[The prepared statement of Mr. Howell follows:]

Statement of Andrew Howell, Esq.
General Counsel, Blackwater USA
For
The Committee on Oversight and Government Reform
February 7, 2007

Chairman Waxman, Congressman Davis, Members of the Committee, my name is Andrew Howell and I am the General Counsel of Blackwater USA—a team of dedicated security professionals whose primary mission is to protect the lives of Americans in very dangerous places. More specifically, Blackwater professionals, most of whom are military veterans, voluntarily go in harm's way at the request, direction, and control of the United States Government in order to provide security for U.S. personnel, facilities, and diplomatic missions. Chances are, if and when you as Members of Congress and your staffs travel into Iraq, your lives will be protected for at least part of the trip by Blackwater professionals.

Areas of Iraq are among the most dangerous places on Earth, where violence against Americans is endemic. Our people on the ground there choose to put their lives on the line daily in the service of our country. On behalf of Blackwater, I thank them for their service, especially those wounded or killed in the line of duty. I express again our deepest condolences to the families of our fallen colleagues, both those who appeared here today on the previous panel and those families who are not here today. Losing our teammates is the hardest reality of our profession.

Just two weeks ago, we lost five good men who were shot down in Iraq protecting a diplomatic convoy. This week we have had another man critically wounded. Our thoughts and prayers are with their families. I would like to read the statement of US Ambassador to Iraq Khalilzad on the tragic incident of just two weeks ago:

> **"These five American citizens were our colleagues and worked on behalf of the United States Government to protect American diplomats and missions in Iraq. They were killed during an attack on a security detail in eastern Baghdad where two Embassy employees were attending a routine meeting. . . . They represent the best of America, showing valor and courage in the work they did each day."**

And the words of State Department Spokesman Sean McCormick:

> **"These men assisted the Bureau of Diplomatic Security in protecting American diplomats and missions in Iraq. They played a critical role in our effort to bring a better way of life to the people of a country who had never experienced freedom and opportunity. We will always remember their courage, commitment, and ultimate sacrifice for their country."**

These messages recognize the dedication, capability, and sacrifice of our teammates. Like the other good men we have lost in the line of duty, these five are heroes who embody the best of who we are and who we strive to be.

Such dedication, however, is by no means atypical. I would like to briefly share with you today the unclassified and non-sensitive aspects of a recent event that reflects the dedication and heroism of our teammates that some so casually label "mercenaries." On a recent October afternoon, two Blackwater "little bird" helos, BW33 and BW34, were returning from a mission, when BW34 observed a US Army motorcade that had been attacked by an insurgent-placed explosive formed projectile charge (EFP). Our aircrew saw that the vehicles struck by the EFP contained numerous US casualties, and they made the decision to land at the site, help the wounded and provide medevac assistance.

Mark, a Blackwater medic, exited BW33 on landing, while John, another of our professionals, provided security. Mark quickly went to work assessing the wounded and beginning triage. Meanwhile, BW 34 with Door Gunners Emmett and Steve provided overhead protective cover for BW 33, anticipating the all-too-common secondary attack during rescue efforts. BW 34 also requested additional Blackwater medium-lift helicopters respond to the scene and assist with the medevac due to the potential number of casualties involved. Mark made a rapid care decision and our team used BW33 to transport two of the more seriously wounded to a Combat Surgical Hospital (CSH) in the International Zone. Mark remained behind to continue treating other wounded servicemembers, while John accompanied the evacuees and provided in-

flight care. BW 34 remained on scene to protect Mark, the wounded, and the other soldiers on the ground.

Shortly thereafter, BW 126 carrying Door Gunners Saleem and Andrew, and BW 608 with Door Gunners Luigge and Gregg arrived on scene. The gunners set up a security perimeter and began loading wounded soldiers for transport. Luigge (Medic) immediately assisted Mark with medical duties and evacuated the remaining wounded to the CSH.

Throughout this incident each individual performed his duties flawlessly, with the utmost concern for the wounded and the safety of all those involved. Their calm demeanor and actions prevented unnecessary casualties during the rescue efforts and saved the lives of five US soldiers. The events of that October afternoon are typical of our team.

The dedicated professionals serving today in Iraq are part of our nation's total force. In fact, just last month, during an appearance before the Senate Armed Services Committee, Lt. Gen. David Petraeus, the new commander in Iraq, said he counts "contract security forces" among the assets available to him to deal with the enemy insurgency. To be clear, we do not engage in offensive operations, but our defensive security function helps to unburden more of those in uniform to do so.

With regard to the important policy issues we will discuss today, we look forward to working with this Committee and with Congress so that the right laws, policies and procedures are in place to ensure that private security contractors can support our nation's essential security missions. Even as we provide that support, we are fully accountable and are subject to the laws, treaties and regulations of the United States. Even in our work with foreign allies or foreign companies, we must seek and receive the approval of the United States Government before providing any sort of defense services.

I hope you will understand that there are matters that I cannot discuss in an open forum such as this—especially matters relating to operational security or matters that our government has classified. I will endeavor to answer your questions as fully as possible with these

restrictions in mind. However, my task is even more complicated. Our company comes before this Committee today engaged in litigation in North Carolina. As you know, Committee staff provided us with a copy of a December 13, 2006, letter from plaintiffs' counsel to Speaker Pelosi effectively requesting that Congress hold this hearing.

In light of this obvious attempt by the plaintiffs' lawyers to use this hearing for their own purposes, I respectfully request careful consideration of the impact of Blackwater being asked in an open oversight hearing questions requested by one party in ongoing litigation. The four men murdered by our nation's enemies, whose deaths we still mourn, were killed with malice aforethought by those whose goal that day was, simply put, to murder Americans. Those who perpetrated the acts of terror that led to the deaths in Fallujah will never be witnesses before this Congress. Nor can our comrades killed in action be called upon to testify.

Litigation is conducted according to the rule of law before an impartial judge or jury hearing direct testimony over many days from witnesses and experts. After a case is complete, the issues raised in it may provide policy issues for Congress to consider. But Congressional intervention at this early stage of a litigation, at the request of one party, can have not only the expected and intended effects, but can have unexpected negative effects and even be unlawful. Our hope is that this hearing will not delve into an incomplete and one-sided exploration of a specific battlefield incident, but rather will explore the important policy issue of whether death and disability benefits of contractors and service members should remain roughly the same, as current Congressional policy dictates.

At Blackwater, we are proud to serve the United States. Every day our professionals protect other Americans serving our country in harm's way. We are a professional organization that got its start in 1997. Our first government contract was in 1998. In Iraq, the overwhelming majority of our contracts have been for services on a firm fixed-price basis with some costs reimbursed, rather than on the "cost plus" basis that is currently a source of concern. We are accountable under numerous laws and to the United States government clients we serve.

Our professionals are highly skilled and experienced. Yet for all of the experience and training, no one can guarantee that they will always be safe when they step into a war zone. Our

enemy has ensured that. Whether it is through a well designed ambush or while taking heavy gunfire from the ground, our teammates are targets of the same ruthless enemies who have killed over 3,000 American military personnel and thousands of innocent Iraqis. Like the uniformed military personnel alongside whom we serve, Blackwater professionals fulfill our duties with the full understanding of the extreme danger we face. Although our teammates have bled and even died in our mission of protecting other Americans, we have never lost a protectee, and our support for and dedication to our nation remain strong.

I am prepared to answer whatever questions I can under these unfortunate circumstances.

Chairman WAXMAN. Thank you very much, Mr. Howell.

Mr. Seagle.

STATEMENT OF GEORGE SEAGLE

Mr. SEAGLE. Thank you. Chairman Waxman and members of the committee, my name is George Seagle. I am the director of security for KBR's Government and Infrastructure Division. From October 2003, to May 2006, I was the director of security for KBR's Middle East operations. In that role I oversaw all of security measures for 150 project locations and more than 50,000 employees and subcontractors. I was in Iraq an average of once a week for the 32 months I was in that job. Let me say my heart goes out to the families of all of those who have lost their lives in brutal attacks in Iraq. My own friends and colleagues, both members of the military and civilian contractors, have been killed in support of operations in the region.

We know how difficult the situation on the ground is, and the situation the troops face is a very, very tough challenge.

We are proud to provide food, housing, and other necessities to them. We support U.S. and Coalition troops at 55 sites in Iraq, 70 other sites in the region. Since 2003, we have served more than 490 million meals, transported more than 675 million gallons of fuel, delivered more than 220 million pounds of mail, washed more than 30 million bundles of laundry, and hosted more than 80 million visits to morale, welfare, and recreation facilities.

Whether building mess halls, providing food service, or setting up housing, our goal is to provide the soldiers with the basic necessities—a hot meal, clean clothes—when they are back on base returning from dangerous missions. The feedback we have received from the troops on the ground has been overwhelmingly positive, and we are proud of the work of our courageous employees.

Like me, many of my KBR colleagues served in the Armed Forces. We understand the importance of our work to support the brave men and women of our military. I followed my father into the Marines, and I am proud to say that my son followed me and also joined the Corps. I served for 26 years, and my career culminated with nearly 3½ years as a White House liaison officer for the unit that includes Marine One, securely transporting both Presidents Bill Clinton and George W. Bush.

The focus of today's hearing is the use of private security contractors. To my knowledge, every foreign company working in Iraq uses private security in one capacity or another. KBR uses private security on our non-LOGCAP work, and in certain circumstances our LOGCAP subcontractors did, as well. Military security was not guaranteed for all of the work the company did in the region, and traveling without security is exceptionally dangerous.

Since 2003, there have been approximately 400 injuries and fatalities to KBR employees and subcontractors through the hostile acts. Those injuries and fatalities were due to improvised explosive devices, mortar and rocket attacks, small arms fire, and kidnapping. At Christmas time in 2004 a suicide bomber blew himself up during lunch time in a KBR-run dining facility, killing 13 troops, 4 of our employees, and 3 subcontractors.

To date we have lost 98 people in Iraq, Kuwait, and Afghanistan. According to this morning's news reports, overall more than 770 civilian workers have been killed in Iraq and more than 7,000 injured. These are the realities our employees and subcontractors face every day.

Amid such dangerous conditions, KBR operates a fleet of trucks that transports military fuel, military parts, medicine, hospital supplies, food, and mail to Coalition troops. They have logged more than 100 miles with more than 700 trucks on the road on any given day. Our mission has required us to be extremely flexible.

In 2003 KBR was initially directed by the Army to plan to support between 25,000 and 50,000 troops. The scope and nature of our task changed dramatically. This is not a criticism. Ever-changing priorities are a reality of war, and the reality was that our mission grew to supporting more than 185,000 troops.

This dramatic change in the scope of services presented significant challenges. KBR first faced difficulties in mounting such a large enterprise in a hostile environment. As with any endeavor of this size and magnitude, there have been times when our company and those that we work with have made mistakes. A handful of our 50,000 individuals on the ground have acted improperly. When we had questions about the actions of certain individuals, we investigated and reported them to the Army.

The rapid growth of our assignment and constant changes taxed our systems, but we adapted and developed systems that work.

In conclusion, for more than 60 years KBR has undertaken demanding assignments in dangerous regions to support the U.S. military. I speak for everyone in our company when I say we are extremely proud to support the courageous men and women of our armed forces. With each meal we serve, we try to bring them some small sense of the comforts of home. And when a soldier does have a few extra hours, the fitness centers we run and the activities we host at our morale, welfare, and recreation facilities offer a brief refuge from the strain of combat.

As the Congress continues its oversight of the war effort and contracting, I want to assure you that we are fully committed to cooperating with the Congress as it fulfills its oversight responsibilities. As a Government contractor, we take very seriously our responsibility to assist in the proper oversight of our work.

Mr. Chairman and members of the committee, I look forward to your questions and will do my best to provide you with the information you need.

Thank you.

[The prepared statement of Mr. Seagle follows:]

STATEMENT BY
GEORGE SEAGLE
DIRECTOR OF SECURITY,
KBR GOVERNMENT AND INFRASTRUCTURE

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2007

Thank you, Chairman Waxman and Members of the Committee.

My name is George Seagle. I am the Director of Security for KBR's Government and Infrastructure Division. From October 2003 to May 2006, I was the Director of Security for KBR's Middle East operations. In that role, I was responsible for the management and oversight of all KBR security operations in the Middle East, and oversaw all security measures for 150 project locations and more than 50,000 employees and subcontractors. Iraq was of course central to that position. I was in Iraq an average of once a week for the 32 months I was in that job.

The nature of this conflict has led to extended tours of duty, faster-paced deployments and less time at home between tours. Some soldiers are on their third or fourth deployment. They face a very, very tough challenge. We are proud to have had a central role in providing food, housing and other necessities to them.

We support U.S. and Coalition troops at 55 sites in Iraq, and 70 other sites in the region.

Since 2003 we have:

- served more than 490 million meals;
- transported more than 675 million gallons of fuel;
- delivered more than 220 million pounds of mail;
- washed more than 30 million bundles of laundry;
- and hosted more than 80 million visits to Morale, Welfare and Recreation facilities.

Whether building mess halls, providing food service, or setting up housing, our goal is to provide the soldiers with the basic necessities – a hot meal, clean clothes – when they're

back on base, returning from dangerous missions. The feedback we have received from our military and the troops on the ground has been overwhelmingly positive, and we are proud of the work of our courageous employees.

Like me, many of my KBR colleagues served in the military. We understand the importance of our work to support the brave men and women of our military.

When I was graduating from high school and was offered a college football scholarship, I chose, instead, to follow in my father's footsteps and become a Marine. I can proudly say that my son followed me and also joined the Corps. I was an active Marine for more than 26 years and retired at the highest Warrant Officer rank in the Marines. I was a Security Guard Detachment Commander in both Europe and the Middle East and also served in a variety of aviation maintenance positions. My career culminated with nearly three-and-a-half years as a White House Liaison Officer for Marine Helicopter Squadron One, which includes Marine One, securely transporting both Presidents Bill Clinton and George W. Bush.

I joined KBR in late 2002 as site security manager for its construction of the new U.S. embassy compound in Kabul, Afghanistan. Sadly, my first visit to Iraq in August 2003 was a direct result of the first KBR employee killed there in hostile action. Along with four other security experts, I traveled throughout Iraq to carry out a comprehensive review of KBR's security measures. Due to the deteriorating security situation, we recommended key enhancements to company security procedures, oversight and management.

I understand a focus of today's hearing is on the use of private security contractors in Iraq. To my knowledge, every foreign company working in Iraq uses private security in one capacity or another. KBR uses private security on our non-LOGCAP work. And in certain circumstances, our LOGCAP subcontractors did as well. Military security was not guaranteed for all of the work the company did in the region. And traveling without security is exceptionally dangerous.

Since 2003, there have been approximately 400 injuries and fatalities to KBR employees and subcontractors due to hostile acts. More than 180 of those injuries and fatalities were due to Improvised Explosive Devices or IEDs. One-hundred-twenty-three of them were from attacks by mortars, artillery and rockets. Seventy-two were from small arms fire. Still others resulted from objects thrown at convoys, criminal assaults and kidnapping. To date, we have lost 97 people in Iraq, Kuwait and Afghanistan. Overall more than 400 civilian workers have been killed in Iraq and nearly 4,000 injured. These are the realities our employees and subcontractors face every day.

The changes in the security landscape have been dramatic. When I first went to Iraq in 2003, we drove regular passenger vehicles from location to location, with no security and no fear. But that situation soon changed. Small arms fire attacks increased, and our people became frequent targets when off base. The enemy used increasingly sophisticated

IEDs and, later, at checkpoints and in crowds, the even more lethal vehicle borne IEDs. Rocket-propelled grenades, land mines and mortars are additional constant threats.

The attacks are not limited to the roads. Even being on base can be dangerous – with regular mortar and rocket attacks. And at Christmastime in 2004, a suicide bomber blew himself up during lunchtime in a KBR-run dining facility, killing 13 troops, four of our employees and three subcontractors.

Amid all those challenges, in such dangerous conditions, KBR operates a fleet of trucks that transports military fuel, military parts, medicine, hospital supplies, food and mail to Coalition forces. So far, they have logged more than 100 million miles with more than 700 trucks on the road on any given day. We continue to provide the troops with meals, services and living quarters. Our top priority must be our mission: providing the troops with what they need in a war zone.

While our mission to support the troops has always been clear, executing the details of that mission has required extreme flexibility. In 2003, KBR was initially directed by the Army to plan to support between 25,000 and 50,000 troops. The scope and nature of our task changed dramatically. This is not a criticism; ever-changing priorities are a reality of war. And the reality was that our mission grew to supporting more than 185,000 troops.

Naturally, with a dramatic change in the scope of services to be provided, all within a war zone, KBR encountered significant challenges. KBR first encountered difficulties in mounting such a large enterprise in a hostile environment. As with any endeavor of this size, magnitude and challenge there have been times when our company, and those that we work with, have made mistakes. A handful of our 50,000 individuals on the ground have acted improperly. But while the rapid growth of our assignment and the constant change taxed our systems, we adapted and developed systems that work. When we had questions about the actions of certain individuals, we investigated and reported them to the Army.

For more than 60 years, KBR has undertaken demanding assignments in dangerous regions to support the U.S. military. I speak for everyone in our company when I say we are extremely proud to support the courageous men and women of our armed forces. With each meal we serve, we try to bring them some small sense of the comforts of home. And when a soldier does have a few extra hours, the fitness centers we run and the activities we host at our morale, welfare and recreation facilities offer a brief refuge from the strain of combat.

As the Congress continues its oversight of the war effort and contracting, I want to assure you that we are fully committed to cooperating with the Congress as it fulfills its oversight responsibilities. As a government contractor, we take very seriously our responsibility to assist in the proper oversight of our work.

Mr. Chairman and Members of the Committee, I look forward to your questions and will do my best to provide you with the information you need. Thank you.

Chairman WAXMAN. Thank you, Mr. Seagle.

Mr. Flores.

STATEMENT OF TOM FLORES

Mr. FLORES. Mr. Chairman and members of the committee, my name is Tom Flores. I am the senior director of corporate security for Fluor Corp.

After a nearly 25-year career in the U.S. Army, I joined Fluor in 1998 and have since been responsible for Fluor security programs around the world. In 2003 I was assigned to oversee Fluor's security programs in Iraq.

Fluor began working in Iraq under a contract with the U.S. Army Corps of Engineers, through which we provided services throughout the entire U.S. Army Central Command region, including Iraq. Subsequently, Fluor and its joint venture partner country, AMEC, a U.K.-based engineering and construction company, also competitively bid on and were awarded three of the reconstruction contracts. These contracts covered water programs in the north and south of Iraq and restoration of electricity.

In the course of executing that work, Fluor had no contractual arrangement with Blackwater USA and Regency Hotel and Hospital Co. for security or other services, a fact acknowledged by Blackwater in a letter provided to the committee.

With respect to ESS, Fluor and Fluor/AMEC contracted with ESS at three separate locations in Iraq. In two locations, ESS provided dining and/or camp facilities to Fluor and Fluor/AMEC. Those locations were Baghdad's international zone, where ESS provided dining facilities for employees working on our two water contracts, and Buzurgan power station in southern Iraq, where ESS provided camp services. In a third location at Camp Cooke in Al-Taji, under a subcontract to Fluor ESS provided planning, field engineering, procurement, transportation, construction, and rapid setup of housing and latrine units.

Thank you for the opportunity to testify before the committee. I stand ready to answer your question about Fluor's work in Iraq.

Thank you.

[The prepared statement of Mr. Flores follows:]

Statement of Mr. Tom Flores, Senior Director Corporate Security
Fluor Corporation
Before the
Committee on Oversight and Government Reform
US House of Representatives
February 7, 2007

Good Morning.

My name is Tom Flores and I am Senior Director for Corporate Security for Fluor Corporation. In 1998 I joined Fluor, after a career in the US Army, and have since been responsible for Fluor's security programs around the world. In 2003, I was assigned to oversee Fluor's security programs in Iraq.

Fluor began working in Iraq under a contract with the US Army Corps of Engineers through which we provided services throughout the entire US Army Central Command Region – including Iraq. Subsequently, Fluor and its joint venture partner AMEC, a UK based engineering and construction company, also competitively bid on, and were awarded, three of the reconstruction contracts. These contracts covered water programs in the north and south of Iraq and restoration of electricity.

In the course of executing that work, Fluor had no contractual arrangement with Blackwater USA and Regency Hotel & Hospitality Company for security or other services.

With respect to ESS, Fluor and FluorAMEC, contracted with ESS at three separate locations in Iraq.

In two locations, ESS provided dining and/or camp facilities to Fluor and Fluor/AMEC. They are: (1) Baghdad International Zone, where ESS provided dining facilities for employees working on our two water contracts; and (2) Buzurgan power station in southern Iraq, where ESS provided camp services.

In a third location, at Camp Cooke in Al-Taji, under a subcontract to Fluor, ESS provided planning, field engineering, procurement, transportation, construction and rapid setup of housing and latrine units.

Thank you for this opportunity to testify before the Committee and I stand ready to answer any questions you may have about our work in Iraq.

Chairman WAXMAN. Thank you very much for your testimony.
Mr. Chvotkin.

STATEMENT OF ALAN CHVOTKIN

Mr. CHVOTKIN. Mr. Chairman, thank you very much for the invitation. My name is Alan Chvotkin and I am the senior vice president and counsel for the Professional Services Council. The Professional Services Council is the leading national trade association representing more than 200 companies of all sizes that provide professional and technical services to the Federal Government. Many of our member companies are operating in Iraq under contracts awarded by the departments and agencies of the Federal Government. These firms are purchasers of security services, and we have worked with them to highlight and address their concerns.

Several of our member companies provide security services in Iraq, in the United States, and around the globe. Some also have contracts directly with the U.S. Government, and we are working with them on a myriad of issues, as well.

We share the outrage at some of the events taking place in Iraq; however, we must be realistic about the circumstances in which the events are taking place and the options that may be available to address them.

We share the outrage at the unfortunate loss of life in Iraq. Thousands of American troops have been killed in the line of duty, and many thousand more wounded. U.S. contractor employees have also been killed while performing their work, with several thousand more wounded. We offer our condolences and prayers for their recovery. Yet, we must be realistic about the missions that they are asked to perform and the risk that all who are working in that hazardous environment take on a daily basis.

Iraq is a unique foreign policy event in our Nation's experience. To our knowledge, it is the first time that the U.S. Government has attempted three simultaneous activities: a military action, a massive reconstruction effort across 10 sectors, and extensive developmental assistance effort. There was an initial massive surge of resources into Iraq, often in uncoordinated and overlapping activities, that led good people with good intentions to make their best judgments under trying circumstances in the middle of a war zone.

While we share the outrage about the dollars spent in Iraq for the results achieved to date, we must also be realistic about the reasons for those dollars spent and the results achieved.

In the contracting environment, for example, the U.S. Government made a conscious decision to be a good steward of the contracts awarded and applied the full scope of the Federal acquisition regulations to the preponderance of the contracts awarded there. The U.S. Government made a decision to impose U.S. health and safety requirements on those contractors. The U.S. Government made a decision to require its contractors operating in Iraq to have liability insurance. Each of these steps in isolation may have been the right decision for the right reason, and we don't have any objection to the Government imposing them in a planned and consistent manner. But imposing these additional contractual requirements increases the cost of contract performance, so every dollar awarded by an agency or spent by a contractor in performance of these con-

tractual requirements is not waste and is not abuse, as those terms have been commonly used.

We share the outrage about the appearance of a lack of accountability for certain behaviors in Iraq and strongly endorse holding all participants in the contracting process equally accountable for their responsibilities. We strongly support a robust oversight function, and, where fraud is found, we strongly support vigorous prosecution. But we must be realistic about the activities that are taking place and the root cause for them.

Companies don't set the mission. The nature of the contracting arrangements in Iraq, particularly at the earliest stages of the war, was driven exclusively by the Government's choice and the Government's requirements. So, while it is legitimate to talk about the appropriate roles and assignments for contractors, the use of code words for their work mask the real issues and diminishes the opportunities for serious discussion.

Contractors are playing critical roles in each of the concurrent operational areas taking place in Iraq today. It would be impossible to execute the number and scope of projects underway without them.

We share the outrage about the cost of security, but we must be realistic about the factors that are driving such behaviors. For those contracts awarded by the Defense Department to directly support the military's activities, the contractors that accompany the force, for them force protection and other life cycle support functions have traditionally been the responsibility of the military. We strongly support that formulation. But in a significantly and little-discussed June 16, 2006, change to the Defense Department's acquisition regulations, the Defense Department has made force protection the primary responsibility of the contractors performing unless the military accepts the responsibility directly in the contract. We strongly oppose that reversal of policy, but our companies are adjusting to it, including addressing the cost of performance to reflect these changes.

For contractors who are supporting the reconstruction activities or are under contract to other Federal agencies, force protection has traditionally been the responsibility of the contractor performing that work and we support that. A July 18, 2006, proposed acquisition regulation has reconfirmed the U.S. Government policy to impose this responsibility and the expense on contractors. So, while we can be outraged about the security instability in Iraq and the cost of security spent by contractors to support the activities, we must be pragmatic about understanding the costs that are driving such costs.

In conclusion, hiring private security is common in overseas operations. Iraq is not new in that regard. However, the magnitude of the work and the concurrent operations taking place there create unique challenges we see. The security situation is highly volatile and contributes to the unique challenges, but any solution must be addressed carefully, with full consultation to address the real issues without creating new problems.

The Professional Services Council would welcome the opportunity to work with this committee and others on these important mat-

ters. Thank you for the opportunity to provide this information. We look forward to your questions.

[The prepared statement of Mr. Chvotkin follows:]

STATEMENT OF

ALAN CHVOTKIN
SENIOR VICE PRESIDENT AND COUNSEL

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HEARING ON

IRAQ RECONSTRUCTION: RELIANCE ON PRIVATE MILITARY CONTRACTORS

FEBRUARY 7, 2007

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Introduction

Mr. Chairman, members of the Committee, thank you for the invitation to testify today at your hearing titled "Iraq Reconstruction: Reliance on Private Military Contractors." My name is Alan Chvotkin, and I'm the senior vice president and counsel for the Professional Services Council (PSC).

The Professional Services Council is the leading national trade association representing hundreds of companies of all sizes that provide professional and technical services to the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services.

Many of our member companies are operating in Iraq under contracts awarded by numerous departments and agencies of the U.S. Government; these firms are purchasers of security services and we have worked with them to highlight and address their concerns about the contracting process in general and the security regime in particular. In addition, several of our member companies provide security services to firms in Iraq, in the U.S. and around the globe. Some also have contracts directly with the U.S. Government. As such, we know their concerns as service providers and have been working with them on a myriad of issues raised by their activities, as well.

We share the outrage at some of the events taking place in Iraq. However, we must be realistic about the circumstances in which the events are taking place and about the options that may be available to address them. Similarly, we must be cautious in identifying politically expedient solutions that do not fully address even the symptoms let alone the root causes of the concerns being raised. And we must be extremely cautious when developing solutions to perceived past errors so as not to create unnecessary constraints on future events.

We also share the outrage at the unfortunate loss of life in Iraq. Thousands of American troops have been killed in the line of duty and many thousand more wounded. According to the U.S. Department of Labor, more than 800 U.S. contractor employees have also been killed while performing their work, with several thousand more wounded. Yet we must be realistic about the missions they are asked to perform and the risks that all who are working in that hazardous environment take on a daily basis.

PSC Partnership with Federal Agencies

Over the past several years, PSC has had extensive interactions with the Department of Defense, including particularly with the Offices of the Under Secretary of Defense for Acquisition, Technology and Logistics and the Assistant Secretary of the Army for Acquisition, Technology and Logistics, and with the Army Materiel Command (AMC), who is the Defense Department's lead for Iraq. In 2004, we conducted an extensive "lessons learned" project with the Army Materiel Command staff with the support of and guidance from the former AMC Commander. We have also worked closely with the Department of State, USAID and other agencies on their Iraq initiatives and their policies and practices affecting our member companies.

Finally, PSC was pleased to have partnered with the Special Inspector General for Iraq Reconstruction (SIGIR) on his comprehensive activities, including serving as the only private sector organization that participated in his three-part "lessons learned" project.

Iraq: A Unique Foreign Policy Event

To begin with, there must be an acknowledgment and clear understanding that Iraq is a unique foreign policy event in our nation's experience. To our knowledge it is the first time that the U.S. Government has attempted three simultaneous activities in a confined geographic area: a military action, a massive reconstruction effort across ten major sectors, and an extensive developmental assistance initiative. There was a massive surge of resources into Iraq, often in uncoordinated or overlapping activities, that led good people with good intentions to make their best judgments under trying circumstances in the middle of a war zone!

Hiring private security support is common for many of our companies who are routinely engaged in reconstruction and developmental assistance overseas, so Iraq is not new in that regard. However, it is obvious that Iraq has been, and continues to be, a very dangerous place to live and work, particularly for those individuals and organizations associated with the U.S. Government, and has presented incredible challenges and problems.

Over time, the contracting environment in Iraq has also changed. At the outset of the war, the initial approaches were emergency, short-term focused. In fact, the clear U.S. Government Iraq policy was to approach requirements as short-term directives; 90 day terms were not uncommon. As we've moved from emergency contracting through "contingency" contracting into sustainment contracting, the contracting process has stabilized and slightly improved.

Stewardship of Funds Spent

While we share the outrage about the dollars spent in Iraq for the results achieved to date, we must also be realistic about the reasons for the dollars spent and the results achieved. In the contracting environment, for example, the U.S. Government made a conscious decision to be a good steward of the contracts awarded and applied the full scope of the federal acquisition regulations – the FAR – to the preponderance of the contracts awarded there. But the FAR, for all its provisions and authorities, is still not as flexible as it needs to be for addressing the emergency needs of the initial wave of awards or to adjust these contracts to rapidly changing circumstances.

As a good steward of the health and safety of all workers in Iraq, the U.S. Government made a conscious decision to impose U.S. health and safety requirements on its contractors. To be a good steward about the potential impact of our work in Iraq, the U.S. Government also made a conscious decision to require its contractors operating in Iraq to have liability insurance. Each of these steps, in isolation, may have been the right decision for the right reason and we don't have any objection to the Government imposing such requirements on the contractor community in a planned and consistent manner. But even the simple act of imposing these additional contractual requirements increases the cost of contract performance. So every dollar awarded by an agency or spent by a contractor because of these contractual requirements is not "waste" or an "abuse" as is commonly reported.

U.S. Government policy also sought to involve the Iraqi people – but only the non-Baathist Iraqis – in the reconstruction efforts. Thus, many of the U.S. Government's contracts required contractors to utilize Iraqi and other coalition partner businesses as subcontractors and to use Iraqi labor in the performance of work. This presented some special opportunities and significant challenges for contractors and higher-tier subcontractors that has had a direct impact on cost, transparency, performance and accountability.

Work in Iraq also presents special issues and challenges because of the number of projects the U.S. Government has contracted for and that are underway simultaneously; the number of contractors, employees and facilities that are operating, including the need for personnel and property security support; and the evolving and deteriorating security situation where the work is to be performed. There continues to be resource challenges of federal employees and more oversight reviews than officials with the warranted authority to commit the U.S. Government. We have also seen changes imposed without meaningful consultation or much attention to the direct and indirect consequences of such actions.

Accountability

We share the outrage about the appearance of a lack of accountability for certain behaviors in Iraq and strongly endorse holding all participants in the contracting process equally accountable for their responsibilities. We strongly support a robust oversight function to hold all parties accountable for their performance; where fraud is found, we strongly support a vigorous prosecution. But we must be realistic about the activities that are actually taking place and the root cause for them; we must also look to isolate the limited number of adverse events from the overwhelming number of successful efforts. In fact, in the January 2007 quarterly report, the SIGIR has said that "fraud has not been a significant component of the U.S. experience in Iraq." These requirements clearly drove some of the very contracting behaviors, such as the issue of tiering that are being highlighted today. But tiering by itself does not equate to "waste" or "abuse." It starts as a contracting issue based on the requirements identified by the U.S. Government; tiering is also a business issue based on how individual companies chose to propose their solutions to the government and to subsequently execute that work.

Role of Contractors

Companies don't set the mission. The nature of the contracting arrangements in Iraq – particularly at the earliest stages of the war – was driven exclusively by the government's choices and the government's requirements. So while it is legitimate to discuss the appropriate roles and assignments of contractors, the use of code words masks the real issues and diminishes the opportunities for serious discussion. Contractors are playing critical roles in each of the concurrent operational areas taking place in Iraq today. It would be impossible for the U.S. Government, even with its coalition partners, to execute the number and scope of projects underway without contractors.

And while we share the concern about the role of private security companies operating in Iraq, the reality is that the environment and nature of the relationship between the U.S. Government and its contractors requires their presence. Only for those contractors who are providing support to the military and are directly "accompanying the force" is the military even tasked with the responsibility for providing force protection for people and property; in many instances, the

military is not able to fully carry out that responsibility. Thus, private security firms are an essential adjunct to the U.S. companies executing some direct support contracts and for all other contracts for U.S. Government agencies. Of course, these private security firms are also employed by organizations in Iraq who are not under contract to the U.S. Government; these may include firms supporting other coalition partners' initiatives and non-governmental organizations.

The need for private security firms is also driven by the projects that are, of necessity, being undertaken by U.S. firms outside the Green Zone and other military-fortified areas. In fact, it is impracticable for the military to provide force protection for all of these activities. Indeed, some of the government agencies, contractors and non-governmental organizations don't believe that they can effectively carry out their contractual work if the U.S. military provides the visible security support.

Security Costs

We share the outrage about the cost of security but we must be realistic about the factors that are driving such behaviors. For example, while many are properly concerned about the share of appropriated funds now being allocated to security costs – security for employees and their work sites is of primary concern to the contractors who are there and we are all well aware of the increasingly dangerous security situation in Iraq.

As I noted earlier, there are three categories of U.S. government contracts that have been awarded work in Iraq. The first are those awarded contracts by the Defense Department to directly support the military's activities, i.e., the contractors that "accompany the force." These include the systems and logistics support contracts whose work is only performed because the military is operating in that area.

For these contractors, force protection and other life cycle support functions have traditionally been the responsibility of the U.S. military. We strongly support that formulation. But in a significant and little discussed June 16, 2006 change to the Defense Department's acquisition regulation supplement, the Defense Department has made force protection the primary responsibility of the contractors performing contracts in these hazardous environments unless the military accepts that responsibility directly in the contract. We strongly opposed that reversal of policy and our companies are now adjusting to it, including addressing the costs of performance to reflect these changes.

For contractors who are supporting the reconstruction activities or are under contract from any other federal agency, force protection has traditionally been the responsibility of the contractor performing that work; a July 18, 2006 proposed FAR regulation has reconfirmed that U.S. Government policy is to impose this responsibility and expense on contractors. We understand and support that policy formulation. So while we can be outraged about the security instability in Iraq and the cost of security spent by contractors to support their activities there, we must be pragmatic about understanding why those costs are being incurred and the circumstances that are driving such costs.

Most U.S. contractors working in Iraq are not security companies. Thus, private security firms must provide personal security for employees, housing locations and work sites for contractors that are providing services other than security. They coordinate and provide security for the transportation of key company personnel and resources and coordinate with government officials when their clients require interaction for official government business.

It is understandable why many of the sources and methods of these private security firms are confidential. By and large, it is our experience from our PSC member company firms' that contracting for these security services have been sound and, more significantly, effective. However, the experience of our member companies, who are among the most sophisticated in the international reconstruction and developmental assistance communities, may not be typical of all firms that contract for security services in Iraq. Factors such as cost, availability, scope of the security responsibilities and others also factor into the decision of whether to contract for such services and from whom to obtain them.

To the extent possible, these private security firms also routinely seek to coordinate with the U.S. military on the overall security threat environment. Yet only in the past year has the U.S. Government established reconstruction operations centers in Iraq that provide a formal channel for such coordination, on a voluntary basis. In fact, one of the key "lessons learned" from our Army Materiel Command effort was the fact that contractor force requirements were not integrated into the military planning process. Even within the military contracting process for contractors accompanying the force, where DoD policy dictates that the government contracting officer is required to validate any force protection requirements and provide that information to the geographic combatant commander, we found too many examples where these procedures were not followed. Indeed, in many instances, the roles, numbers, and life support needs of those contractors accompanying the force were not fully addressed.

The number and scope of the projects in Iraq, the need to attract, retain and employ personnel who are "on their own" for force protection, and the highly variable security environment forced contractors to put a premium on hiring skilled, trained and well-managed security services. Thus, from almost the outset of this Iraq conflict, the Professional Services Council strongly recommended that the U.S. Government and the Defense Department, in particular, adopt a non-traditional role with respect to private security firms.

In March 2003, PSC recommended to the senior acquisition leadership of the Department of Defense, through the Defense Acquisition Excellence Council, that DoD consider implementing at least one of three initiatives: setting standards for the private security firms who wanted to operate in Iraq; or better yet, establish a qualified list of firms from which the private sector could contract directly for services needs; or even better still, that DoD directly contract for and supervise these private security firms that the contracting firms would reimburse. The essence of this recommendation was included in the Government Accountability Office's (GAO) July 2005 report: "Rebuilding Iraq —Actions Needed to Improve Use of Private Security Providers (GAO 05-737; 7/28/05). While U.S. Government agencies raised valid reasons why they did not concur with these recommendations, there was a missed early opportunity for the government to address what we feared would become a significant and growing challenge.

The Importance of Advance Planning and Coordination

Our lessons learned efforts with both the Army Materiel Command and the Special Inspector General for Iraq Reconstruction highlighted the lack of advance planning for the security needs of those U.S. Government organizations responsible for non-DoD contracts to support either reconstruction or developmental assistance. The most significant portion of the State Department's December 22, 2004 revision to their acquisition regulation proposed new coverage requiring State Department contracting officers to address the administrative, logistical and security support to contractors performing overseas in "high-risk" activities.

The proposed rule explicitly states that contracts performed under Department of State contracts outside the United States "may be inherently dangerous" and that, unless specified in the contract, the contractor is responsible for all administrative, logistical and security support required for contractor personnel engaged in this contract.

While our members understand and accept the fact that they are responsible for these functions, PSC strongly opposed this portion of the State Department's initiative in our February 22, 2005 written comments (available on the PSC website at www.pscouncil.org), in part because the rule failed to provide necessary flexibility to address the real-world situations that were then obvious in Iraq and elsewhere. This State Department rule was replaced by the July 18, 2006 FAR rule and the supplemental DFARS rule.

In-country coordination and communication is essential. It must be a two-way effort and there is every reason for the government to take advantage of the information that these companies have about the security situation in various parts of the country. Over time, despite the lack of any formal methodology or doctrine, many firms have created informal mechanisms to assist them in getting the job done as effectively and as efficiently as possible.

Contractor Liability

Beyond the risk associated with these security arrangements, contractors and private security firms face significant legal challenges from third parties. Some of these cases arise out of the actions by contractors accompanying the force; others are the result of injuries suffered by others as a result of the security situation in Iraq. Each death is tragic and our thoughts and prayers go out to the families of all of those who have been injured or killed while supporting the U.S. activities in Iraq. We have tried to address this important liability issue from a variety of perspectives.

First, we looked at the current regulatory scheme for third-party liability while performing government contracts. PSC identified a problem with respect to third party liability arising from litigation brought in the United States based on acts or omissions of contractors supporting U.S. and Coalition forces overseas under fixed-price contracts. Third parties potentially subject to inadvertent injury or death include host country citizens, third country nationals, personnel of other contractors, and even uniformed and civilian members of the U.S. and Coalition forces.

Performing what may be considered routine work in the U.S. becomes significantly more dangerous and often uninsurable when performed overseas in a theater of military operations. The Air Force recognizes this heightened risk in its published guidance regarding contractors accompanying a deployed military force:

> Even if a contractor performs in accordance with the contract, the contractor may be vulnerable to claims that services in support of a war effort are inherently risky. Poor performance of systems support services (e.g., calibrating a weapon) could result in casualties or fatalities involving the military members using those weapons as well as unintended civilians. Air Force General Counsel Guidance Document Deploying with Contractors: Contracting Considerations, November 2003, at 9.

Under current circumstances, particularly in Iraq, commercial liability insurance is still often unavailable, insufficient or unreasonably expensive. In addition, many commercial policies often exclude "war risks" or risks associated with terrorist activities. Furthermore, as we know from PSC's continuing work in this area, insurance companies are increasingly concerned about their ability to insure against the full range of risks associated with performing work in an area that is experiencing violence against U.S. military forces, contactor personnel and the local citizenry. The increasing number of well publicized lawsuits filed in the U.S. by third parties against contractors alleging wrongful death supports the concerns of both contractors and insurance companies.

If commercial liability insurance is insufficient, unaffordable or unavailable to contractors (and particularly to those performing fixed-price work) the number and quality of the contractors willing to accept such financial risks will decline. Boards of Directors, corporate officers, and audit committees, particularly of publicly traded companies, will decide that they cannot assume the full risk of a potential, catastrophic incident and may decline to pursue such work. As a result, the DoD and other federal agencies will lack full access to the depth of experience and resources these contractors could otherwise provide; it could lead to reduced competition for those opportunities and potentially increased cost of performance.

Providing contractors with indemnification under Public Law 85-804 is an available solution, but that approach is viewed by many inside and outside of DoD as too burdensome or unpredictable, and certainly not consistently applied across a broad range of even related circumstances. Thus, while Public Law 85-804 remains a viable potential strategy to address the risk of third-party liability under fixed-price contracts on a case-by-case basis, we are not suggesting that DoD consider using that indemnification authority to address the concerns raised here.

We believe a less burdensome and more expedient remedy to address these liability concerns is to tailor the existing FAR clause to provide contractual indemnification under fixed–price contracts. As you know, contractors performing under *cost reimbursement* contracts are entitled to have included in their contract the clause at FAR 52.228-7 titled "Insurance – Liability to Third Persons." That clause requires contractors to maintain a specified level of insurance and provides government indemnification for certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise. Since an increasingly large percentage of a contractor's cost is attributable to insurance and "reserves" for self-

insurance, in these fixed-price circumstances, it may be more economical for the U.S. to rely on its self-insurance through contractual indemnification for amounts not covered by a company's commercial insurance or otherwise.

Conclusion

Hiring private security is common in overseas operations. Iraq is not new in that regard. However, the magnitude of the work and the concurrent operations taking place there create the unique challenges we see. But any solution must be approached carefully and with full consultation to address the real issues without creating new problems. PSC would welcome the opportunity to work with the Committee and others on these important policy matters.

Thank you for the opportunity to provide this information. I would be pleased to respond to your questions.

Chairman WAXMAN. Thank you. I want to thank each of you for your testimony.

Before we proceed to questions, there was a motion by Mr. Issa to take down the words of the gentlelady from Illinois, and I want to recognize Mr. Issa on this point.

Mr. ISSA. Thank you, Mr. Chairman. It was unfortunate that I was out of the room when the words were spoken. After reviewing the words, which I will read just to be sure we all understand them: "I also wanted to take exception to the question about who wrote the testimony, because I think clearly the implication was that somehow these wonderful women couldn't have possibly written that wonderful, heartfelt testimony, and that it took a lawyer in order to put it together, and I resent that very much and I just wanted to put that in the record."

Mr. Chairman, although these words I think are inappropriate and they set the wrong tone for the business that we must do on a bipartisan basis, after reviewing them and after believing that this was an anomaly on this committee and not something that would be regularly repeated, I would like to withdraw my motion and I appreciate the time.

I yield back.

Chairman WAXMAN. I appreciate that. The gentleman has withdrawn his motion and therefore there is nothing pending before us.

I was going to read the words, but the gentleman did accurately read the words in question.

Let me start with my questions. Without objection, the Chair and the ranking member will have 10 minutes each and all Members will get 5 minutes to pursue the matters.

Mr. Howell, let me start with you. I want to begin by extending my thanks for you to be here. We heard very emotional testimony from people who lost their loved ones that worked for your company. Their pain is very personal, but there is pain for your company, as well, when any of your employees lose their lives, and I want to acknowledge that fact. You pointed that out in your testimony. I think I am speaking for all the members of the committee that we are sorry for your losses.

Mr. HOWELL. Thank you, sir.

Chairman WAXMAN. At a company providing security services, you have a job to do, and as Members of Congress we have a job to do. Our job is to provide oversight to make sure Government is working effectively and efficiently and to identify and eliminate any waste in taxpayers' dollars.

We have heard allegations that call into question the job that Blackwater was performing in Iraq. The family members raised questions, I think legitimate questions, that deserve answers about whether Blackwater is endangering the lives by skimping on protective equipment. That was the issue raised. The contracts and audits we have received have raised questions about whether Blackwater is overcharging and double billing the Government. I don't know what is true or not. I haven't reached any conclusions on these allegations, but they are important allegations and I think they should be fully investigated.

I want to focus on an e-mail you provided to us. It is an e-mail from Tom Powell, who we understand was operations manager for

Blackwater in Baghdad. It is dated March 30, 2004, 1 day before the attack in Fallujah that killed the four Blackwater contractors. In hindsight, it is a pretty chilling communication. The e-mail begins, "Ground truth, guys, this is reality." The e-mail was sent to Brian Berry. I understand he's a senior Blackwater executive. My understanding is he is the director of Blackwater's security consulting. Am I correct that Mr. Berry was a director of Blackwater's security consulting?

Mr. HOWELL. My understanding is that he was not director at that time, but he was certainly a Blackwater official.

Chairman WAXMAN. OK. Another recipient of the e-mail was Mike Rush. Can you tell us what position he had at attachment time?

Mr. HOWELL. I believe that he was the director at that time.

Chairman WAXMAN. He was the director of operations for Blackwater?

Mr. HOWELL. He was the director of Blackwater security is my understanding. Yes, sir.

Chairman WAXMAN. The third recipient of the e-mail was named Justin, and we presume this is a reference to Justin McGuown, who was the program manager in charge of Blackwater's contract with ESS and Regency; is this right?

Mr. HOWELL. I believe that is correct. If I could, chairman, those names have all been made public, but to the extent that our personnel, publishing the names of Blackwater personnel that are not public information could possibly place them at risk. I would ask that if we could find a way to identify them without publicly stating the names, or perhaps go into closed session, I am certain that they would appreciate that respect for their safety.

Chairman WAXMAN. I appreciate what you are saying.

Mr. HOWELL. Yes, sir.

Chairman WAXMAN. This is a disturbing e-mail, because if it is correct, if it is accurate, it shows that Blackwater personnel working on the contract with Regency and ESS, which is the contract involved in the Fallujah incident, did not have adequate equipment or vehicles, and it also shows that Blackwater may have been circulating situation reports that were "smoke and mirrors show" and "not reality-based information."

Let me read you a passage from the e-mail. "I need new vehicles. I need new COMs—" which means communication devices—"I need ammo, I need Glocks and M–4s—" which are types of weapons—"All the client body armor you've got. Guys are in the field with borrowed stuff and in harm's way. I have requested hard cars from the beginning, and from my understanding an order is still pending. Why, I ask. It is my understanding that someone in Kuwait made a decision to go with Suburbans that are used. Bad idea." The e-mail ends, "Ground truth is appalling."

Well, my understanding is that this e-mail was addressing the lack of equipment available for Blackwater personnel working on the Regency and ESS contract, which is the current contract involved in the Fallujah incident; is that correct?

Mr. HOWELL. If you would like me to comment on specific text from the e-mail, I would like to have it in front of me, sir, but the

general subject of the e-mail was overall equipment requirements. That is correct.

Chairman WAXMAN. OK. We will be glad to give that to you. But the question I have sort of preliminarily is whether the e-mail was addressing the lack of equipment available for Blackwater personnel working on the Regency and ESS contract, which is the contract involved in Fallujah.

Mr. HOWELL. It was discussing a lack of equipment as to the contract as a whole. It doesn't follow therefrom that any individual who set out to accomplish a task didn't have the equipment that he needed.

Chairman WAXMAN. OK. Mr. Howell, have you investigated the circumstances surrounding the Fallujah incident?

Mr. HOWELL. I am familiar with them. Yes, sir.

Chairman WAXMAN. Have you determined whether the conditions described in the e-mail are accurate as it relates to that incident? Were your forces sent on missions in used Suburbans rather than hardened vehicles, as the e-mail describes?

Mr. HOWELL. Yes. Our forces did go on missions, some of which were in soft-skinned vehicles. But the nature of what we were doing there is that it was not a single task. It was not a single mission that our men did, so different equipment was appropriate for different missions, given the threat as it was known at the time on the ground in Iraq.

Chairman WAXMAN. Were your forces short on communications devices, as the e-mail describes?

Mr. HOWELL. There was not sufficient communication gear for the team on the day of this memo had it been fully manned; however, there was sufficient communication gear for the teams that would have been operational at this time.

Chairman WAXMAN. You answered my question about the Suburbans as opposed to hardened vehicles, and you said on certain missions that was the case. On the mission in Fallujah that we heard about this morning, was it the case for that incident?

Mr. HOWELL. I am not following your question, sir. Was it the case that a Suburban was appropriate?

Chairman WAXMAN. No. Did they use a Suburban as opposed to a hardened vehicle?

Mr. HOWELL. They used something equivalent to a Suburban, which was a Mitsubishi Pajero. It is the equivalent in the United States of a Montero, and the idea behind using that vehicle was that it was a sort of a local vehicle that was a low-key approach. It sort of blended in, if you will.

Chairman WAXMAN. Was it hardened?

Mr. HOWELL. It had been outfitted with some steel plate. Yes, sir.

Chairman WAXMAN. And on the issue of communication devices which the e-mail described, in this program Fallujah incident did they lack communication devices?

Mr. HOWELL. They did not. If we are going to inquire into specific facts that are under litigation, I know propose that we do so not in an open session. But I can answer that question. Yes, sir.

Chairman WAXMAN. You cannot answer?

Mr. HOWELL. I can answer the question.

Chairman WAXMAN. OK. Well, I would like you to answer the question.

Mr. HOWELL. Yes, sir. The men that day did have communication devices.

Chairman WAXMAN. They did? OK. Were they short on ammunition and weapons, as the e-mail describes?

Mr. HOWELL. The e-mail describes the situation for the project as a whole. The men who went on the mission on March 31st each had their weapons and they had sufficient ammunition.

Chairman WAXMAN. OK. Mr. Murray, you work for ESS, which is the contractor that hired Regency, which is the contractor that hired Blackwater. I would like to ask you about this e-mail.

At one point in the e-mail chain, Laurens Badenhorst receives a copy of Mr. Powell's e-mail. Mr. Badenhorst is an executive director at ESS, as I understand it; is that accurate?

Mr. MURRAY. Chairman Waxman, yes, Laurens Badenhorst at the time was our CEO of our design and build division.

Chairman WAXMAN. And, Mr. Murray, what information does your company, ESS, have about the conditions described in Mr. Powell's e-mail?

Mr. MURRAY. Chairman, I would like to first say that ESS' relationship was with Regency. We had contracted with Regency to provide ESS with our private security as a turnkey service. What I mean by turnkey is we relied on Regency to tell ESS what equipment, what routes, and such were safe for us to move throughout Iraq. We relied on them exclusively. And in our contract with Regency, we gave them the ultimate authority for go or no-go scenarios, so if they determined it was unsafe, they had the ability to do that. We indemnified them for that fact.

Chairman WAXMAN. But one of your executives received this e-mail. Do you have any information that corroborates the complaints about lack of equipment and vehicles that Mr. Powell describes?

Mr. MURRAY. No, I don't, Chairman.

Chairman WAXMAN. OK. Perhaps the most disturbing parts of the e-mail involve what Mr. Powell had to say about the situation reports that were being prepared by Justin McGuown of Blackwater and Regency. Let me read you some excerpts of this part of the e-mail. "The sitreps by Regency/RHHC I am reading are very misleading and bogus on the surface. My only hope is that Justin sees through the smoke and mirrors show and believes me when I am telling him that all is not what it seems. Justin knows what has to forward and realizes that it is just enough to sustain the appearance of gear and an operational capacity. Please, Justin, send your sitreps to the client with reality-based information."

Mr. Howell, have you investigated the situation reports that Mr. McGuown was preparing?

Mr. HOWELL. No, sir.

Chairman WAXMAN. Do you agree with the description in the e-mail that they were smoke and mirrors and not reality based?

Mr. HOWELL. Not having seen them, I can't comment one way or the other, sir.

Chairman WAXMAN. Mr. Murray, do you have any information about whether ESS believes it was getting accurate information from Blackwater and Regency about the ground truth?

Mr. MURRAY. Chairman, ESS had confidence in Regency to provide us with accurate intelligence, accurate movement guidance, so the answer is yes, we relied on Regency to provide that to us.

Chairman WAXMAN. We also have a response from Mike Rush, who is deputy director of operations for Blackwater. It is dated March 30th, the day before the fatal attacks. As I read it, Mr. Rush is telling Mr. Powell that the problems he has identified are not Blackwater's responsibility to fix. Let me read you some excerpts of what Mr. Rush told Mr. Powell, the author of the ground truth e-mail. "You are right about vehicles and coms being the responsibility of RHHS—" which, of course, stands for Regency Hotel and Hospitality. "There is no order for hard cars. The contract only allows for hardening, and yes, I realize that is not optimum. Body armor for the clients is not our responsibility, either. It is, in fact, up to RHHS, Regency, to fix some of the things you mentioned, particularly reliable vehicles."

Mr. Howell, the e-mail from Mr. Rush reads to me like someone is passing the buck. Do you agree?

Mr. HOWELL. I don't agree, Mr. Chairman. And the reason is Mr. Rush is just correctly noting that it was—under our contract with Regency, it was the responsibility of Regency to fund the acquisition of that equipment. It does not mean that Blackwater was not actively seeking to assist in identifying and obtaining the required equipment, as the other e-mails would indicate.

Chairman WAXMAN. Well, there are three issues and questions whether the vehicles were hardened sufficiently to protect them, whether they had the ammunition and equipment needed to protect themselves, and third the question also is whether they had the third person to be a tail gunner. Can you tell us whether they had what they needed in all three of those areas?

Mr. HOWELL. Yes, sir. With regards to the armored vehicle question, there was certainly desire to have some sort of armored vehicles on this project, meaning the ESS project as a whole, but, again, it doesn't follow therefrom that each mission involved an armored vehicle. In fact, close review of the contracts revealed that it was specifically contemplated that there would be other vehicles which had some sort of protection added that would be used on the project. Beyond that, the armored vehicle question, the vehicle that they went out in that day was believed appropriate, based on the mission by everyone involved, or the mission. I don't believe that it would have been carried out at that point, and the armored vehicle, whether it would have affected that day is not a question. With regard to the third person, the protocol for the type of mission the men were on that day—and, again, we are bordering on things that could involve operational security of not only our folks but service members—the mission they were on that day at that point in time, given the threat as it was known on the ground in Iraq, the norm was not to have the third person.

Chairman WAXMAN. Well, Mr. Powell obviously in his e-mail was expressing concern. I guess my general question is: When Blackwater sends private forces into a war zone, do you have an

obligation to equip them adequately? I assume you would have to say yes. Then my next question is: Did Blackwater meet this obligation in Fallujah?

Mr. HOWELL. Yes, we did.

Chairman WAXMAN. OK. I just want to conclude by reading this quote again. "But guys are in this field with borrowed stuff and in harm's way with the client which I am very uncomfortable with given the upcoming events with five million Shia moving in Karbulah in 5 days. I have requested hard cars from the beginning, and from my understanding an order is still pending. Why, I ask."

Thank you.

Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you.

Ms. Ballard, I am going to start with you. You note that the Army will take steps to recoup funds paid under LOGCAP for private security contractors, but, as I understand the law, these security services were likely performed under a fixed price subcontract. As far as you know, has the Army ever been able to recoup funds in a situation like these where the costs appear to have been imbedded within a fixed price subcontract?

Ms. BALLARD. As far as I know they have not.

Mr. DAVIS OF VIRGINIA. OK. How would you be able to do that if it was competitively bid?

Ms. BALLARD. In a competitive, fixed price contract we don't have access to the subcontractor's data. The regulation prohibits us from getting cost and pricing data in a fixed price competitive contract from the prime, and it also prohibits the prime from getting that data from the subcontractor.

Mr. DAVIS OF VIRGINIA. Does the Army have enough personnel on the ground to support military convoys for LOGCAP subcontractors? Do you know the answer to that?

Ms. BALLARD. I don't have the answer to that, sir.

Mr. DAVIS OF VIRGINIA. OK. The majority says that the cost of security services provided by private firms are substantially higher than the direct costs that would be incurred by the military. Do you have any comment on that?

Ms. BALLARD. No, sir, I don't. The GAO and CIGAR have estimated that our security costs on the ground are between 9.8 and 12.55 percent.

Mr. DAVIS OF VIRGINIA. Now, we hear a lot about the so-called evils of tiering. Now, as I understand the practices of using a number of levels of subcontractors to perform various functions under a prime contract which is larger and has myriad features, of which one company may not be able to deliver all of those services, I guess the alternative would be to just have more direct contracts, which would entail much higher aggregate costs to the Army in terms of overseeing it. But do you think the practice is, in general, wasteful and inefficient, as is portrayed?

Ms. BALLARD. Sir, the practice of having subcontract tiers is a practice, according to our research, that even occurs in commercial construction in the United States.

Mr. DAVIS OF VIRGINIA. Of course. So, from your perspective, there is no reason to outlaw it or anything? Obviously, oversight

is important to make sure that they are subcontracting appropriately in this competition? Is that fair to say?

Ms. BALLARD. We don't have anything in the regulation that allows us to prohibit subcontract tiers.

Mr. DAVIS OF VIRGINIA. And, in fact, if a prime contractor didn't have the in-house capability to perform that, they would have to subcontract it, or the alternative would be to have a myriad of additional contracts directly with the government, where the government would, in a sense, be the integrator?

Ms. BALLARD. Yes, sir.

Mr. DAVIS OF VIRGINIA. OK. Mr. Howell, we have heard that the cost of security services provided by firms such as yours are much substantially higher than the direct costs that would be incurred by the military. Do you have any comment on that? You are not the decisionmaker here, but you are on the ground delivering.

Mr. HOWELL. I am not qualified to comment on the costs, the direct costs of military services.

Mr. DAVIS OF VIRGINIA. Let me ask you this. You noted that 99 percent of your contracts in Iraq are fixed price contracts; is that correct?

Mr. HOWELL. Yes, sir. The vast major are of the firm fixed price nature. If I may clarify, sir?

Mr. DAVIS OF VIRGINIA. Sure.

Mr. HOWELL. In some contracts there are mandatory provisions for a pass-through of costs, but there is no markup or profit on those costs. The general nature of those contracts is very limited number of specific items are passed through at cost.

Mr. DAVIS OF VIRGINIA. How many of your contracts were awarded under competitive acquisitions?

Mr. HOWELL. Of our contracts in Iraq—and, again, I understand that the nature of today's hearing is only on unclassified contracts. I am not prepared to—I don't know the answer regarding any classified work at the moment. But, in terms of unclassified work, of approximately—out of all our contracts in Iraq, one, to my knowledge, was not competitively bid, and it was issued on an urgent and compelling basis after the incumbent was unable to provide the services, and we were asked on short notice to provide those services.

Mr. DAVIS OF VIRGINIA. OK. But that is not the contract that has been at issue today?

Mr. HOWELL. That is not the contract at issue, and ultimately that is not a contractor decision. That is a Government decision. Yes, sir.

Mr. DAVIS OF VIRGINIA. We have heard that your people are paid anywhere from $600 to $1,500 a day for these dangerous assignments. I wonder if you could give us, explain the various payment structures you have with your employees.

Mr. HOWELL. Yes, sir. First of all, I think there is a great deal of myth about the exorbitant pay rates. Certainly our people face grave danger and that is well recognized, but in terms of the rate structure, which is your real question, the general nature of these sorts of Government contracts for security services involve breaking it down into classes. They are typically called tiers. In a given tier, there are very specific requirements by the Government client on

the experience level and capabilities of the individual, and the individual's services are filled out at a firm, fixed price per day based on which tier they lie in. So, for example, a special forces veteran with extensive experience is billed at a much different rate than someone who just had more general military experience and less time.

Mr. DAVIS OF VIRGINIA. What kind of markup do you get over the direct costs on a basis? Does that also vary with the tier?

Mr. HOWELL. Well, the nature of our contracts is a fixed price basis.

Mr. DAVIS OF VIRGINIA. Right. And it is competitively bid, so I am not——

Mr. HOWELL. It is competitively bid, yes, sir. So our pricing is really based on its——

Mr. DAVIS OF VIRGINIA. The marketplace.

Mr. HOWELL [continuing]. Pricing, not cost.

Mr. DAVIS OF VIRGINIA. But I am just curious.

Mr. HOWELL. I don't want to be unresponsive, sir, but it is a question that is sort of mixing apples and oranges. Cost contracts involve markups over cost.

Mr. DAVIS OF VIRGINIA. I understand the business.

Mr. HOWELL. Yes, sir.

Mr. DAVIS OF VIRGINIA. Basically, you don't want to give away your cost data?

Mr. HOWELL. I am sorry?

Mr. DAVIS OF VIRGINIA. Basically, you don't want to give away—you are not compelled to give it away, and you don't want to give it away.

Mr. HOWELL. Right. It would harm competition on future contracts.

Mr. DAVIS OF VIRGINIA. Obviously, it is a question, even though these are fixed prices, that is of interest to us, but I am not going to pressure you at this point.

Mr. HOWELL. Yes, sir.

Mr. DAVIS OF VIRGINIA. What death benefits do you provide to the survivors when the enemy kills a contract employee?

Mr. HOWELL. Well, all Government contractors are mandated by statute to provide benefits under the Defense Base Act, and that is a program that was set up. It goes back actually to World War II, and it was set up in order to provide what is, in effect, a worker's compensation benefit for those who are injured or killed in the service of their country, contractors overseas working for the Government.

Mr. DAVIS OF VIRGINIA. You don't do anything in addition to that? Is that right?

Mr. HOWELL. Well, we are always looking for additional ways to protect our folks. We currently have an additional insurance policy that is above and beyond that we acquire because we want to provide for our folks.

Mr. DAVIS OF VIRGINIA. In the contract at issue—we heard from the first panel—who was Blackwater's clients? Were you contracting with Regency or ESS?

Mr. HOWELL. Our contract was with Regency.

Mr. DAVIS OF VIRGINIA. OK. Regency. And I have seen some tiers that have been introduced and some charts and the like. And who was Regency contracting with above that?

Mr. HOWELL. My understanding is that Regency's contract was with ESS.

Mr. DAVIS OF VIRGINIA. OK. There has been a lot of attention to the cost of providing security services. Let me just ask in a general question, who wants to take it, why are these costs—these costs seem to be very, very large over there. Obviously, there is a huge premium whenever you are doing this kind of thing. Could somebody explain to me what goes into your marketing of this and your costing of this, your pricing? How do you price a security provision into a contract? Is it a marketplace based, or is it your costs, being able to recruit people to go over? What goes into that?

Mr. HOWELL. These are competitively I don't contracts, so, yes, it is ultimately driven by the marketplace. There is high competition for the individuals, security provisionals with the expertise that is needed.

Mr. DAVIS OF VIRGINIA. OK.

Mr. HOWELL. We have to account for that, as well as the many expenses that we incur in training them, often providing weeks of training at Moyak, transportation on many contracts. There is lodging, subsistence travel to and from Iraq. The list of factors that go into it vary with each contract.

Mr. DAVIS OF VIRGINIA. Is it hard to find people that are willing to do this, qualified people?

Mr. HOWELL. It is always a challenge to find the most qualified people. Yes, sir.

Mr. DAVIS OF VIRGINIA. Mr. Murray, let me ask you, the military convoy system for LOGCAP contractors has been described to us as unreliable. Could you address some of the choices your company is faced with when the military convoy system doesn't work as it should?

Mr. MURRAY. Yes, I can. We face many challenges moving our cargo. It is actually two aspects. We move cargo and we move people. I mentioned in my statement the convoy system wasn't designed to move people. We had over in excess of 1,000 ESS employees in the country of Iraq. Primarily, we had to move them from Kuwait into Iraq, and it was a challenge to move them into Iraq into Coalition camp, either a KBR site or another site, safely.

The convoy system, itself, the rules to put our non-tactical vehicles [NTVs]—those are the vehicles that would carry our civilian employees—into a convoy would change virtually on a daily basis. Some days we would be allowed to put a non-tactical vehicle in a convoy. Some days we would arrive with one or two of these vehicles and we would be told at that point, "Well, the rules have changed. We can't accept your vehicles to day." How does that impact us? That prevented us from moving our chefs, our cooks, our laborers up to the site. That was one impact on us. That caused and could have caused delays in our performance.

Another impact, another extenuating circumstance, perhaps, is the border crossing between Kuwait and Iraq called Nazca was an assembly point for all the contractors that crossed our vehicles into Iraq. We would ship, at the peak, in excess of 300 to 350 trucks

per week. Convoys in the early days would take 5 to 10, perhaps 20 of these trucks. We would be queued up or lined up at the border 3, 2 a.m. in hopes of getting in a convoy, and it may take 2 or 3 days to have one truck slotted into that convoy. That, again, caused further delays to us.

Mr. DAVIS OF VIRGINIA. Let me ask you this. On the contract at issue that you heard the first panel, where the individuals lost their lives, were you contracting at that point with KBR under LOGCAP or with Fluor?

Mr. MURRAY. For the particular contract at issue, we engaged—actually, I can answer by saying both. We employed private security. You asked about the contract at issue, which is the ESS Regency contract for private security. We used that private security attachment team, the private security to move our people throughout Iraq across all contracts.

Now, the specific incident on March 31st, if you would like me to address that——

Mr. DAVIS OF VIRGINIA. That is what I want to address.

Mr. MURRAY. OK. That particular incident——

Mr. DAVIS OF VIRGINIA. We have been having a hard time figuring out, I think, up here.

Mr. MURRAY. OK. On March 31st, that particular incident was a movement of ESS cargo. We had a convoy that was moving from Taji, Camp Taji, which was going to Al-Asaad. Al-Asaad was on the far side of Fallujah, the western side of Fallujah. We were picking up cargo, and that was a KBR site, and we were going to return that cargo and supplies and construction equipment to Camp Taji, where we were building, had a construction contract with Fluor.

The attack occurred en route from Taji through Fallujah to Al-Asaad. They never reached their destination, but they were moving cargo under our Fluor contract.

Mr. DAVIS OF VIRGINIA. So it was so intermingled at this point. Let me just ask one question, then, Mr. Flores, from you. Were you aware that Blackwater was apparently performing security services for ESS, as well?

Mr. FLORES. No, sir, I was not.

Mr. DAVIS OF VIRGINIA. You were not? OK. Thank you very much.

Chairman WAXMAN. Thank you, Mr. Davis.

Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

You know, these accounts that we have heard about with Blackwater and the private security contractors are very troubling, and I am concerned about the profit motive they have and the lack of insight. Some reports have estimated that there are as many as 50,000 private security contractors in Iraq right now, but I have yet to see the data from the Defense Department.

Ms. Ballard, how many private security contractors are there in Iraq right now? You know, the President just asked us in the State of the Union—I have heard some discussion here—the President has said during the State of the Union that he wanted more civilians. I think he was talking about volunteers. But I am just curious. How many security contractors do we have?

Ms. BALLARD. Congressman, I can take that question for the record. I don't have that number. The security contractors on the ground aren't all for the Department of Defense. There are contractors on the ground providing security for other agencies, as well. So I would have to take that question for the record. I don't have it for DOD or the total number.

Chairman WAXMAN. We will hold the record open to receive that information. How long will it take? Will we get that within a week?

Ms. BALLARD. I can go back and request the information be provided in a week, Mr. Chairman.

Chairman WAXMAN. OK.

Mr. CUMMINGS. On a larger question—I really appreciate that, Ms. Ballard—why does the administration rely on so many private contractors? Do you know? And we can't even count them? I take it from the testimony here the American people end up one way or another paying for them, and I am sure we all would want to know how many we have. I know you are going to get that information for me, but why do we have to do that?

We have the President asking for another 21,500 troops. There is debate as to whether it is that number or more. I guess what we are trying to do here, too, is just trying to get to the bottom line of exactly who is over there in Iraq, what they are doing, and how much are the American people paying for them to do whatever they do, and are they doing the things that are lawfully—that they can do lawfully?

Chairman WAXMAN. Mr. Cummings, you had asked the question about the number of contractors. Ms. Ballard said she has to check those other agencies, but you should know for the Department of Defense. Do you have that information, please?

Ms. BALLARD. No, sir, I do not.

Chairman WAXMAN. OK.

Mr. CUMMINGS. How soon can you get that to us?

Ms. BALLARD. The question on how many security contractors in the Department of Defense?

Mr. CUMMINGS. Yes.

Ms. BALLARD. I am taking that for the record and, as the chairman requested, I will go back and ask if we can provide it in a week.

Mr. CUMMINGS. And would you also get us the number of subcontractors, too?

Ms. BALLARD. I will ask for that information, sir.

Mr. CUMMINGS. And can you find out for us how much, as best you can, the citizens of the United States of America are paying for these contractors and subcontractors, so as we try to assess how we vote on more money for Iraq so we can, you know, just have to total picture? Will you do that for us?

Ms. BALLARD. I will certainly ask and take that as a question for the record, sir.

Mr. CUMMINGS. All right. That is all I have, Mr. Chairman.

Chairman WAXMAN. Mr. Cummings, it just strikes me as amazing that this kind of information wouldn't be readily available. That is the purpose of this hearing. The Department of Defense—I can understand you might not know other agencies, but you certainly should know what is going on in the Department of Defense.

We did invite you to come and talk about this topic. Did you not think you would be asked, Ms. Ballard?

Ms. BALLARD. Mr. Chairman, we appreciate the invitation to come and speak on this topic; however, in the case of the KBR contract, there were no provisions allowing security, so in our estimation there should not have been any security provided.

Chairman WAXMAN. No. The question that——

Ms. BALLARD. In terms of the——

Chairman WAXMAN. That wasn't the question that Mr. Cummings had asked.

Ms. BALLARD. In terms of——

Chairman WAXMAN. Mr. Cummings wants to know how many contractors and subcontractors——

Ms. BALLARD. I understand, sir.

Chairman WAXMAN [continuing]. Do we have out there under the Defense Department, how many under other departments. He asked you generally. You said, "Well, I have to check those other departments." But you also have to check it for the Defense Department?

Ms. BALLARD. I can't speak for the Defense Department, sir, because I work for the Department of the Army, and in the case of——

Chairman WAXMAN. Well, tell us about the Department of the Army. How many do you have?

Ms. BALLARD. In the case of the Department of the Army, we have the design/build contracts where the contractors were required to provide their own security. Those costs would be subcontracted, so we would have to go back and ask those prime contractors to provide that information because we do not have privity of contract with the subcontractors.

Chairman WAXMAN. How many contractors do you have with the Department of the Army that are involved in Iraq?

Ms. BALLARD. Sir, I did not come prepared to answer that question. I will take it for the record.

Chairman WAXMAN. Well, we will hope that you get that information to us and break it down. Thank you.

We now go to Ms. Foxx. Do you have any questions?

Ms. FOXX. I do.

You mentioned that there is a prohibition on the contractors having security. That is in the contract. Does that apply to other groups? And if there is that prohibition, then how do you all expect people to provide security for the people there, if there is a prohibition?

Ms. BALLARD. There is a specific clause in the LOGCAP contract that addresses security. That clause stipulates that the theater commander will provide force protection commensurate with that provided to the service and agency civilians, unless otherwise stipulated in the task order.

On the design/build contracts, which are different from the LOGCAP contracts, the contractors were expected to provide their own security.

So there are different contract vehicles and different terms and conditions.

Mr. CHVOTKIN. Ms. Foxx, if I may, Ms. Ballard makes an important point and I wanted to reiterate a point I made in my testimony. There are three simultaneous actions taking place. There is a military action, and for the military action the military is supposed to provide force protection for its contractors. But for everybody else that is operating in Iraq, and that is the reconstruction contractors, those supporting the Department of Justice, USAID, the Department of Agriculture, Health and Human Services, all of those contractors are required to provide their own security, and that is why the difficulty of understanding. That is why you have a lot of security operations in Iraq unrelated to the military activity.

Ms. FOXX. Mr. Chairman, I want to followup with a question, but I want to make a comment about the direction in which this hearing has gone. I have been here from the beginning. I have read a lot of the material. I am, again, a person who is very much opposed to waste, fraud, and abuse, and I like to think in system issues. It seems to me that if we are interested in waste, fraud, and abuse and we want to do something about it what we should be doing is being focused on the way the systems operate in all these areas.

What we've got here is a gotcha situation, it seems to me. There is a tragic loss of life that has occurred, and every life that has been lost in any of our wars I am sorry for. What has been happening in Iraq and the war on terror I am very, very sorry for, and the people who were working for Blackwater I am extremely sorry they lost their lives. But particularly in Iraq, everybody is going there as a volunteer, and I understand that. But what we ought to be about is asking for how the systems work, what is wrong with the systems now, and how do we get at it, instead of spending all this time trying to get people on issues that are irrelevant to much of what we should be concerned about.

So I want to ask one question, and I will ask you to answer with a yes or no. Has anybody associated with the Congress or with any of the departments that you work with asked you in any formal way or any organized way to give suggestions on how we can make these systems better, because it seems to me that is what our focus ought to be. So a real simple answer, yes or no. And if you answer yes, then I will ask you to followup with some information, but I won't burden us with a lot of time.

I will start down here. Has anybody in your group looking at this, has anybody asked you that question?

Ms. BALLARD. Yes, ma'am.

Ms. FOXX. Yes, they have. OK. Can I ask each one and then come back?

Chairman WAXMAN. It is up to you, whatever you want to do. It is your time.

Ms. FOXX. Let's go down the line, and then we will come back to whoever says yes.

Ms. BALLARD. Ma'am, we have consistently——

Ms. FOXX. Hold on 1 second. Next person?

Mr. MURRAY. No, they have not.

Ms. FOXX. Mr. Howell.

Mr. HOWELL. Yes, they have.

Ms. FOXX. OK.

Mr. SEAGLE. No, ma'am.

Mr. FLORES. Would you rephrase that question please, Congresswoman?

Ms. FOXX. Has anyone in a position of authority—and I am not going to try to name departments and that sort of thing—asked you to make suggestions on how the systems within which you are working, how could they be made better so that we cut down on waste, fraud, and abuse, and certainly cut down on the potential for loss of life.

Mr. FLORES. Yes, ma'am.

Mr. CHVOTKIN. Yes.

Ms. FOXX. Then let's go back up here and see. Can you tell us briefly, have those suggestions been taken? Are they still in the mill? Tell me just a little bit about that, without going into too great detail.

Ms. BALLARD. Yes, ma'am. Several of the suggestions have been taken. As a result, over the years we have evolved significantly in our contracting operations in the theater. And the Army has also made a significant change in the structure. We have established the contingency contracting officer battalions that are under the Army Field Support Brigades, and this will enable our contracting officers to interface with the combatant commanders in the planning stages for contingency operations. So we have made several significant changes.

Ms. FOXX. Let me followup real quickly. Has anybody from the Congress asked you for any suggestions before today?

Ms. BALLARD. No, ma'am.

Ms. FOXX. No. OK. Would each one of you respond to that part as you go down the line. Let's see. Who else said yes? I am sorry. Who else said yes? Mr. Howell.

Mr. HOWELL. Yes, Congresswoman. On hearing you restate that question, I can't say definitively that we have been asked, but I would say we've discussed that issue with one of our largest clients, and it has been more in the nature of us and the client seeking to provide the best protection possible for the folks that we are protecting and to agree on—our billing is closely scrutinized, and we make sure we are in agreement that the bills are correct.

Ms. FOXX. But no one from Congress has asked you that question before today?

Mr. HOWELL. No, ma'am.

Ms. FOXX. Mr. Flores, did you say yes?

Mr. FLORES. No one from Congress has asked me anything about this, but a gentleman named Lawrence——

Chairman WAXMAN. Before you get into details, the time has expired. You basically want to know if anybody in the Congress has asked?

Ms. FOXX. Right.

Chairman WAXMAN. And your answer is no. Does anybody have an answer in the affirmative that anybody in the Congress has asked? You essentially, Mr. Howell?

Mr. HOWELL. Yes, for us. We worked closely with the House Armed Services Committee in 2005 to develop the oversight work that they were doing, the development of some legislation. Similar

work with the Senate. And also, of course, this committee in the past years.

Chairman WAXMAN. Thank you, Ms. Foxx.

I do want to point out that now is the time Congress should be asking these questions. We should have been asking them in the past, and asking questions and trying to get accountability is not gotcha. It is trying to do our job, and I think we need to work together on a bipartisan basis to do that.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Howell, I am going to ask you some questions. You, in your comments, I think inferred the fact that you thought the gentlemen that went into Fallujah and lost their lives were outfitted and situated in such a way as warranted by the general conditions at that time. I want to ask you if you are aware of an agreement for security services dated March 8th, I believe, of 2004 between ESS and Regency?

I would draw your attention to Appendix A of that document, second paragraph reads, "Further, to Regency's analysis of ESS requirements and the current threat in the Iraq theater of operations, as evidenced by the recent incidents against civilian entities in Fallujah, Aramadi, Al-Taji, and Al-Halla, there are areas in Iraq that will require a minimum of three security personnel per vehicle. The current and foreseeable future threat will remain consistent and dangerous. Therefore, to provide tactically sound and fully mission capable protective security details, the minimum team size is six operators, with a minimum of two armed vehicles to support ESS movements."

Were you aware of those contract provisions, sir?

Mr. HOWELL. Yes, I was.

Mr. TIERNEY. Now, does that change your testimony earlier that you thought having two people per vehicle, with plated vehicles, as opposed to armored vehicles, was sufficient on the date in question?

Mr. HOWELL. It does not, and there are a number of reasons why. First of all, this agreement is, as you said, was executed March 8th between ESS and Regency. On March 11th, during a meeting between Regency, ESS, and Blackwater, my understanding is ESS confirmed that armored vehicles were not appropriate or not expected, not requested for all missions.

Mr. TIERNEY. So what you are saying is they told you verbally something that absolutely contradicts this statement here that ESS had requirements that for the current and foreseeable future threat will remain consistent and dangerous and recommending a minimum of six operators and a minimum of two armored vehicles? So 3 days after this contract was executed you say they said exactly the opposite thing?

Mr. HOWELL. This contract was between Regency and ESS.

Mr. TIERNEY. That is correct.

Mr. HOWELL. Three days after that, my understanding is that ESS stated that was not required, and the requirement imposed by Regency on Blackwater was that it was not a requirement for armored vehicles.

Mr. TIERNEY. Do you agree or disagree with the threat assessment as stated in that paragraph?

Mr. HOWELL. That statement in the paragraph just reflects the fact that it was a dynamic and dangerous environment in Iraq. It is not a statement as to the specific conditions in any particular place on any given day.

Mr. TIERNEY. Well, it talks about civilian entities in Fallujah, Aramadi, Al-Taji, Al-Halla. Those are fairly specific places. It talks about a consistent and dangerous threat remaining for the current and foreseeable future, and it talks about the type of capabilities they think are necessary to deal with those, a minimum team of six operators and a minimum of two armored vehicles. Do you agree or disagree with that assessment?

Mr. HOWELL. I disagree with part of that, sir. It notes specific incidents to reinforce the general point that Iraq was a dangerous place, and, with regard to the armor requirement that is discussed in Appendix A of the Regency ESS contract, my understanding is that is with regard to personal protective services, which is a different mission than convoy operations.

Mr. TIERNEY. Mr. Murray, do you agree or disagree with that threat assessment in that paragraph?

Mr. MURRAY. I would like to make a couple of points, if I may.

Mr. TIERNEY. No, I really just wanted your answer. I've got a limited time, so yes or no would be sufficient, thank you.

Mr. MURRAY. Yes. I would agree with that.

Mr. TIERNEY. Thank you. You do.

Mr. Howell, I am aware that you asserted earlier that Mr. Powell's e-mail may have been speaking generally about conditions, but are you aware that e-mail was written at 1 a.m. on March 30th, which is, in fact, the morning of the day in which the gentlemen were sent out on their mission? Are you aware of that date?

Mr. HOWELL. Yes, sir, I am aware of that.

Mr. TIERNEY. OK. And are you aware that Mr. Powell is, in fact, the one that directed those men on those mission, he was their direct supervisor that day?

Mr. HOWELL. Yes, sir.

Mr. TIERNEY. And you still think that was only generally, that he was not contemplating those men and those conditions specifically on the morning when he wrote that?

Mr. HOWELL. I can't know. I can't read his mind, sir, but, given what I know, the status of the program, the problems, I would say the challenges faced by the program were the same challenges faced by everyone in Iraq, which was acquiring enough equipment. But the fact that there—the question whether there was enough equipment for the program had it been fully manned that day is a very different question from whether the team was equipped.

Mr. TIERNEY. Thank you. I yield back, Mr. Chairman.

Chairman WAXMAN. Thank you, Mr. Tierney.

Mr. Shays. Mr. Issa. Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. Howell, when did Blackwater enter its first Government contract?

Mr. HOWELL. I believe that was in 1998. I think we have contracts for training in the United States and contracts for security services overseas, and those are two different animals.

Mr. CANNON. And that was under the Clinton administration then?

Mr. HOWELL. Yes, sir.

Mr. CANNON. And do you have staff or contracts with people who have been employed by the Clinton administration?

Mr. HOWELL. I am sorry?

Mr. CANNON. In a political capacity?

Mr. HOWELL. I don't——

Mr. CANNON. For instance, you are accompanied by counsel today. Do you know what is her name and what was her political experience?

Mr. HOWELL. Yes, sir. Her name is Ms. Beth Nolan, and she was, indeed, part of the Clinton administration, to my understanding.

Mr. CANNON. And do you know what her title was there?

Mr. HOWELL. I am sorry, sir, I don't recall it at the moment.

Mr. CANNON. That is fine. I guess my point is that you are not exactly what you would call a Republican company then, are you?

Mr. HOWELL. No, sir. We have folks in our company of many persuasions.

Mr. CANNON. And, therefore, it would follow that you are not an extremely Republican company, and at this point I would like, Mr. Chairman, to introduce or ask unanimous consent to introduce into the record a letter from Callahan and Blain dated December 13, 2006, to the Honorable Nancy Pelosi, wherein the——

Chairman WAXMAN. Let me point out to the gentleman that letter is already part of the record.

Mr. CANNON. Thank you. Then, referring to that letter that is part of the record, the lawyer who drafted that letter referred to you as an extremely Republican company and went on to demand that this committee proceed to investigate issues, presumably to help them with their discovery. They also accuse you of being profiteering from the war in Iraq, but your company existed before the war in Iraq came into being, did it not?

Mr. HOWELL. Yes, sir.

Mr. CANNON. And are you, in fact, profiteering from that war? Have you skimped on equipment?

Mr. HOWELL. We have not skimped on equipment. No, sir.

Mr. CANNON. Thank you. Let me just say here, Mr. Chairman, that I personally don't think it is wrong for committees to investigate issues where there is litigation. In fact, I think that is appropriate on occasion. but I think it is highly inappropriate to have the perception that this committee or any organ of Congress is used to beat up a company to discover information that lawyers can't discover in the ordinary course of litigation, and that the purpose of this committee should be, in fact, to find out what is wrong and then help fix those things that are wrong.

I think it is absolutely clear that things have not gone perfectly well in Iraq, but to victimize any particular company, especially when that company is undergoing litigation under tragic circumstances, is, I think, just something we need to be very careful.

Now, of course, this committee is not at fault for a letter written by a law firm, but I would hope that the committee would be extraordinarily careful to not be the instrument of a law firm like that.

Now, Mr. Howell, you had five employees that were tragically killed recently. Would you like to talk a little bit about the circumstances, what they were doing that day, and what was behind the decision? Are there statements you would like to make so that we can understand that a little better?

Mr. HOWELL. Yes, sir, I would very much like to discuss that, but I am unable to do so in an open hearing.

Mr. CANNON. Because what they were doing was classified. The fact is, much of your work is very, very difficult, driven by sensitive information, by information that can't be made known. Thank you. I appreciate your being here and your undergoing these questions. War is difficult, especially when it is as expensive and complex and with so many issues at hand as we have in this war. I want to just let you know I appreciate your being here.

I yield back the balance of my time.

Chairman WAXMAN. I thank the gentleman for his questions.

I do want to state to you that I strongly agree with that statement that it is not appropriate for committees to be getting information for private lawsuits. I resented it when I saw it take place when the Republicans were in charge of the Congress. That is the last thing this committee should be doing. But we need to ask questions, even if a lawsuit is pending, and, as I heard from the family members this morning, there is a lot of information that I think they are entitled to know. I have been working on this particular investigation for a couple of years. It is about time we got all the information out.

Mr. Lynch.

Mr. LYNCH. Thank you, Mr. Chairman.

I agree with the gentleman, but I think that part of the problem is that we've got this perception because Vice President Cheney's connections with Halliburton just put a flavor of, I don't know, complicity there, of, you know, a political one. Appropriate or not, it is there, so we just have to address it.

Mr. CANNON. Would the gentleman yield? Is the gentleman suggesting that complicity is a term that means the Vice President——

Mr. LYNCH. Connection.

Mr. CANNON [continuing]. Is involved with illegal dealings. I don't think that anybody in this hearing is——

Mr. LYNCH. Connection.

Mr. CANNON. But connection to illegal activity?

Mr. LYNCH. I am sorry?

Mr. CANNON. Is the gentleman suggesting improper illegal activity on the part of the Vice President?

Mr. LYNCH. No. I am saying that the perception of a connection between Republican efforts and some of the industrial complex, the military industrial complex is because of that perception. He is a former CEO. And so I think that flavor is just out there. It is something——

Mr. CANNON. It is certainly something, if the gentleman would yield, it is something we ought to look at. I agree.

Mr. LYNCH. Reclaiming my time——

Mr. CANNON. Complicity is not the word.

Mr. LYNCH. Mr. Howell, can I just say that I want to followup on Mr. Tierney's question. He referred to a document that indicated

that between ESS and Regency there was a requirement that a minimum of three security personnel be added to each vehicle. It also refers to two armored vehicles to support ESS movements.

Now, based on your earlier response, you were saying that between March 8th, the date that this document was executed, and in fairly rigorous detail, saying that the current and foreseeable future threat will remain consistent and dangerous on March 8th, I want to clarify something. You are saying that this document was changed after the 8th?

Mr. HOWELL. I am not certain whether a subsequent contract was ever executed between ESS and Regency or not, sir. I don't know the answer to that.

Mr. LYNCH. But you were saying that was not the case on the 11th? You referred to another meeting on the 11th. I am just asking, if you have documents that change this contract that we were given, then I would just ask you to produce it, that is all.

Mr. HOWELL. My understanding is that the minutes of the meeting that I mentioned have been produced to the committee. I don't know if a subsequent written agreement between Regency and ESS exists.

Mr. LYNCH. OK. All right. I do want to refer to there was one audit that was actually produced. We asked for all audits, but there was one audit that was produced regarding the provision of security personnel. In this audit it indicates that there were duplication of labor costs in connection with personnel hired by Blackwater. What it essentially says here is that you were double billing. You were putting three people, including the driver, in some of these vehicles, and then you were charging the Government for a driver and three security people because a security person was driving. Do you get what I am saying? They are saying in here there were costs, $1.25 million for drivers at $750 a day, but those costs were already included in the security contract, and they are saying that it is, in effect, a duplication of labor costs, and consequently they question the costs included in Blackwater's proposed dedicated overhead and total.

What they say further on is that Blackwater applied profit to profit. In other words, you applied your percentage of profit to profit that had already been accumulated.

Last, they indicate in this audit that the proposed profit by Blackwater represented 23.6 percent of total proposed cost, which is significantly higher than what we have seen for similar contracts in dealing with the Department of Defense, which is usually 1 to 5 percent profit margin, maybe 10 percent at the most.

I just want to know, 23.6 percent profit on this, I just want to know do you think that is reasonable? Is that customary for the way you do business?

Mr. HOWELL. First, with regard to production, I would just like to note that we are a small business and we have been seeking to produce as much as possible. In connection with the committee staff, agreement was reached to focus on the hearing today. We have produced close to 7,000 documents and we are continuing to produce documents. I don't know which if our audits you are referring to, so there is some speculation inherent here.

Mr. LYNCH. This is the State Department contract.

Mr. HOWELL. OK. I came here prepared to talk about ESS, but what I can say about that audit that I know as of today is that when that report was issued it was not a final report. There were subsequent review of documents by the auditors and by our financial team, and when all of the concerns had been fully investigated, most of those concerns were determined to be based on misunderstandings.

Mr. LYNCH. Well, I understand my time has expired. I just want to say that the last time we had a hearing we were told that there was no contract between Blackwater and Regency and ESS, and that was confirmed by the Department of the Army, I believe. And now we come here today and we find out all that was wrong and that there were, indeed, contracts between the parties. So it is getting a little frustrating not getting straight information. I can tell you that. I don't know what we are going to hear at the next hearing. It may delete everything that we've heard here today.

Mr. HOWELL. Sir, we are seeking to answer your questions today as best we can, and from what I know of the prior hearing I do not believe that the question of whether there was a contract between Blackwater and Regency was questioned. There was a contract, and I believe that was the understanding during the hearing. I can't answer for the other companies that would have been in the chain.

Mr. LYNCH. OK. I yield back.

Mr. VAN HOLLEN [presiding]. Mr. Issa.

Mr. ISSA. I thank the chairman.

You know, I apologize if I don't ask enough questions to quite everyone on the panel, but this appears to be mostly about Blackwater, so I will focus my questions somewhat on them.

Mr. Howell, I know that there is a lot of proprietary information, but I hope that you can at least answer a couple of questions related specifically to this contract.

One, have you been paid on this contract?

Mr. HOWELL. None of the invoices that we submitted to Regency were ever paid. There was an initial mobilization payment, but it was a small portion, relatively small portion of the overall work that we did.

Mr. ISSA. And how much have you spent on this contract, if you can tell us?

Mr. HOWELL. I believe it was approximately $2.3 million, but that is a rough number.

Mr. ISSA. If you get paid some day?

Mr. HOWELL. If we had been paid, I believe it would have been—the total billings were $2,290,000 and some dollars.

Mr. ISSA. And earlier there was a statement about a 35 percent up-charge contractor fee, if you will, that gets marked up, not just at your level but at each level. To the extent you can, without revealing classified information or confidential, proprietary information, is 35 percent anywhere close to an accurate number?

Mr. HOWELL. If we had been paid—and I can discuss this because it is a contract that is closed. The market has changed significantly and it doesn't affect our Government bids going forward. Had we been paid, our profit would have been significantly less than that. I have a pie chart that would show exactly where the

payments to us that we didn't receive would have gone, and our profits were approximately—they would have been slightly over 1 percent.

Mr. ISSA. So if you got paid, it would have been slightly over 1 percent. If they pay you today without interest, you are in the hole for the amount, cost of the interest.

I am particularly concerned about the allegations that in a strange way had nothing to do with the previous panel. You were in the audience for the previous panel?

Mr. HOWELL. Yes, sir, I was.

Mr. ISSA. The previous panel seemed to say unequivocally that the four men who died in March 2004 were highly qualified, highly skilled professionals that you induced, offered $200,000 roughly a year to come there because of their security expertise, their training, their Seal training and so on. But then they alleged that, in fact, you hire people from Africa for a few hundred dollars a month. can you tell us how—because they referred to it, but they didn't have first-hand knowledge. Tell us about how that would work and what they would be used for, if you do it.

Mr. HOWELL. Yes, sir. It goes back to the issue of there being multiple tiers of security professionals. Some may be required that they are cleared in terms of security clearance, special forces veterans with a required number of years, all the way down to where the requirement may simply be for a third country national who has received training in firearms and security procedures and things like that.

The level of training and the category within which a given individual will fit is specified by the customer. In terms of U.S. Government contracts, it is normally specified by tier, how many people by tier by the customer. So we are directed, effectively, to use some folks who are third country nationals. That being said, they are cleared and vetted by the U.S. Government and they have met the minimum required training standards.

Mr. ISSA. OK. So if you were using third party—and I guess we will kind of call them second or third tier, compared to these four men that we met with today, or their widows and parents and so on, you pay them less. Does the Government pay you less for them?

Mr. HOWELL. Sir, I believe the category would be fifth tier, and fifth tier personnel, third country nationals, they are paid a different wage commensurate with the skills that they bring to the project, and the Government accordingly——

Mr. ISSA. Just recapping, lower skills, lower expectation because of home wages, and lower cost to the Government?

Mr. HOWELL. Lower cost to the Government, and they are also used for fundamentally different tasks.

Mr. ISSA. Would these third country nationals, would they tend to be, you know, selected because they were Muslim, because they could speak Arabic, because they had sensitivity, and/or because they were not Iraqis and, as a result, would be less likely to align with insurgent groups? That is a combined question, but I think you get the gist.

Mr. HOWELL. Yes, sir. I think it is very much driven by the contract. We do use some third country nationals to provide interpre-

tation, interpreting services. That is a very complex question. It is difficult to answer briefly, sir.

Mr. ISSA. OK. I thank the Chair. Hopefully we can followup further. I yield back.

Mr. VAN HOLLEN. Thank you.

Mr. Yarmuth.

Mr. YARMUTH. Thank you, Mr. Chairman.

I would like to follow this whole tier billing system so we can get a clear picture of what this is costing the American taxpayer. We have some slides that we want to show to illustrate this.

As we have all heard many times before, the initial level, the first level, we have four tiers of contractors, the individual contractor, Blackwater, Regency, ESS, and then KBR, and then finally the Army above that, so six tiers altogether. We know from the first, all the original testimony, that the individual contractor is being paid, in the one case we heard about earlier, $600 per day. And then in the next slide we will show that Blackwater billed $815 for that same $600 employee or contractor, which represents a 36 percent markup, and then Regency billed ESS $1,100 for that same contractor.

Mr. Murray, ESS was paying $1,100 for the same contractor who originally was being paid $600, supposed to be paid $600 a day. That figure does not include housing, food costs, those types of support services; is that correct?

Mr. MURRAY. First, in that $1,100 you referred to does not include accommodations, which would include food. It does not include fuel, as one of the items mentioned that is cost reimbursable, that is fuel. It did not include the d/b/a insurance that was a cost reimbursable item, itself. That $1,100 you see there refers to just the—I think that is a T–3 perhaps security person.

Mr. YARMUTH. Personnel. So essentially you paid $285 more to Blackwater than they paid the contractor. What does that $285 represent?

Mr. MURRAY. Congressman, that——

Mr. YARMUTH. Where was the value added for that $285?

Mr. MURRAY. I had no visibility on the pricing between Regency and Blackwater. Our contract was clearly with Regency for security services, and that was the quoted rate that we obtained. Their rates with their subcontractor, Blackwater, I had no visibility of.

Mr. YARMUTH. OK. Do you know what percent of your contract with KBR comprised labor costs?

Mr. MURRAY. Pardon me, Congressman?

Mr. YARMUTH. What percent of your contract with KBR comprises labor costs, the cost of personnel of the total?

Mr. MURRAY. We provided a detailed letter to KBR on this. Approximately 45 percent.

Mr. YARMUTH. So 45 percent. And do you know what percent of your labor costs are on security?

Mr. MURRAY. Approximately 12.5 percent.

Mr. YARMUTH. OK, 12.5 percent. So you are talking about probably somewhere around 5 percent of the total cost would have been represented on private security contracts?

Mr. MURRAY. That is approximately right.

Mr. YARMUTH. Does that have an impact on the price you can quote to a potential contractor?

Mr. MURRAY. Congressman, our prices are, as we mentioned, fixed price, firm fixed price. During the time that this scenario developed, we were already involved in our contracting with all of our clients. This actually came in mid-term in our clients, so we had already budgeted our security costs.

Mr. YARMUTH. I am saying is that an element that is an important element in your bidding, the construction of your bids and your competition for bids, the security costs?

Mr. MURRAY. Is it an important element? Yes, it is a very important element.

Mr. YARMUTH. And do you know has ESS ever lost a bid because of the difference in cost of security?

Mr. MURRAY. Congressman, it is hard to say if we have lost a bid because of the difference in our security cost. We have certainly won and lost bids in Iraq. Bids are based on either the best value or, in some cases, the lowest price, so we have lost some business, but I can't tell you if it is attributable to our security factor or not.

Mr. YARMUTH. As you go up that chain, is there a place where you can tell me, just based on your knowledge of the whole process of the industry, where there was any value added to that initial $600 paid to that individual contractor along the chain?

Mr. MURRAY. Well, yes, I can, Congressman.

Mr. HOWELL. Sir, I am the one best suited to answer that with regard to Blackwater, if I may.

Mr. YARMUTH. Sure.

Mr. HOWELL. There are two serious areas of possible misunderstanding on that slide. The first is the fact that the contract chain is reflected as being KBR on LOGCAP work. My understanding, which may not be correct, is that has not been definitively determined.

More to your question, the numbers that keep coming up, the 600 and 815, that is not the correct calculus, because the assumption that anything other than the amount paid in labor cost is pure markup and pure profit is wrong because this is a firm fixed price per day situation.

The amount of profit out of the services——

Mr. YARMUTH. Well, that is the question I was asking.

Mr. HOWELL. Yes, sir.

Mr. YARMUTH. Where is there value added to that $600 as it goes up the chain, because ultimately the taxpayer is paying a lot more than that.

Mr. HOWELL. Yes, sir. I will try to answer your question directly. The 815 is not the right number because there were multiple labor rates involved. The average labor rate I think is more reflective because the costs were spread among different categories equally. So the blended labor rate of approximately $885 per day per man I think is a more useful way to discuss this. Out of that $885 per day that Blackwater invoiced to Regency, the average labor cost was $683 per day, and that went to the individual security professional, $51.78 per day went to air fare. Blackwater was responsible for the initial movement, the initial mobilization of security professionals into Iraq. Supplies, including the personal weapons, ammu-

nition, personal gear for our men, that sort of thing, was another $18-plus per day. Other costs, such as lodging and transportation in the United States—that would be from their home of record to Moyak—housing, and berthing while they were receiving training in Moyak, freight, Internet access, that sort of thing accounted for another——

Mr. YARMUTH. Well, if I could interrupt you for a second, we had testimony that ESS didn't pay that. That was added cost, so not necessarily from you but along the whole chain housing costs and food wouldn't have been included. It might have been included at your level, but not subsequently.

Mr. HOWELL. There are two different categories of housing costs, sir: that that Blackwater incurred for the men prior to their arrival in theater and that which was the responsibility of Regency after they were in theater.

Mr. YARMUTH. My time has expired. Thank you.

Mr. VAN HOLLEN. Thank you, Mr. Yarmuth.

Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Mr. Chairman.

What I would like, Mr. Chairman, if I could—and maybe you could get some answers from staff for me, but I was reading the memorandum that we got today and I found it interesting. I am a little slow, but it says today's hearing provides an opportunity for the committee members to ask three basic questions about the extensive use about private security services. The first one says: Are private security contractors operating in Iraq doing an adequate job? I haven't seen anybody from any of the two panels that could really testify to that, and I don't think any of them have ever been protected by one of these private security companies. So I was wondering why that statement is in there.

The second statement says: How much are they costing the Federal taxpayer? I haven't seen anybody from either panel that works for the GAO who would know the answer to that.

And then it says: And is the Federal Government providing sufficient oversight, which I think the majority staff pretty much answered, itself. On page 3 it says, "U.S. contract employees may be prosecuted under American criminal law." And then in the next line it says, "All security contractors in Iraq are under the Uniform Code of Military Justice."

So I am kind of confused about the panels that we had today based on what the committee staff said we were supposed to find out. So if you could just find out those answers, I think it would help us all.

Mr. VAN HOLLEN. Well, we do have Ms. Ballard here today, who has actually been intimately involved in the issue of the use of taxpayer money, especially as it pertains to the contracts that we are dealing with today. In fact, there has been lots of correspondence between this committee and Ms. Ballard and the Secretary of the Army, including a number of letters that I have sent, that Mr. Waxman has sent, and others.

The focus of this hearing has been to try to put a lens on these contracting issues by looking at this particular case, and so I think these are the appropriate individuals and witnesses to have to answer those questions.

Mr. WESTMORELAND. OK. So the gentlelady from the Army would be who we would need to address the questions to as far as the cost? I am asking. Is that what I am hearing you say?

Mr. VAN HOLLEN. Feel free to address any question.

Mr. WESTMORELAND. The other point I wanted to make—and I am glad you are in the Chair, because I wanted to continue on with what Mr. Cannon talked about. The letter from Callahan and Blain continually used the word profiteering. I thought it was also interesting that they did copy you, as the DCCC chairman, with the letter. I know that the chairman previously stated—and I believe him—that these hearings have no political ties. And I found it interesting, as I was sitting here, I went to the waste, fraud, and abuse hotline and saw where the chairman had introduced a bill that was to do away with cronyism. As I look at this letter from this attorney and who he addressed it to and all the contributions that he had made and his former law partner, I can hardly wait until we get into those cronyism hearings.

But I think that we are walking on very thin ice when we start having public hearings with panels that are both the defendant and the plaintiff in something that is in a civil action.

But I have a question for Mr. Howell. In the letter I referenced—and it has been submitted for evidence—from Callahan and Blain they keep talking about profiteering. I was a contractor before I got into politics, in the building business, and I used many subcontractors. In fact, I have been a subcontractor before from another subcontractor. If I understand profiteering—and Blackwater was specifically picked out in this letter, and I am sure it was not for political reasons, even though it mentioned Blackwater as being a Republican company, and then the copy going to Mr. Van Hollen, the DCCC chairman, but it keeps talking about profiteering.

Now, on this program contract the thing that I've got says the Federal Government contracted with KBR that then contracted with ESS Support Services that then contracted with Regency Hotel Services that then contracted with Blackwater. Now, being in the contracting business and talking about profiteering, how can the last person, or how can the person at the bottom of the totem pole be profiteering? Can you explain that to me?

Mr. HOWELL. Sir, I don't see how they can be, and I also think that the notion of profiteering is inherently incompatible with a competitively bid contract.

Mr. WESTMORELAND. What would your definition of profiteering be?

Mr. HOWELL. My understanding of the definition under the English language is someone seeking to make an excessive profit, when the person desiring the services is somehow in dire straits, if you will.

Mr. WESTMORELAND. OK. And I think that is a pretty good definition. As Mr. Issa was questioning you, I understand that you never got paid from Regency Services, is that true, on this particular contract? It was a little over $2 million?

Mr. HOWELL. None of our invoices were paid. We did receive the initial mobilization payment.

If I may, I forgot to mention earlier, would it be possible to make this chart that we discussed at length part of the record, just so it is clear. It has been previously provided to the committee.

Mr. VAN HOLLEN. Without objection.

Mr. HOWELL. Yes, sir.

Mr. WESTMORELAND. And just one further question. You are sitting there with your friend from ESS. Did they get paid?

Mr. HOWELL. I am not certain, sir. I think they can answer that.

Mr. WESTMORELAND. Did ESS get paid on the contract that specifically is mentioned so many times here today, where the four brave Americans lost their lives?

Mr. MURRAY. Are you asking me if ESS brought value? I am not understanding your question, Congressman.

Mr. WESTMORELAND. Did KBR pay you for the services rendered that you subcontracted to Regency Hotel Services who then contracted with Blackwater? Did you get paid for the services that Blackwater and Regency Hotel Services subcontracted from you?

Mr. MURRAY. Congressman, I would like to address that kind of two-fold. No. 1, I think, understand our contract was with Regency to provide security services for ESS——

Mr. WESTMORELAND. Did you get paid from Kellogg, Brown, and Root for that contract?

Mr. MURRAY. That contract was not with Kellogg, Brown, and Root, so the answer to that would be no.

Mr. WESTMORELAND. OK. So I got some bad information that KBR did not subcontract to you on that particular contract?

Mr. MURRAY. On that particular contract I indicated earlier it was a contract we ran out of Taji, which was not a KBR contract.

Mr. WESTMORELAND. I cannot hear you. Would you speak up? I am a little slow and hard of hearing.

Mr. MURRAY. Yes. As I mentioned earlier, that particular contract was run out of Taji, and that was not the KBR contract that ESS had.

Mr. VAN HOLLEN. All right. We are going to have to wrap it up. I thank you.

Are there going to be further questions for other members of the panel, because we are going to have to——

Ms. MCCOLLUM. Mr. Chair, if you are not coming back again I would just like to——

Mr. VAN HOLLEN. No, we can come back.

Ms. MCCOLLUM. But if we were not, you are not referred to as the DCCC Chair on this letter. You are a Member of Congress.

Mr. VAN HOLLEN. Thank you.

Mr. MCHENRY. Mr. Chairman, I have been here for about 2½ hours waiting for questions, so I would like to come back.

Mr. VAN HOLLEN. We will do that.

Just for the record, let me say my understanding—and I hadn't seen that letter—that they essentially copied Members of the Democratic leadership, including Ms. Pelosi. And I am also informed apparently that this firm has contributed also to Republicans, as well. I just think it is important for the record to reflect that this hearing has been designed to get at the facts on the ground. I think it has done a good job of doing that. And to suggest

that there is some sort of political motivation behind it other than trying to get to the truth of the matter I think is unfortunate.

We will now recess the committee until after the voting. We will recess until 2:45.

[Recess.]

Mr. WAXMAN [presiding]. The meeting of the committee will come back to order.

To continue questioning of this panel, the chair recognizes the gentleman from Maryland, Mr. Sarbanes, for 5 minutes.

Mr. SARBANES. Thank you, Mr. Chairman.

We have heard a lot about the contracting, and I have done a fair amount of contracting in my life as an attorney, so I know when there is this multi-tier contracting it can get very, very confusing. It can be hard to pin down exactly what happened, and we are talking about cost-plus contracts, we are talking about fixed price contracts, we are talking about turnkey contracts, etc.

Depending on what goes into developing a bid or how you load up a contract on the pricing side, whether profiteering or markups that are more generous than they should be is occurring, that can happen. I think the inquiry will continue on whether the particular contract that we are looking at today had those characteristics, or, more generally, whether the environment in which private contracting was being engaged in Iraq allowed for that kind of thing to occur. But that is actually what I am more interested in.

I am more interested in the larger environment, because I, frankly, believe that a lot of the things that you do, Blackwater, ESS, Regent, whatever, are things that you should not be doing. I think that this is symptomatic of a situation in which the Secretary of Defense's ideology, philosophy, sort of new notions of tactical warfare were pushing this notion so that we were on a mad dash to slimming down our military, and most people agree that the initial response in terms of the number of troops in Iraq was inadequate. That meant that there was space that our military should have occupied that now had to be occupied by someone else, and that is when people turned to the private contracting community to fill that space, with the kinds of tragic results that can occur.

So I really just have one question. I invite any of you who wish to answer it. Did you, yourselves, ever reflect on whether you were in a space where you didn't belong? Did you ever say to yourselves, "We shouldn't be doing this? This is something that the armed forces should be engaged in. We are being put in an untenable position?" Anyone can answer that if they would like. Maybe you would like to start, Mr. Howell.

Mr. HOWELL. I think the best answer I can give is one based on my nearly 20 years as a Naval officer, informed, if you will, by my time at Blackwater. I have to say that it is ultimately a policy decision that is set by Congress, but I think that the idea of using contractors to supplement and to aid the armed forces is a valid one. We have a role to play. We have a contribution to make. There are certain functions that we can do at a cost efficiency when it is properly executed to the Government that free up soldiers to do—soldiers, Marines, airmen, and sailors—to do service member tasks.

Mr. SARBANES. I allow that there will be situations where you have an appropriate role. I guess I am asking whether you believe

that in this situation at all times you think the role that you played was appropriate, not the way you executed it, because I understand that once you have the assignment you are going to try to execute it, and whether you executed it well or not has been a subject of the discussion today, but whether the assignments that you were being asked to execute were appropriate in this larger context of what our military should have been doing versus what the private contracting community should be doing.

Mr. HOWELL. I believe that escorting personnel in convoys in a purely defensive role is an acceptable task for private security. That said, I believe and Blackwater supports appropriate Government control thereover. And if I could add one other thing that sort of slipped out of my mind, I had a massive amount of information that I tried to bring here today, and I don't want to not provide proper respect to Ms. Nolan, and I wanted to clarify she was a former White House counsel for the Clinton White House.

Mr. SARBANES. Does anyone else have a response?

Mr. CHVOTKIN. Mr. Sarbanes, just to remind you what I said earlier—I don't know if you were here for that—the unusual situation taking place in Iraq today is three simultaneous actions. There is a military action, and the work that is supporting—the contractors that are supporting the military, accompanying the force. That has been longstanding, weapons system support, logistics support, traditional.

There is the reconstruction activity, and that has usually followed a military activity. We are now doing that simultaneously. And an economic development or developmental assistance activity. All taking place in a very confined space. That has created some ambiguity about who is there doing what, for what purposes. I think that clarity is very important in your thought process about the appropriate role of contracts.

Mr. SARBANES. And do you agree that having that kind of ambiguity can create dangerous situations——

Mr. CHVOTKIN. Absolutely.

Mr. SARBANES [continuing]. To people on the ground?

Mr. CHVOTKIN. It absolutely creates difficult situations, confusion, unclear lines of authority and responsibility, and questions on both parts.

Mr. SARBANES. And confusion, would you agree, can lead to situations both where there is abuse, in terms of the way contracts and assignments come together, and clearly can also lead to situations where there is tragedy, as well?

Mr. CHVOTKIN. There is clearly tragedy. I am not sure that, by definition, you have abuse. Confusion could create ambiguity, ambiguity could create a variety of situations that may not be abuse of the process.

Mr. WAXMAN. The gentleman's time is up. Thank you.

Mr. SARBANES. Thank you.

Mr. WAXMAN. Thank you, Mr. Sarbanes.

Mr. McHenry.

Mr. MCHENRY. Thank you, Mr. Chairman.

Under Secretary Ballard, I have a simple question. I assume you will be able to answer this, because of your position. How many

private security contractors are currently working for the U.S. Government in Iraq?

Ms. BALLARD. Sir, that is a very broad question and I am unable to answer that question. It is a very complex situation on the ground. There are many organizations over there that may have private security contractors. A lot of these security contracts are subcontracts under——

Mr. MCHENRY. Thank you. There are approximately 60, according to the research we have done.

I ask Mr. Howell, Blackwater is one of those 60 currently working in Iraq providing security services; is that not correct?

Mr. HOWELL. We are currently providing security services in Iraq to the U.S. Government. Yes, sir.

Mr. MCHENRY. All right. What year was the company founded?

Mr. HOWELL. In 1997.

Mr. MCHENRY. What year did the company receive its first contract from the U.s. Government?

Mr. HOWELL. In 1998.

Mr. MCHENRY. Who was in the White House in—pardon me. I know that is a bit ridiculous to ask. It was obviously William Jefferson Clinton, a Democrat. It seems that the questioning here today is that these are sort of a Republican scandal that we have contractors working for the U.S. Government, providing essential security services for us in war zones. It is actually something very common for the last 200 years working with firms, private security firms to provide needed resources for our military and for our diplomats overseas. So I apologize for asking that question, because it was obviously a Democrat administration that gave you your first contract.

I think it is also ironic that there is a big discussion from the chairman of this committee and Democrat leadership about a company called Halliburton and how it is this Republican scandal that Halliburton is getting contracts from the U.S. Government.

I think today Mr. Seagle, you work for what firm?

Mr. SEAGLE. I work for KBR.

Mr. MCHENRY. Which Kellogg, Brown——

Mr. SEAGLE. Which is a subsidiary——

Mr. MCHENRY [continuing]. And Root, which is a subsidiary of——

Mr. SEAGLE. That is correct, of Halliburton.

Mr. MCHENRY. Of Halliburton. How many questions have you been asked today by this panel?

Mr. SEAGLE. One question, I believe.

Mr. MCHENRY. One question. Was it just now?

Mr. SEAGLE. No. It was a simple yes or no question that was earlier.

Mr. MCHENRY. Very good. How long have you been here?

Mr. SEAGLE. For about 3 hours.

Mr. MCHENRY. Three hours. That is kind of interesting. I find a lot of vitriol is heaped on your organization, but there is not even a question asked of you.

But back to you, Mr. Howell. I understand there is an ongoing lawsuit which Callahan and Blain have filed on behalf of families that were taken down in action. It is a very sad thing. I also know

that a letter that has already been admitted to the record here refers to you and other contractors as extremely Republican companies. It is ironic, coming from a law firm that is extremely Democratic, and it is ironic that they send this letter to the Speaker of the House and cc the committee chair here, but also copy the Democrat Campaign Committee Chair. Well, it might not be ironic because, after all, this law firm has given over $60,000 to Democrats over the years, so this might be another pay to play prospect here in Washington, DC, where Democrat donors get the investigations that they wish in order to help their law firm win a lawsuit.

So if you could comment, just in legal terms, about this idea of turning a private lawsuit into a legislative show trial?

Mr. HOWELL. Sir, I think the best answer I can give is to refer to a U.S. Supreme Court case that has been around for a large part of the existence of our Republic. It is a case that is known by the name Kilborn. It goes back to 1880 and it established the longstanding principle that, in certain circumstances, congressional involvement in private litigation can be unlawful, and obviously it is a very complex issue, a lot of subsequent case law, but that is the general principle that I think you are asking about.

Mr. MCHENRY. Thank you, sir. I think it is also interesting and important to note that this committee hearing that we have here today and the original—according to House rules, the minority side is entitled to receive notification about what the hearing is intended to be about, and then the night before we receive a supplemental document that completely changes the notion of this hearing. So I want to apologize to you individuals working in the private security and Under Secretary Ballard who works for the Government for having to waste a full day on a hearing that is nothing more than a show trial for a Democrat trial lawyer firm. I apologize to you for that. I think it shows that, you know, the new majority and the new leadership of this committee is intent on making political hay out of something that simply is not a valid point, and I apologize that you have to be brought in to be a part of this spectacle.

Mr. WAXMAN. The gentleman's time has expired, and I must say that he just was so partisan in what you had to say, without a foundation for it. I have no idea who is a Democrat and who is a Republican. I know that the four people, four men who lost their lives, were Americans. I don't know whether they are Democrats or Republicans. I know Americans, Democratic and Republican, are paying taxes, and they don't want their taxes wasted. And I think Congress should be following up on these investigations and asking witnesses questions.

I must say I am outraged at Ms. Ballard coming here to represent the Army coming here and not being able to give us an answer to the simple question of how many contractors and subcontractors have contracts with the Army. I mean, that is what this hearing was all about, and we couldn't even get an answer from that on that point.

So I know the gentleman wants to look at partisanship under every rock, but I suggest that he return under that rock and look at his own reasons for trying to make everything partisan. This is not a partisan investigation nor it should be——

Mr. MCHENRY. I think it is rather partisan for the Chair to say I should crawl under a rock.

Mr. WAXMAN [continuing]. And I resent that you are going to make it one. I resent that you are trying to make it a partisan one.

The gentleman from Ohio, Mr. Kucinich, is now recognized.

Mr. KUCINICH. Secretary Ballard, the President recently gave an order that was basically a shoot to kill order for anybody who was coming in from Iran who was thought to be an operative of the Iranian government. Does that order extend to the personnel hired by the companies who are here? Private contractors, are they given the authority to go and shoot to kill Iranian operatives in Iraq?

Ms. BALLARD. Congressman, those orders are Executive orders that deal outside my area, which is strictly contracting.

Mr. KUCINICH. OK. Well, this is contracting in a sort.

Mr. Howell, we have heard from the families on the first panel that they had to sue Blackwater to get information about what happened to their relatives. Then we heard something else that I have to say astounded me in its callousness, and that is that Blackwater filed a countersuit against the families for $10 million. Now, Mr. Howell, you are the general counsel for Blackwater. Why did the company sue the families that lost two sons, a husband, and a father?

Mr. HOWELL. First, let me say that, once again, extend our deepest condolences to the family, that their loss is——

Mr. KUCINICH. Is the lawsuit part of those condolences?

Mr. HOWELL. The lawsuit was not against the families. We seek nothing from the families. We have sought to support them. The lawsuit was against a North Carolina attorney who established hollow estates that did not contain any assets of the fallen men, their homes, their cars. They were just shell estates established for the purpose of personal injury litigation, and the lawsuit—the claim against that attorney was for a violation of our agreements with the men.

Mr. KUCINICH. So you are saying that attorney violated your agreement? What did they do? Did they make a mis-statement? How did they violate your agreement?

Mr. HOWELL. Our agreement with the men provided that any dispute that involved Blackwater would be resolved via arbitration, and that is where we are seeking to have this matter addressed.

Mr. KUCINICH. Did you have a contract with the men who fought for your company there? Did they have a contract with you that they had no right to sue, couldn't seek publicity, had to protect certain information, and that they would have to assume all risks of being shot, killed by a firearm, terrorist activity, hand-to-hand combat? Did you have a contract with them to that effect?

Mr. HOWELL. The terms of the contract included a waiver regarding certain injuries or death in certain circumstances, and it also contained provisions regarding confidentiality.

Mr. KUCINICH. But aren't you, in effect, suing the estates of the decedents? Isn't that what you are doing?

Mr. HOWELL. None of the property that is in the meaningful estates, the actual estates of the decedents, is involved in what we are——

Mr. KUCINICH. There is no connection whatsoever with the action you are taking and the decedents' property, their estates?

Mr. HOWELL. The estates that are in issue in the Norton litigation, as I understand it, have no assets at all. They were established solely for the purpose of personal injury litigation.

Mr. KUCINICH. And could you tell me then, is it your position that this attorney you are talking about has violated an agreement, and that is why you are suing?

Mr. HOWELL. As the shortest possible answer, that is a summary of the gist of the argument. Yes, sir.

Mr. KUCINICH. I would like to raise an issue regarding Blackwater's prior testimony in front of Congress, Mr. Waxman. Blackwater testified before a National Security Subcommittee of this committee, Blackwater testified on June 13, 2006, and I had asked questions about their contracts. The Blackwater's vice president testified that Blackwater charges $815 per day for the services of independent security contractor working in Iraq, and he testified that the $815 charge was fully burdened. Specifically, he provided the following response to me.

I asked, "In those contracts is it true you were paying your men $600 a day but billing Regency $815 a day?" He said, "Per the presentation, Mr. Kucinich, $815 a day is the right figure, but it is a fully burdened figure that includes travel, training, gear, housing, food, the works, fully burdened number." But the documents obtained by this committee, Mr. Chairman, refute the claim that these were fully burdened. We received the contract between Regency and Blackwater which clearly provide information contrary to Mr. Taylor's claims: one, that housing costs were the responsibility of ESS, not Blackwater; two, that food, subsistence for the contractors, was the responsibility of ESS, not Blackwater; and, three, insurance was to be paid by ESS, not Blackwater.

Now, Mr. Chairman, I know my time has expired. I think that, since I have information here that Mr. Taylor presented misleading testimony under oath to our committee, and I am going to ask that this committee look further into that to try to reconcile what he said and what the facts are, as this committee has been able to determine them.

Mr. WAXMAN. The gentleman will permit, we will take a look at that issue with you and pursue further clarifications for the people involved.

Mr. KUCINICH. I think it would be good to get it clarified, because the exchange that we had really didn't leave a positive impression. It seems to me there may have been an effort by Blackwater to mislead or conceal relevant information from the Congress.

I thank the Chair for his willingness to look at it further. Thank you.

Mr. WAXMAN. Thank you.

Mr. HOWELL. Mr. Chairman, if I may, I believe there is a grave misunderstanding here, that I would like just a moment to address. I respect the time constraints, but this is a fundamental misunderstanding.

Mr. WAXMAN. We want to be fair. Go ahead and say what you have to say.

Mr. HOWELL. If we could put up this graph that reflects the approximately $885 per man per day that was invoiced by Blackwater, if we could put that up on the overhead I believe it will help clarify this.

The testimony that Mr. Taylor gave, as I understand it, is that Blackwater's costs, meaning things such as weapons, ammo, personal gear, to go directly to Congressman Kucinich's point, housing provided while at Blackwater prior to the men going in theater, food provided to men while at Blackwater, that sort of thing, those were costs that Blackwater had to pay. They came out of the $884.97 per day average daily rate that was invoiced to Regency, and the amount that was the markup or the profit, if you will, was approximately $10.61 per day out of that $885, so it is approximately 1 percent.

There are basically two different categories of expenses, if you will. There are in-theater expenses, which Mr. Kucinich is absolutely correct in stating that Regency was responsible for providing housing, food, things like that when the men were in theater, but there were similar expenses that were incurred by Blackwater prior to the men going in theater—for example, when they were receiving training in Moyak—that were Blackwater costs that were borne by Blackwater or incorporated into our invoices, although, again, the invoices were never paid.

Mr. KUCINICH. Mr. Chairman, I am asking unanimous consent to be able to have 5 minutes of time to continue the questioning, because he said something that does not square with some facts here, and I would like to just know if I could have a unanimous consent to ask some questions.

Mr. WAXMAN. I'd like to see if the gentleman can handle it in 3 minutes, and if not——

Mr. KUCINICH. Fine.

Mr. WAXMAN. Mr. Shays has been kind enough to reserve his opportunity for questioning until you have completed yours.

Mr. KUCINICH. I thank you. I thank the Chair.

I would just like to ask Mr. Murray, did ESS pay for the housing costs?

Mr. MURRAY. Congressman, ESS was responsible for the housing——

Mr. KUCINICH. Did ESS pay for the housing costs? Could you answer yes or no?

Mr. MURRAY. ESS paid for the housing costs——

Mr. KUCINICH. Did ESS pay for the food costs?

Mr. MURRAY. While they were in theater, yes.

Mr. KUCINICH. Did ESS pay insurance?

Mr. MURRAY. Yes.

Mr. KUCINICH. OK. Mr. Chairman, that doesn't square with the impression Mr. Howell is trying to give this committee.

Now, Mr. Murray, the same contract also shows that Regency, not Blackwater, paid the cost of rotation travel; is that correct?

Mr. MURRAY. I can't answer that. I am not aware of that.

Mr. KUCINICH. The same contract shows that Regency, not Blackwater, paid for the individual body armor, heavy weapons, vehicles, navigational devices, and personnel radios; is that correct?

Mr. MURRAY. Congressman, our contract was with Regency. ESS' contract was with Regency, not with Blackwater. We had turnkey service with Regency to provide all of our security services except for those few items that were cost reimbursable or those items that ESS would provide. ESS would provide the accommodations and food.

Mr. KUCINICH. Right.

Mr. MURRAY. While in theater. We pay for the d/b/a insurance and we pay for fuel and a few other items that were cost reimbursable. All of the services were turnkey services.

Mr. KUCINICH. Thank you for answering that. And the point is that, Mr. Howell, it does not appear that Mr. Taylor's testimony was accurate. You know, he said $815 per day charge was so high because Blackwater had to pay for housing and meals and insurance, when, in fact, this was not the case, according to the contract documents. What made it worse was that Mr. Taylor was given a chance to go back and consult with the company, provide a follow-up response in writing, and when he did so, he sent a letter dated July 14, 2006, reaffirming his testimony stating, "$815 is what is known as the fully burdened rate." Now, Mr. Howell, do you know why Mr. Taylor would continue to insist on this information which appears to be erroneous and misleading, twice in communicating with this committee?

Mr. HOWELL. Sir, Blackwater incurred housing costs, subsistence costs, travel costs, and things like that that were properly its expenses under the contracts. The Blackwater Regency contract did provide that Regency would pay for some housing, some subsistence, some travel, but Blackwater also paid for some of those expenses.

For example, the initial deployment of the personnel into Iraq was Blackwater's responsibility, so Blackwater did pay for some travel, and I believe that is clear from the contracts.

Mr. KUCINICH. Mr. Chairman, I don't think that is responsive. You know, I would just like to conclude by saying that, you know, they only got paid when the troops were in theater, and I think it is important to keep that in mind, because it goes back to the question of whether, in fact, the taxpayers of the United States have been overcharged.

Thank you, Mr. Chairman.

Mr. WAXMAN. Thank you, Mr. Kucinich.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman.

Mr. Chairman, I really appreciate your having this hearing, and I have a lot of questions pretty much because I don't understand certain relationships. But what I do understand is this: we need contractors. They enable our troops to focus on being the tip of the spear and not setting up housing, not manning the kitchens, and contracted out, so that part makes sense to me. And I understand that Kellogg, Brown and Root, their LOGCAP contract that they were under during this phase of the war was actually negotiated under the previous Presidency; is that correct?

Mr. SEAGLE. That is correct.

Mr. SHAYS. So that contract—and I hate to say it. It is the kind of contract I see with FEMA. In other words, you are contracted,

and when an emergency arises you are on board and you take over. There is logic to doing that. So let me understand this. When you negotiate a contract, it may involve a lot of work or not all that much work. You never know; is that correct?

Mr. SEAGLE. That is correct.

Mr. SHAYS. How long do the contracts usually last, Mr. Seagle?

Mr. SEAGLE. This contract was a 1-year base contract with 10 option years.

Mr. SHAYS. So you had the right to roll it over for 10 years?

Mr. SEAGLE. No, the Army has the right to continue.

Mr. SHAYS. So they contracted it under the Clinton administration, but it was renewed under the Bush administration; is that correct, if you do it every year?

Mr. SEAGLE. Yes, correct.

Mr. SHAYS. OK. I understand why, if you hire someone for food service, they may want to engage someone who has a service that they don't provide, like security, so I can understand the subcontract there, and I understand in the LOGCAP that they have to eat that cost; is that correct, that ESS, for instance, would have to eat the cost of security if it is a LOGCAP contract?

Mr. SEAGLE. LOGCAP contract states that the military will provide our force protection. We think——

Mr. SHAYS. And you don't think it is being provided adequately and you choose to get security, contract out security, you are allowed to do that, but then you have to pay the cost?

Mr. SEAGLE. We haven't asked any subcontractors to subcontract for security.

Mr. SHAYS. Well, let me understand——

Mr. SEAGLE. We ask for a turnkey price to provide a service.

Mr. SHAYS. OK. Now, when you subcontracted—when ESS contracted with Regency, Regency then negotiated with Blackwater, correct?

Mr. SEAGLE. I don't know, sir. We contracted with ESS for a turnkey job. It was not an itemized bid.

Mr. SHAYS. OK. I understand you don't know, but it is not comforting, because what it is like is you can be Pontius Pilate and wash your hands of it. In other words, you contract with someone else, they get the job done, and it is their responsibility and not your responsibility? That is what you are saying?

Mr. SEAGLE. We certainly don't wash our hands. It is a competitively bid project.

Mr. SHAYS. Right, but they bid the contract and then it is theirs, but it was yours, and you sub-bid it, correct? You subcontracted?

Mr. SEAGLE. Yes, sir, we subcontracted.

Mr. SHAYS. You subcontracted to ESS?

Mr. SEAGLE. Correct.

Mr. SHAYS. Then ESS subcontracts to Regency to provide——

Mr. SEAGLE. Any service they need to meet those contract requirements.

Mr. SHAYS. And then Regency then engaged Blackwater?

Mr. SEAGLE. I don't know who our subcontractors determine they need to perform the contract. They give us a——

Mr. SHAYS. I understand you don't. I am going to just tell you what I think. I think you should know. I think the system should

somehow require it. I think there should be some responsibility to it. My analogy of Pontius Pilate is you just wash your hands of it. It is not your responsibility. I just can't believe that if I were doing a contract for a building and I was subcontracting that I would be oblivious to who my subcontractors were dealing with. So it just strikes me as something I am surprised by. That is all. Maybe I shouldn't be. Maybe that is the way it works. But we did good things with contractors and we did some bad things with contractors, and the bad things have given the good concept a bad name.

Ms. Ballard, I am surprised that you can't give us an idea of the number of contracts and number of contractors in theater. Is that because you just hire out from the first and then from then on you don't feel you have an interest in or responsibility to know who was subcontracted? In other words, once you put out that contract, whoever is subcontracted is not your interest or responsibility?

Ms. BALLARD. I can tell you how many contract actions have been awarded in Iraq. How many subcontracts you are correct, the prime has responsibility for the subcontract. We do not have privy of contracts with the subs.

Mr. SHAYS. And so you don't know who they hire, you don't know the quality of who they hire, and so on?

Ms. BALLARD. We have with the primes a quality surveillance plan and a quality plan that is monitored by the Defense Contract Management Agency to ensure that——

Mr. SHAYS. I don't know what that means. I honestly don't know——

Ms. BALLARD. We have quality plans in place that are monitored to ensure that the prime is doing what he committed to do in terms of monitoring his subcontractors.

Mr. WAXMAN. Would the gentleman yield?

Ms. BALLARD. We don't actually monitor the subs.

Mr. SHAYS. I will yield.

Mr. WAXMAN. You say you do know the number of prime contracts you have?

Ms. BALLARD. I know how many actions that we had in Iraq. In JCCI in fiscal year 2006 we had 26,994 contract actions. I can't tell you that those were all security contract actions. In fact——

Mr. WAXMAN. Can you tell us whether they are all prime?

Ms. BALLARD. Those are all prime contract actions.

Mr. WAXMAN. So 26,000?

Ms. BALLARD. It is 26,994 actions out of JCCI, the Joint Contracting Command Iraq.

Mr. WAXMAN. Actions means a contract?

Ms. BALLARD. Yes.

Mr. WAXMAN. So you had close to 27,000 contracts, and then you don't know how many of those contractors had subcontractors?

Ms. BALLARD. Correct.

Mr. WAXMAN. And you don't know how many of those subcontractors had subcontractors?

Ms. BALLARD. Correct.

Mr. SHAYS. I mean, tell me why I shouldn't be concerned by that. I mean, maybe you could tell me. Tell me. You are smiling, but it is a concern to me.

Mr. CHVOTKIN. You should be concerned. A contract action is not a contractor, so there may be—my guess, and Ms. Ballard would know, there are fewer contractors, many of whom are receiving multiple transactions, so the number of contract actions does not equal on a one-to-one basis the number of contractors. The subcontract relationships, there is elements of transparency, elements of visibility on the ground. Some of that may not be known in a data base where it is easily obtainable, either at higher level or at headquarters or here.

Mr. SHAYS. Well, let me just conclude. What I know is this: that this would be something I would recommend to the subcommittee on Government Reforms Oversight for National Security, because I think, you know, just a few Members who could ask questions for 10 or 15 minutes, we could get a better understanding. But I was always left with the feeling that our Government would know who the contractors were, who were the subcontractors, who got a subcontract from a subcontractor. I just thought it would be intuitive that we would know how many people, and so on. And the fact that once the major contractor subcontracts, they don't care who is subcontracting that is of concern to me, and it tells me that we are not going to have good quality control and that we are going to have pretty serious mistakes.

I would just add to this that if, in fact, anybody who is a contractor was told he had better get his butt out there, even without proper protection, weapons, and so on, I think the company has to be held responsible.

Ms. BALLARD. Congressman Shays, if I may, I don't want to leave you with the impression that we don't have any visibility at all of the subcontracts. We do have a consent to subcontract process, and there are clauses in the contract that require the contractor to notify us when they are taking certain subcontract actions at certain dollar thresholds. But that regulation is very clear as to what that information will be, and it says specifically that we are not, in our consent to that subcontract, consenting to the terms and conditions of those contracts, the price of those subcontracts, or the allowability of cost under those contracts. But the contractor does come to us and tell us that they are subcontracting based on what the contract specifically asks.

But to my knowledge, we don't have any system where we automatically keep track of then every subcontract that a subcontractor or a prime contractor lets.

Mr. SHAYS. Thank you, Mr. Chairman.

Mr. WAXMAN. Thank you, Mr. Shays.

This point leads into some questions I had, so if the gentleman from Maryland would allow me to go ahead, I will.

The question of oversight over the activities of the private security contractors, this problem is illustrated by the clear indications that there was unauthorized private security work under Government contracts with the Defense Department, and prime contractors were not even aware of it or did nothing to address it.

Mr. Flores, Fluor Corp. has a similar provision in its contract with the Air Force, contractor force protection. The U.S. Government will provide for the security of contractor personnel in convoys and onsite commensurate with the threat and in accordance

with the applicable theater anti-terrorism/Fluor protection guidelines.

Do you agree that this provision bars not just Fluor but its subcontractors from using private security contractors?

Mr. FLORES. In the case that you are speaking of and in all those cases where we have to use Government for those security requirements, we have never acquiesced to our subs to have private security, at least on the site and working with us in getting that particular task done.

Mr. WAXMAN. What would you do if you determined that one of your subcontractors had violated this provision? Would you report it to the Army or to the Defense Department?

Mr. FLORES. What we would certainly do, I think a good example was at Taji. We recognized that the Army was having trouble supporting ESS, and Lourens Baddenhorst coordinated with our project director, and we went back to the Army and said it is not working, we are anxious to get this bid down project completed for soldiers so that we will improve their quality of life on this base. But the Army said no, you can't use private security on this.

We kept beating on the Army because of this, but if the Army determines that their soldiers are living in certain conditions and they don't have the personnel, or other missions come up that preclude them from providing that convoy escort, we are not going to go past the provisions of our contract and suggest to our subs that they need to get private security.

Mr. WAXMAN. In a letter to Congressman Shays dated July 14, 2006, the Secretary of the Army stated, "Under the provisions of the LOGCAP contract, the U.S. military provides all armed forces protection for KBR, unless otherwise directed. Additionally, the LOGCAP contract states that KBR personnel cannot carry weapons without the explicit approval of the theater commander." In your written testimony, Mr. Seagle, you acknowledge that KBR contractors have used private security contractors. Doesn't that violate the terms of the LOGCAP contract?

Mr. SEAGLE. To clarify, I said we had other non-LOGCAP contracts in which we subcontracted for armed security. KBR has never directly subcontracted for armed security under the LOGCAP contract. KBR has never directly subcontracted for armed security under the LOGCAP contract.

Mr. WAXMAN. You have done it through ESS, though?

Mr. SEAGLE. We have not required or directed any of our subcontractors to subcontract for security, either.

Mr. WAXMAN. Well——

Mr. SEAGLE. The majority of our contracts are firm fixed price, competitively bid. We award them on best value to the Government, fully understanding that——

Mr. WAXMAN. Are you now aware that you did subcontract with ESS for private security?

Mr. SEAGLE. Was I aware that ESS had—at this time I understand. When we initially had this conversation with the Army we were focused on had Blackwater ever worked for KBR, to which the response was no. We were initially told by ESS and Blackwater, both, that Blackwater was not contracted to KBR.

Mr. WAXMAN. Well, let me ask you about this. James Ray of KBR wrote this e-mail on June 3, 2004, and it says, "We should not attempt to effect a material change in our contract with the Government by hiring a company that we know uses armed escorts. That company is an agent of KBR, and if anything happens KBR is in the pot with them. Even with lipstick, a pig is a pig."

Ms. Ballard, there seems to be a disagreement here on whether the Defense Department prohibits the use of private security contractors on these contracts. Why is there so much confusion about such a simple issue?

Ms. BALLARD. Contracts contain different provisions. In the case of the LOGCAP contract, there was a specific provision that prohibited the use of private security contractors. There are others, the design/build contracts, for example, that expressly say that the contractors would be providing their own security, and the proposals included those security costs.

Mr. WAXMAN. Well, LOGCAP has an agreement they won't have these private security people, but they did it. Now what happens?

Ms. BALLARD. What happened when we had all the data that demonstrated that they had, in fact, incurred these costs and passed them on to the Government, the contracting officer issued a payment adjustment and yesterday withheld $19.6 million. I am sorry, they didn't withhold it, they removed it from the KBR payments.

Mr. WAXMAN. It seems to me that the Defense Department and the prime contractors sometimes don't seem to have an idea of what is going on lower down on the contracting chain, and it may be acceptable not to have any oversight over subcontractors who provide paper clips, but it is not acceptable when the subcontractors are putting armed forces in the field. That is my big concern. I think it should be all of our concern. If the contracts don't allow it, those contracts need to be enforced.

Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. And let me thank all of our witnesses today. You covered a lot of the material I was going to go over, and so I am not going to go back over it in great detail, but, as you know, we sort of launched on this effort many, many months ago in terms of looking at some of the subcontracts, and it began as an effort to try and determine whether, from the taxpayers' perspective, some of this layering of subcontracts, cost-plus subcontracts, was a good deal for the taxpayer or not a good deal for the taxpayer, because there did appear to be lots of mark-ups that accumulated, and with a big price tag at the end of it.

During that process, we looked into whether or not the contracts between KBR and the others in the subcontractor chain permitted the contracting for private security personnel. As was testified to by Ms. Ballard, the contracts with KBR prohibited, essentially, both KBR and, as I understand it—and correct me if I am wrong—your view also remains that it also prohibits subcontractors under that prime contract from essentially engaging private security; is that right, Ms. Ballard?

Ms. BALLARD. That is correct.

Mr. VAN HOLLEN. OK. And it was on that basis that you made the decision, as I understand, just yesterday to at least withhold or—did you withhold it or you took back $19.6?

Ms. BALLARD. We took back $19.6 million.

Mr. VAN HOLLEN. And that was your estimate, I take it, of the amount of moneys under this KBR LOGCAP contract that had gone for the private security component; is that right?

Ms. BALLARD. Yes.

Mr. VAN HOLLEN. OK. I am just trying to get a better sense of the Blackwater. Was that most of it going through this process to the Blackwater private security?

Ms. BALLARD. What we relied on was a letter that was referred to earlier from ESS to KBR that said there was a factor applied to their direct labor costs, and our analysts then did the climate changes against that to take the funds back from KBR.

Mr. VAN HOLLEN. OK. So that was done through your discussions with ESS?

Ms. BALLARD. It was KBR that notified us that this had occurred.

Mr. VAN HOLLEN. OK. With respect to the Blackwater private security folks, you were operating under this in your contract. Did you understand that you were operating under the LOGCAP contract with KBR?

Mr. HOWELL. No, sir. We have not been certain which contract applied. What we did know was two key facts: we were subcontracted to Regency, and ultimately we were providing services to the U.S. military.

Mr. VAN HOLLEN. OK. So the personnel whose family members we heard from earlier you hired pursuant to your contract with Regency, right?

Mr. HOWELL. Yes, sir.

Mr. VAN HOLLEN. OK. And I guess for the Regency representative here, was that contract, the KBR contract that we are talking about today, that LOGCAP contract?

Mr. MURRAY. Well, Congressman, I don't think there is a representative from Regency.

Mr. VAN HOLLEN. I am sorry.

Mr. MURRAY. I am with ESS.

Mr. VAN HOLLEN. I am sorry.

Mr. MURRAY. We contracted Regency to do our security services. Turnkey service we contracted for all of our contracts. It wasn't targeted for KBR or non-KBR. It was across all of our contracts, both with KBR direct with the military and commercial contracts. When we had a security mission going to one of those camps or sites, Regency would carry that mission for us.

Mr. VAN HOLLEN. Right. But let me just make sure I understand. The $19 million that was withheld yesterday, or taken back yesterday, was essentially part of the funds that you initially charged the Government under this contract; is that right?

Mr. MURRAY. I am not aware of that, Congressman. I am not aware of the withhold or the action the Army has taken.

Mr. VAN HOLLEN. OK. Well, let me ask, I guess, Ms. Ballard. Was that pursuant to this chain of contracts that we have been talking about today?

Ms. BALLARD. Yes, sir, it was.

Mr. WAXMAN. And if I might further inquire on that, may I assume that has to do with the fact that you were going to be coming before this hearing today, and therefore punitive action was warranted and you took it?

Ms. BALLARD. No, sir. We received our positive confirmation on January 30th, and from then until yesterday we accumulated the documentation to solidify our decision. We consulted with counsel and other agencies that bear upon that decision, and then we were able to take action. This was important because KBR has the right to dispute this, so it was important that we have our facts in order before we take action.

Mr. WAXMAN. Well, I am pleased that you have your facts in order, you took action, but I haven't heard too much action taken by the Defense Department in actually denying money to KBR and some of these contractors. So, even if you don't want to acknowledge this, I think that the fact we are holding this hearing today might have saved the Government $20 million.

Mr. VAN HOLLEN. Thank you. I again appreciate the letter we received yesterday. I think Mr. Waxman and I both received a letter yesterday.

With respect to the KBR contract here, is the reason that the U.S. Government takes the position that they cannot subcontract out for private security services because the expectation is that the U.S. military will provide for that security?

Ms. BALLARD. The clause in the contract does stipulate that the U.S. military will provide that security.

Mr. VAN HOLLEN. OK. To your knowledge, did any of the entities, the subcontractors in this chain of subcontracts we are talking about today, did they request that the U.S. military provide security?

Ms. BALLARD. We have in writing from KBR that they nor any of their subs ever requested in writing for this security.

Mr. VAN HOLLEN. OK. Thank you, Mr. Chairman.

Mr. WAXMAN. Thank you, Mr. Van Hollen.

Mr. Kucinich had just one question he wanted to ask and get an answer for the record.

Mr. KUCINICH. Yes, Mr. Chairman. I am going to submit for the record a story that was in the January 11, 2007, edition of the Pilot Newspaper. The headline says, "Iraq Killing Contractor Could Test Laws." The question is this: Mr. Howell, are you familiar with a December 24th shooting involving one of your employees who shot and killed an Iraqi security officer? Are you familiar with that?

Mr. HOWELL. I am familiar with some aspects of it, yes, sir.

Mr. KUCINICH. Did your company order that man back to the States?

Mr. HOWELL. That gentleman, on the day the incident occurred, he was off duty. Blackwater did bring him back to the United States and our client also understandably directed that he be off the project immediately. His security clearance was revoked, and there is other activity going on, sir.

Mr. KUCINICH. Is he going to be extradited back to Iraq for murder? And if not, why not?

Mr. HOWELL. Sir, I am not law enforcement. All I can say is that there is currently an investigation by, as I understand it, the FBI and the Department of Justice of the incident that day, and we are fully cooperating and supporting that investigation. What action they will take, sir, I can't say.

Mr. WAXMAN. Thank you, Mr. Kucinich. Mr. Welch has been waiting. If you have further questions, if you would submit it in writing, and we would appreciate responses in writing.

Mr. KUCINICH. Mr. Waxman, I appreciate your indulgence, and I just want to point out that there is a question that could actually make their corporate officers accessories here in helping to create a flight from justice for someone who has committed a murder, and so that is why I feel it is important that we get these answers. Thank you.

Mr. WAXMAN. Well, let's get the answers before we make the charges. We would certainly welcome further responses to questions that either Mr. Kucinich or any member of the committee may further want to ask, and have you respond to in writing for the record. We will keep the hearing record open for another week.

Mr. Welch, you are going to conclude the questioning.

Mr. WELCH. Thank you, Mr. Chairman.

Mr. Howell, Blackwater has multiple contracts with the Federal Government, including the Defense Department, State, and other agencies, and it has contracts, of course, with other companies. I want to ask you about whether Blackwater will be getting any additional contracts in the hear future. And specifically, to your knowledge is Blackwater currently under consideration for any sole source or no-bid contract from the Defense Department or any other Federal agency?

Mr. HOWELL. Not to my knowledge, sir. At any given time we have a number of business initiatives in progress, including U.S. Government work, and to my knowledge no, but we may. I can't say definitively, sir.

Mr. WELCH. So you will confirm yes or no and get back with a specific answer?

Mr. HOWELL. Yes, sir. And if I could caveat, if we could make it with regard to unclassified matters?

Mr. WELCH. Has Blackwater had any communications with the Defense Department or any other agencies in the past several months regarding a contract to provide emergency evacuation services?

Mr. HOWELL. I don't know, sir.

Mr. WELCH. And you will check?

Mr. HOWELL. I will check.

Mr. WELCH. And does Blackwater currently own any helicopters that are designed for defensive purposes or for evacuating people quickly?

Mr. HOWELL. A helicopter designed for defensive purposes, as I as a military person understand it, would be like an Apache attack helicopter. We don't own anything in that nature. In terms of evacuation, any utility helicopter that would be normally used for personnel movement would be suitable for evacuation.

Mr. WELCH. And has Blackwater been trying to raise capital, to your knowledge, to purchase or lease helicopters of this sort in

order to potentially provide services to the United States Government?

Mr. HOWELL. Mr. Congressman, answering that question necessarily would harm a competitive U.S. Government bidding process that is underway. I am happy to answer it, but I would ask that, in the interest of preserving competition, we do so in a closed session or in writing.

Mr. WELCH. You will do that in writing?

Mr. HOWELL. Yes, sir.

Mr. WELCH. I want to ask you about the Fallujah incident. I heard you testify about Blackwater's concern for its employees, members of the team, and all of us take seriously the genuineness of that statement. But you heard the four women who were here, and they had a question about what happened and why. My understanding is that your company has done an incident report.

Mr. HOWELL. As I understand it, there was more than one inquiry into the events of that day.

Mr. WELCH. So your company has done an inquiry, not just one but several, correct?

Mr. HOWELL. I was not referring solely to Blackwater, sir.

Mr. WELCH. Well, I am asking you about Blackwater. You are Blackwater?

Mr. HOWELL. Yes, sir.

Mr. WELCH. And I am asking you about Blackwater. Have you done an incident report?

Mr. HOWELL. There was an investigation. Yes, sir.

Mr. WELCH. Is my question complicated? Have you done a report or not?

Mr. HOWELL. No, sir. I am just trying to be clear. Yes, sir, we have done a report.

Mr. WELCH. And you understand that—you were a member of the military?

Mr. HOWELL. Yes.

Mr. WELCH. And obviously when the military loses one of their sons or daughters, they provide information to the family, as much as they have, about what happened, correct?

Mr. HOWELL. With one important caveat, sir, that there are instances where the military does not, and I can discuss that not in a public forum.

Mr. WELCH. Well, the military takes seriously its ability to help families who are grieving come to terms with their loss by doing one of the most basic and human steps that an organization can take, and that is to provide as much information as they can, correct?

Mr. HOWELL. Yes, sir.

Mr. WELCH. What is the problem about answering the question to these four people who lost their loved ones by telling them everything you know about what happened and how it happened so they can have the one thing they are requesting, and that is the truth?

Mr. HOWELL. Sir, some of the facts of that day were classified by the Government and we are not permitted to discuss them.

Mr. WELCH. Well, let me ask you this. This committee has requested copies of that report or reports, correct?

Mr. HOWELL. Yes, sir.

Mr. WELCH. Will you turn over to this committee those reports?

Mr. HOWELL. Sir, we cannot turn over classified information. It would be a criminal act.

Mr. WAXMAN. If the gentleman would permit, that is not an accurate statement. We are entitled to receive classified information in this committee. This was requested in our document request to you, and we are expecting to receive that information from you.

Mr. HOWELL. I understand, sir.

Mr. WELCH. Ms. Ballard, are you aware of whether there was a report that was done in the Pentagon concerning this incident?

Ms. BALLARD. No, sir, I am not.

Mr. WELCH. Is that anything within your knowledge that you could respond to questions from me about, or do I have the wrong person here?

Ms. BALLARD. Wrong person, sir.

Mr. WELCH. OK. Thank you.

Mr. Chairman, I just want to be certain I understand. You have made it clear that this committee has requested the Fallujah incident reports from Blackwater.

Mr. WAXMAN. We have. Mr. Howell was not fully responsive to my statement that we are entitled to receive information even if it is classified, and we want you and expect you to turn over that document to us. Will you comply?

Mr. HOWELL. I want to ensure that we comply with the law, sir, and I want to fully respond to the committee as much as possible. We will turn over everything that we are permitted to without affecting attorney/client privilege and Government classification interests, and if that is not a sufficient answer I would have to provide one in writing, sir.

Mr. WAXMAN. Well, let me suggest this to you, in case there is any vagueness of the law.

Mr. HOWELL. Yes, sir.

Mr. WAXMAN. We will supply you with the information about our entitlement to information, notwithstanding its classification, and that should eliminate the objection that you have raised to us. Attorney/client privilege, we will talk further about that, but matters that Congress are entitled to receive, we expect to receive unless you have some argument against it that fits into exceptions that are recognized.

Mr. HOWELL. Yes, sir.

Mr. WAXMAN. We will both look at that together.

Mr. SHAYS. Mr. Chairman.

Mr. WAXMAN. Yes, Mr. Shays?

Mr. SHAYS. If I could just make a comment or two and just a question?

Mr. WAXMAN. Sure.

Mr. SHAYS. One, I don't have a lot of sympathy, frankly, for the position of Blackwater right now, but I do have a concern and I just want to express it. If information is provided to the committee that is important for the committee to know, is it then transferred to the parties that are in a lawsuit, and then does it become available to either side? And is that a role we should be playing?

Mr. WAXMAN. Absolutely not. It is not a role we should be playing and it would not be transferred for purposes of litigation, especially if it is classified information.

Mr. SHAYS. And then, just if I could make a closing comment about this hearing, I just think it really has set the stage, I think, for a very real dialog about a lot of things. For instance, I just didn't know the disinterest of one contractor of the Government contracting out and then subcontractors, and then the further down the chain you get there doesn't seem to be this interest, either by the original contractor or by the Government, in my judgment. That concerns me.

And I would also like to know what is the policy of our Government? I consider contractors who die in Iraq as much heroes as anyone else who has risked their life in Iraq. They are contractors. And it just strikes me that the family should have the same courtesies that exist for military families. I am struck by the fact that we may want to get into providing advice, counsel, whatever, in the course of our hearing as to a uniform practice that should be provided, because I am left with the impression from our first four witnesses that they were treated in a very shabby way, and I would like to think no one would be treated like that. That is the impression I am left with.

I thank my chairman for allowing me to close with those comments.

Mr. WAXMAN. I appreciate your comments. I certainly feel that way. They expressed a great deal of emotion and very powerful testimony today.

Mr. Shays, I am pleased that you stayed here for the whole hearing. You, more than any other Member of Congress in the last Congress, actually actively got into many of these issues, and we look forward to working with you and Mr. Davis on a bipartisan basis. These are not partisan issues. I resent it when people try to make this into a partisan issue, and I particularly resent it when it suggests that the family members came before us as partisans. It is such an outrage. They are the ones who lost people in Iraq, and we have no idea what their party affiliation, nor do we have any interest in knowing what their party affiliation is.

To this panel, I thank you very much. We will have possible questions——

Mr. MURRAY. Excuse me, Chairman Waxman?

Mr. WAXMAN. We will have possible questions for the record, and we would ask you to respond.

Yes, Mr. Murray?

Mr. MURRAY. Yes. I would like to just make, if I may, one clarification——

Mr. WAXMAN. Yes.

Mr. MURRAY [continuing]. On comments that were discussed in the earlier session. There were discussions around our contract, ESS' contract with Regency, which is dated March 8th, and a subsequent meeting to that on March 11th whereby ESS and Regency and Blackwater attended a joint implementation meeting. I just wanted to advise the committee that our contract dated March 8th did not change. None of the terms or none of the conditions of that

contract changed as a result of that meeting or any other reason. The contract on March 8th stood as it is.

Mr. WAXMAN. We appreciate that clarification.

Thank you all. You have been very helpful to us and we appreciate your being here and giving of your time and your answers to us.

That concludes our hearing. We stand adjourned.

[Whereupon, at 3:55 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

POWELL GOLDSTEIN LLP

Atlanta ▪ Washington ▪ Dallas

RESIDENT IN WASHINGTON OFFICE
DIRECT DIAL: (202) 624-7380
WCRENSHAW@POGOLAW.COM

February 21, 2007

The Honorable Henry A. Waxman, Chairman
The Honorable Tom Davis, Ranking Minority Member
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20015

Re: February 7, 2007, House Oversight and Government Reform Committee Hearing on Iraq Private Contractor Oversight

Dear Chairman Waxman and Ranking Member Davis:

As you know, your committee held a hearing on February 7, 2007, regarding Iraq Private Contractor Oversight (the "Hearing"). At the Hearing, the Committee received testimony from various sources, including relatives of certain former Blackwater employees (the "Decedents") who were killed by Iraqi insurgents in Fallujah, Iraq on March 31, 2004 (the "Fallujah Incident").

As you are aware, a personal representative of the Decedents has sued two Blackwater entities as a result of the Fallujah Incident and that case is currently pending in North Carolina state court. Our client, Justin McQuown, is a defendant in that case.

As we are sure you appreciate, given the fact the Fallujah Incident is the subject of pending litigation, it would be inappropriate for Mr. McQuown to fully respond to the numerous unwarranted allegations that were made against him at the Hearing. However, we would like to go on record to state that numerous allegations made by Kathryn Helvenston-Wettengel, the mother of one of the Decedents, Scott Helvenston, all of which are based on hearsay, are inaccurate.

We understand that resolving the disputes relating to those issues is not the province of the Committee and will occur at an appropriate time and under appropriate circumstances. However, we could not in good conscience allow the record to close without noting the numerous inaccuracies directed towards our client.

Mr. McQuown has previously expressed, and continues to express, his sympathy to the families of the Decedents for their loss. It is unfortunate that throughout the legal process, Mr. McQuown's good name and reputation continue to be victimized and that he is not yet at liberty to vindicate himself.

We respectfully request that this letter be included in the formal hearing record. Thank you for your consideration.

Respectfully submitted,

William C. Crenshaw
For Powell Goldstein LLP

PRINCE GROUP

February 6, 2007

By Hand Delivery

The Honorable Henry A. Waxman
Chairman
U.S. House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Chairman Waxman:

Blackwater USA will participate in the Committee's hearing on February 7, 2007, as directed and required by the letter of invitation sent to the company, and the Committee's separate request for documents.

In the Committee's invitation to Blackwater USA of January 18, 2007, it indicates that the "topic of the hearing will be the United States' involvement in Iraq reconstruction and, in particular, the financial effects to the taxpayer of layering multiple subcontracts." Your letter of January 19, 2007, requests that Blackwater produce documents in connection with "an investigation into various aspects of the work of government contractors in Iraq, including their role in Iraq reconstruction efforts," indicating that the Committee hearing is "part of this investigation."

Subsequent to receiving your letters of January 18 and January 19, the Committee decided that the plaintiffs in an ongoing lawsuit against Blackwater would be invited to testify at the same February 7, 2007 hearing. Committee staff also provided Blackwater with a copy of a December 13, 2006, letter from the same plaintiffs' counsel to Speaker Pelosi requesting a congressional investigation by this Committee into the very same allegations pending in the plaintiffs' lawsuit described below. It is our understanding based on discussions with your staff that a significant portion of the questions that will be asked of Blackwater will relate to these issues.

However, we are writing to respectfully request that the Committee voluntarily refrain from seeking to elicit information related to a pending civil lawsuit, *Nordan et al. v Blackwater Security Consulting, et al.*, a case filed in the General Court of Justice, The Supreme Court of Wake County North Carolina; alternatively, if the Committee is intent on such questioning, we respectfully request that you close that portion of the hearing that addressed those issues.

1650 TYSONS BOULEVARD, SUITE 800
MCLEAN, VIRGINIA 22102
PHONE: 571-633-9530 FAX: 571-633-9535

As background, all contracts between Blackwater and its independent contractors, including the four men killed, some of whose families have retained the plaintiff's counsel which wrote the December 13, 2006, letter contains the provisions requiring that issues related to the contracts not be discussed publicly and that any dispute be referred to arbitration not litigation.

The allegations repeated throughout the December 13, 2006, letter are directly from the pending lawsuit, are erroneous in almost every respect and are by their nature designed "to defame, degrade, or incriminate" Blackwater. These are precisely the type of circumstances envisioned in Rule 13 of the Committee Rules, which indicates that, "Meetings for the transaction of business and hearings of the Committee shall be open to the public, or closed in accordance with Rule XI of the House of Representatives." House Rule 2(g) in turn provides that Committee meetings shall be open "except when the committee or subcommittee, in open session and with a majority present, determines by a record vote that all or part of the remainder of the meeting that day shall be in executive session because disclosure of matters to be considered . . . would tend to defame, degrade or incriminate any person, or otherwise would violate a law or rule of the House."

To the extent the hearing scheduled for February 7, 2007, will focus on specific allegations in ongoing litigation at the request of plaintiffs' counsel, such a hearing would inevitably "tend to defame, degrade or incriminate" Blackwater, the defendant in the ongoing litigation, and could well "violate a law or rule of the House."

Finally, in addition, any investigation of the underlying facts of what happened in Fallujah that day will likely require a discussion of "operational" issues that should not be publicly disclosed.

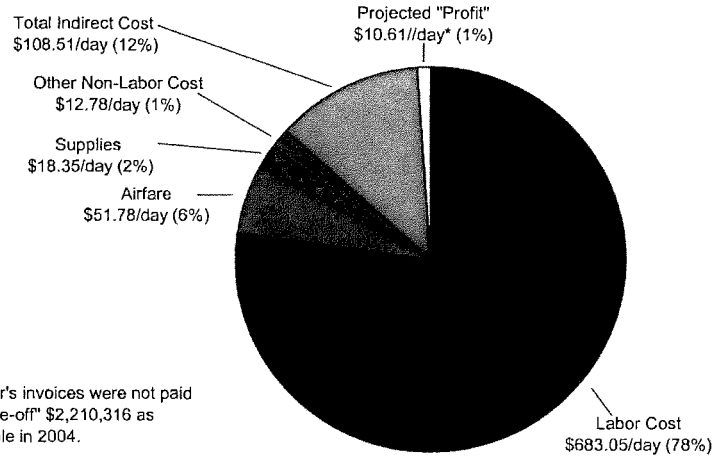
We ask that documents that relate to the issues in the Complaint not be made public for the same reasons. Accordingly, Blackwater respectfully requests that its request be given your consideration.

Yours truly,

Joseph E. Schmitz
Chief Operating Officer &
General Counsel

cc: Honorable Tom Davis, Ranking Member

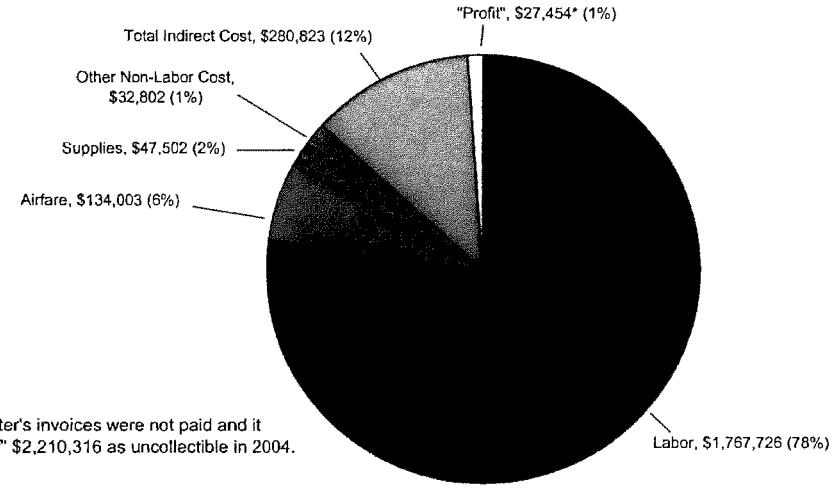
Blackwater Security Consulting LLC
Agreement for Security Services Between Regency and Blackwater
March 12, 2004 to July 8, 2004
Based on Blended Rate of $884.97 Per Man Day



*Blackwater's invoices were not paid and it "wrote-off" $2,210,316 as uncollectable in 2004.

- Labor Costs paid to Blackwater Contractors
- Airfare for Blackwater Contractors
- Supplies (weapons, ammo, personal gear, etc.)
- Other Non-Labor Cost (lodging and transportation in U.S., freight, internet, etc.)
- Total Indirect Cost (general administrative and corporate overhead, e.g., training, facility, administrative salaries, utilities, etc.)
- Profit (assumes Blackwater's invoices had been paid)

Blackwater Security Consulting LLC
Agreement for Security Services Between Regency and Blackwater
March 12, 2004 to July 8, 2004
Based on Total Billlings of $2,290,310*



* Blackwater's invoices were not paid and it "wrote-off" $2,210,316 as uncollectible in 2004.

- ■ Labor Costs paid to Blackwater Contractors
- ■ Airfare to Blackwater Contractors
- ■ Supplies (weapons, ammo, personal gear, etc.)
- ■ Other Non-Labor Cost (lodging and transportation in U.S., freight, internet, etc.)
- ■ Total Indirect Cost (general administrative and corporate overhead, e.g., training, facility, administrative salaries, utilities, etc.)
- □ Profit (assumes Blackwater's invoices had been paid)

ADDendum

Feb. 14, 2007

Bonney
Oversight committee
Fax # 202-226-3348

With reference to my testimony on Feb 7, 2007, I need to clarify one of my statements. When I was stating as to Blackwater's contracts in Africa, I wanted to say that the young men being recruited by Blackwater were currently being paid $30.00 a month with there current positions in Africa. The transcript read that Blackwater was paying them $30.00 per month. I have no idea as to what Blackwater was paying them.

Katy Helvenston-Wettengel
34220 Silver Court Dr.
Leesburg, Fl 34788

352-787-9349

Kathryn Helvenston - Wettengel

Statement of Mr. William H. Reed
Director, Defense Contract Audit Agency
House Committee on Oversight and Government Reform
February 7, 2007

Mr. Chairman, members of the Committee, my statement for this hearing will center on the Defense Contract Audit Agency's (DCAA) oversight of contract costs related to military operations and reconstruction in Iraq.

DoD Contract Performance Oversight Responsibility

DCAA has been an integral part of the oversight and management controls instituted by DoD to ensure integrity and regulatory compliance by contractors performing services in Iraq. DCAA's services include audits and professional advice to acquisition officials on accounting and financial matters to assist them in the negotiation, award, administration, and settlement of contracts. Decision-making authority on DCAA recommendations resides with contracting officers within the procurement organizations who work closely with DCAA throughout the contracting process.

DCAA Staffing and Actions

Since April 2003, DCAA has worked with all U.S. procurement organizations supporting Iraq Reconstruction to establish the resources and planning information needed to carry out required audits of contract costs as they are incurred and billed. These organizations include the Joint Contracting Command – Iraq/Afghanistan, the Army Sustainment Command, the U.S. Army Corps of Engineers, the Defense Contact Management Agency in Iraq and Kuwait, USAID, and the State Department. This coordination has enabled DCAA to maintain an inventory of Iraq-related auditable contracts.

Based on the inventory of auditable contracts as of September 30, 2006, DCAA is responsible for auditing Iraq-related contracts at 93 contractors. These contractors hold more than 175 prime contracts with contract ceiling amounts of $51.8 billion, of which $38.5 billion had been funded at the end of FY 2006. DCAA audits of cost-reimbursable contracts represent a continuous effort from evaluation of proposed prices to final closeout and payment. Initial audits of contractor business system internal controls and preliminary testing of contract costs are carried out to provide a basis for provisional approval of contractor interim payments and early detection of deficiencies. Comprehensive contract cost audits are performed annually throughout the life of the contract and are used by the contracting activity to adjust provisionally approved interim payments and ultimately to negotiate final payment to the contractor.

To carry out these extensive audit requirements, DCAA opened an Iraq Branch Office in May 2003 and implemented planning and coordination procedures to effectively integrate audit work between that office and more than 50 DCAA CONUS Audit Offices with cognizance of companies performing contracts in Iraq.

Results of Audits

Through FY 2006 DCAA has issued more than 1,800 reports on Iraq-related contracts. We estimate issuing another 600 reports in FY 2007. DCAA oversight of contracts in Iraq has found a number of problems. Our resulting action has ranged from recommending changes in business processes – to reduction of proposed or billed costs – to referral of our findings to the Inspector General for investigation and possible legal action against a contractor.

Reliability of business systems affecting contract costs – The most frequent problems disclosed during our audits of business systems involved timekeeping

procedures, cash management procedures, management of subcontracts, or documentation of costs on proposals. The majority of these problems have already been resolved or are actively being worked by contractors and contracting officers. Where appropriate, reductions to billed costs have been taken to avoid potential inaccurate payments until process deficiencies are corrected.

Reductions of proposed and billed costs – Through FY 2006 DCAA has recommended reductions in proposed and billed contract costs of $4.9 billion. Where appropriate, DCAA has taken action to reduce contractor billed costs for disputed amounts pending a contracting officer decision. In addition, DCAA has identified $5.1 billion of estimated costs where the contractor did not provide sufficient information to explain the basis for the estimated amounts. These unsupported costs were usually resolved through contractor submission of additional supporting information at the time of contract price negotiation.

Closing

In closing, I want to underscore that DCAA has worked closely with all acquisition organizations to insure an integrated, well-managed contract audit process in Iraq. We have had a continuous presence in Iraq and the Middle East Theatre of Operations since May 2003, staffing our office entirely with civilian volunteers. To date more than 180 DCAA auditors have served tours and fortunately, none have been injured or killed. The challenges in applying business practices and auditing in Iraq are daunting and have required our auditors to be flexible while insisting that the Department will not tolerate the billing of costs that do not comply with contract terms or are not appropriately documented and supported. DCAA has been and will continue to be vigilant about contract audit oversight and protecting the taxpayers' interests.

I look forward to addressing whatever questions or comments you have on DCAA's important role in Iraq. Thank you.

February 7, 2007

The Honorable Henry Waxman
Chairman
Government Oversight and Reform Committee

The Honorable Tom Davis
Ranking Member
Government Oversight and Reform Committee

2157 Rayburn House Office Building
Washington, D.C. 20515

Submitted for the record 2·7·07

Dear Chairman Waxman and Representative Davis:

I write today on behalf of the Contract Services Association (CSA), the nation's largest and oldest association representing government service contractors. I respectfully request that this letter be included in the record for today's hearing entitled, "Waste, Fraud, and Abuse: Iraq Reconstruction."

By way of background, CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to federal, state, and local governments. CSA members perform over $40 billion in federal government contracts annually and employ nearly 500,000 workers, with nearly two-thirds of CSA companies using private sector union labor. CSA members represent the diversity of the government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HubZone, Native American owned firms and global multi-billion dollar corporations. CSA promotes 'Excellence in Contracting' by offering significant professional development opportunities for government contractors and government employees, including the only program manager certification program for service contractors.

While we recognize that some mistakes have been made in reconstruction contracting in Iraq, we also believe that most activities have gone remarkably well. For example, the Office of the Special Inspector General for Iraq Reconstruction recently reported that, with the support of federal government contractors, eighty-eight percent of the planned reconstruction projects have been completed. Moreover, contrary to a widely held belief to the otherwise, ninety-seven percent of contracts in Iraq have been fairly and competitively awarded, according to the Government Accountability Office.

Yet, we know that more can and should be done to improve the federal acquisition system. As a leading voice in the government services industry, we are actively working to overcome the current challenges present in the system.

In that effort, CSA, in conjunction with several industry partners, completed a comprehensive report on service contracting in 2005. Entitled "Removing Federal Services Acquisition Barriers and Balancing Public and Private Interest", the report took a clean slate approach on how best to improve service contracting. As discussed in the executive summary, the report's task force "determined that many of the processes, procedures, and policies contained in the Federal Acquisition Regulation and its various supplements need to be revisited to assure the Government has full and free access to all commercial capabilities available."

Furthermore, we believe the report accurately points out that the government should "ensure that as many barriers to the federal services sector (should) be eliminated." The report is attached for your review.

Additionally, CSA recently completed a smaller study of federal contracting during emergencies. This report was developed by a special task force of federal contractors established by CSA in 2006. The report was in response to challenges experienced during recent contingency contracting environments, such as the post-Katrina reconstruction effort.

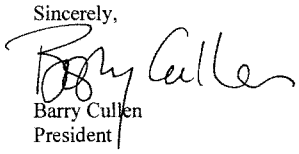
As noted in the emergency contracting report's introduction, "The aftermath of Hurricane Katrina showed the Government may not be as flexible as it needs to be to respond with extreme speed and efficiency. Bringing the private sector into the relief and reconstruction efforts (e.g., rescuing people and rebuilding towns and cities) is essential to ensure quicker, high-quality responses in these emergencies. The primary purpose of such efforts is to help make it easier for the Government to perform its mission."

We believe that this report contributes to the ongoing discussion regarding emergency contracting from the vantage point of the actual contractors who are facing the challenge of performing contracts in a post-Katrina era. Also, this report on emergeney contracting chronicles some of the findings, best practices, and issues to consider when contractors work with the federal government in such operations. It too is attached for your review.

In summary, we believe that these two reports and their recommendations are models for the future direction of service contracting for the federal government.

Thank you for holding this hearing and highlighting areas where industry and government can work together to improve the federal acquisition system. We look forward to working with you in the future. Should you have any questions, please do not hesitate to contact me or Kent Sholars in our public policy department at 703-243-2020.

Sincerely,



Barry Cullen
President

The Time Is Now: Contracting in Emergencies
Contract Services Association
(January 2007)

ISSUE

From recent events we know that we must find new ways for the Government to perform certain functions in times of emergencies (whether it is a natural disaster, domestic terrorist attack or overseas contingency operation). The aftermath of Hurricane Katrina showed that the Government may not be as flexible as it needs to be to respond to such situations with the extreme speed and efficiency. Bringing the private sector into the relief and reconstruction efforts (e.g., rescuing people and rebuilding towns and cities) is essential to ensure quicker, high-quality responses in these emergencies. The primary purpose of such efforts is to help make it easier for the Government to perform its mission.[1]

PROBLEMS ENCOUNTERED

Numerous reports have cited the ongoing problems and challenges of working in emergency/ contingency environments. These include:

- Lack of qualified personnel;
- Turnover in personnel;
- Open-ended or ill-defined requirements;
- Failure of local governments to understand and play a proper role;
- Unnecessary delays, which increase costs;
- Poor communications; and
- Blurred (or non-existent) lines of responsibility.

SEEKING AN ANSWER

The primary way of incorporating the business world into humanitarian efforts, in a timely manner, is to have a fully functional set of contracting guidelines for events of extreme emergencies.

In the aftermath of the 2005 hurricane season, the key agencies involved already have taken a step back and are looking at the lessons learned. In domestic disasters (natural or terrorist), the Federal Emergency Management Agency (FEMA) is the lead Federal entity. For FEMA, they are looking at developing a robust logistics department, establishing better long-term planning, pre-positioning contracts (putting in place contracts that are "ready to go"), and improving communications. Since Hurricane Katrina, FEMA has renegotiated and recompeted several of the original contracts. It also has competitively awarded several regional multiple award contracts for a five-year period.

[1] The definitions and the appropriateness of the response varies depending on the circumstances – whether it's a hurricane/other domestic disaster or terrorism-related incident versus an overseas operations. For the purposes of this review, we are focused on domestic disasters or domestic terrorist-related incidents.

The U.S. Army Corps of Engineers is looking at options that include employing a more comprehensive approach to projects, establishing better risk assessments, improving the review process, and enhancing technical expertise.

A number of challenges facing all levels of Government (Federal, state and local), and issues related to roles and responsibilities have been discussed in great length in other papers – and, therefore, are not addressed in this paper. Rather, the intent of this paper is to contribute to the discussion from the vantage point of the contractors who participated in the trenches and are performing on contracts in a post-Katrina era.

ISSUES TO CONSIDER

The following issues are addressed in this White Paper.[2]

- Contracting regulations;
- Contracting types;
- Competition requirements;
- Payment;
- Risks – lawsuits and insurance liabilities;
- Small Business;
- Local Economy;
- Database on qualified contractors; and
- Contingency Corps.

[2] Several reports and legislative proposals already have touched on many of these issues – this paper supplements the work already done.

ISSUES TO CONSIDER: CONTRACTING REGULATIONS and AUTHORITIES

The Federal Acquisition Regulations, as well as individual agency guidance and certain statutes, provide a certain amount of latitude for getting the immediate job done quickly. However the streamlined acquisition policies, technology, GWACS, GSA Schedules and other procurement vehicles of recent years, have not necessarily improved the Government's understanding of its own rules during emergencies/disasters. Thus, the Government often operates inefficiently, or in the worse case, ineffectively.

Areas that should be considered in shaping effective emergency contracting regulations:

- Understand the order of precedence (of statutes and regulations) between contracting authorities, and identify any inconsistencies.
  - ✓ What trumps what?
  - ✓ How do they all work together?
  - ✓ What is the context – in other words, what is the wrong way to do something vs. what is expeditious but possible (and the correct way to proceed)?
  - ✓ What are the legal and regulatory bottlenecks?
  - ✓ Need to recognize that some rules are not appropriate for the circumstances

- Understand the relevance of applicable labor laws (e.g., Service Contract Act and Davis Bacon Act).
  - ✓ Should a waiver be exercised in extreme circumstances?
  - ✓ What is the impact on the local community if the laws are waived? For example, the impact of hiring of out-of-state workers (at lower wages), or the potential for contracting with less qualified companies and/or with companies with limited and/or no experience in Government contracting.

- Understand the relation with emergency regulations.
  - ✓ Improve transparency.
  - ✓ Implement FAR Part 18 (Emergency Contracting).
    - ❑ Explore revisions to FAR Part 18 to make it more responsive to extreme disasters, by providing a single reference point to contracting personnel.
    - ❑ Ensure that any FAR guidance on emergency contracting includes broader small business involvement (e.g., not limited to those areas where sole source authority is provided).

- Develop Best Practices Guidance (by Office of Management and Budget). The guidance would outline how agencies should proceed in case of extreme emergencies, to include how outside contractors would be used in the initial relief efforts (e.g., this is how initial relief will be provided through this particular type of contract awards).
  - ✓ Distribute information to media and local communities to improve understanding of contracting procedures and actions taken.
  - ✓ When special emergency contracting procedures are used, reinstitute "normal" contracting procedures and preferences for local companies as soon as possible after the initial response. This might counter the negative press stories that occurred following Hurricane Katrina.

ISSUES TO CONSIDER: CONTRACTING TYPES

The private sector plays a critical role in helping the Government respond quickly. The Federal Acquisition Regulations are clear on the types of emergency contracts available – and what steps the Government can, and should, take to protect itself. A better understanding of the contract types and more appropriate use of such contracts should curb potential abuses. In the initial days after a disaster, the Government's first priority should be an immediate response to the urgent needs of the community, irrespective of certain competition requirements or socio-economic procurement goals. Emergency rules should apply for a short period (60-90 or 120 days), and after that initial period all regular contracting rules and socio-economic preferences should kick back in. In order to fully protect the Government and contractor, detailed information should be provided to avoid unnecessary risks and miscommunications. This would include such information as name and contract data, contracting officer, type of contract used, quality, description and delivery dates, applicable certifications and representations, expected contract terms and conditions, special instructions, evaluation criteria and proposal due date/time).

Contracting types that should be considered in shaping effective emergency contracts include:

- Full and open, and set-aside contracts.

- Pre-positioned contracts.
  - ✓ Competitively awarded.
  - ✓ Multiple Award (3-5), multi-year (five-year) contracts.
  - ✓ Pre-awarded indefinite delivery/indefinite quantity contracts in times of emergencies. (this presents challenges because how does industry price a "maybe" contract?).
  - ✓ Example, LOGCAP.
  - ✓ Example, FEMA already has awarded several five-year multiple award pre-positioned contracts.

- FAR Part 12 and the Test Program for Certain Commercial Items under FAR Part 13.5.

- Sole source contracts – with written justification as required by the FAR.

- Regional contracts – though these might not be effective in cases where a region is "wiped out."

- Contingency contractor registration / First Responder database.
  - ✓ Basic IDIQ contracts with task orders for initial response.
  - ✓ Negotiate contingency rates.

- Contracts awarded that provide a preference for local businesses (Stafford Act).

- Schedule contracts.
  - ✓ Used extensively after 9/11.
  - ✓ GSA has grouped available "disaster relief services and products" on its website.
  - ✓ FY2007 Defense Authorization Act.

- Oral requests for proposals (RFPs) – when processing a written solicitation would delay the acquisition of supplies to detriment of the Government/effected population.
  - ✓ This worked particularly well for TACOM during the first Gulf war.
  - ✓ Oral agreements should be put in writing and letter contracts should be definitized as soon as possible.

- Letter RFPs and contracts.
  - ✓ Still must be competed.
  - ✓ Should be as complete and definite as feasible.
  - ✓ Allow time later for contractor to submit proper price proposal.

- Economy Act contracts (allow interagency acquisitions and placement of orders between units of same agency).

Recent legislation addresses some of the concerns resulting from Hurricane Katrina:

- FY2007 Department of Homeland Security Appropriations Act (P.L. 109-295)
  - ✓ Requires contracting strategy that maximizes the use of advance contracts to the extent practical and cost-effective.
  - ✓ Minimize the excessive use by contractors of subcontractors or tiers of subcontractors to perform the principal work of the contract. Excessive use has been defined as being 65%. While this is requirement is included in the statute, a more appropriate view would be to simply require contracting officials, in appropriate circumstances, to minimize the use of multiple tiers of subcontractors to perform the principal work of the contract. CSA members stress that implementation of this provision should not inadvertently discourage the use of small businesses.

ISSUES TO CONSIDER: COMPETITION REQUIREMENTS

A "threshold" should be established that sets a balance between the need to comply with the statutory requirements for competition versus the urgent need to get help to the community. Another "threshold" should be established whereby second guessing (weeks or months after the response) cannot be allowed – accountability could be ensured by having appropriate senior level officials sign off on sole source or limited competitions. Such "thresholds" also could be tied to imminent loss of life or property.

Factors that should be considered in developing policing addressing competition requirements include:

- Unusual and compelling urgency circumstances under the Competition in Contracting Act.

- Detailed written justification and higher approval level for procurements exceeding $500,000.
  - ✓ J&A may be made after contract award if deemed it would unreasonably delay acquisition (See FAR 6.304 - $550,000 can be approved by CO).

- Limited authority for sole-source contracts.
  - ✓ Addressed in FAR Part 6.3.
  - ✓ Request offers from as many sources as practicable under the circumstances.
  - ✓ Sole source is often a negotiated transaction that permits the Government to achieve a fair prices.

- Limited competition.
  - ✓ Exigencies of time (e.g., how long would it using current process, including protests).
  - ✓ Reasonable circumstances where other alternatives do not exist.
  - ✓ Explain why needed and put protections in place for Government.
  - ✓ Limit to three sources (e.g., in the manner used by Federal Supply Schedules)
  - ✓ Informal price competition.

- Audits rights – certain audit rights already granted under the FAR.
  - ✓ May depend on type of contract.
  - ✓ Should not be aimed at criminalizing the process or the company.
  - ✓ Should be focused on overseeing and making it right (e.g., tying up loose ends).
  - ✓ Should not be focused on 20-20 hindsight – standards might be different in times of crisis.

Recently enacted and proposed legislation addresses these issues:

- FY2007 National Defense Authorization Act (P.L. 109-364).
  - ✓ Conferees directed Secretary of Defense to issue guidance on the appropriate use of "unusual and compelling" circumstance under the Competition in Contracting Act.

- H. R. 3766 (sponsored by Reps. Kenny Marchant and Tom Davis in 109th Congress, not aodpted).
  - ✓ Head agency would be allowed to use procedures other than competitive procedures pursuant to the provisions in the Competition in Contracting Act without having to provide written notification to Congress.
  - ✓ Authority can only be used if the head of the agency determines that use of such authority is necessary to facilitate the response to or recovery from the national emergency or major disaster.

ISSUES TO CONSIDER: PAYMENT

Timely contract payments that improve cash flow are critical to the financial health of Government contractors, regardless of size. The expectation that payments will be timely frequently affects a contractor's willingness to do business with the Government. The contracting community promptly responded to the events of 9/11 and Hurricane Katrina – but receiving payment for their efforts was often problematic.

Areas that should be considered to ensure timely payment of contractors during emergency operations:

- How is the money going to be made available to make emergency purchases?
  - ✓ Need to identify causes for the problems on slow payment – and develop procedures for resolving them.
  - ✓ Who has the "cash register" and how do contractors access it to ensure payment for goods and services provided?
  - ✓ Congress could make the money available through a special appropriation, and assign it to an agency such as FEMA.
  - ✓ The procurement official would have a limit on what could be spent initially, and charged with keeping an administrative commitment document and reporting to FEMA so that the Government, and contractors, would not be in danger of over-expending.

- Recognize that advance payments are permissible and should be considered to small businesses as a form of financial assistance.

- Allow direct payments should be allowed for food and lodging.

- Develop contingency contracting payment process.
  - ✓ During Hurricane Katrina, all procedures were in place – but the current payment system could not handle the emergency.
  - ✓ Government. personnel handled the payment process routinely rather than using expedited procedures.
  - ✓ Where did invoices go and who had it? Need ability to track this down.
  - ✓ How does the contracting officer and accounting/payment officials handle a flood of invoices?
  - ✓ Establish payment contingency taskforce in each agency.

- Enforce existing guidance to ensure timely contract payment in emergency situations. Contracting officers should be aware of the payment terms that already are available and that can be used in emergency situations.
  - ✓ Letter contracts – Federal Acquisition Regulation (FAR) Part 16.603-2(c) addresses definitization of contracts.
  - ✓ FAR Part 52.216-26 does allow for payment before contract definitization (not to exceed 85% of the allowable cost). Consideration should be given to definitizing undefinitized contracts within 30 days.

- Develop new policy guidance where needed, or reinforce existing policies, to allow partial payments in the face of a dispute.
  - ✓ Following Hurricane Katrina, FEMA would withhold payment on an entire invoice even though only a fraction of the invoice was in dispute.
  - ✓ FAR allows partial payments and provides protection for the Government for any repayment of overcharges; directions should be given to the contracting officials to follow these requirements.
  - ✓ FAR Part 52.232.1-6 addresses the use of progress payments.
  - ✓ Consider implementing procedures for a small retention requirement (similar to construction contracts), in appropriate circumstances, pending contract definitization.

ISSUES TO CONSIDER: RISKS (LAWSUITS AND INSURANCE LIABILITY)

Unlike many public officials and their agencies, private contractors enjoy no sovereign immunity. To get the job done, such contractors have to put their assets on the line. No contractor carries the insurance necessary to cover all of the many risks involved in responding to a disaster. The unknowns are too many, and the cost of the insurance coverage would be prohibitive.

Areas that should be considered in understanding and addressing the risks involved in emergency contracts include:

- Anti-Deficiency Act has been a barrier to indemnification of contractors. An amendment to the Act should be made to allow such indemnification in limited extreme situations.

- Rapid response by contractors is necessary immediately following a disaster or terrorist attack; and in the following months, such contractors work hand-in-hand with Federal, state and local officials.

- Risk is great of litigation and even liability for performing such essentially public functions.
  - ✓ For example, class actions, alleging mass torts, have been filed against all four of the contractors that supervised the clean-up from the terrorist attacks on September 11th.

- Equitable adjustments and reimbursements.
  - ✓ Allow to cover increased costs due to insurance premium increases and increases in workmen's compensation insurance (following a presidentially declared disaster).
  - ✓ Make change to cost principle to allow for recovery of amounts for self-insuring against catastrophic losses.

Proposed legislation intended to address the issues of risk:

- The Government Contractor Protection Act (sponsored by Senator Thune in 109th Congress), not adopted.
  - ✓ Would ensure that the Army, the Environmental Protection Agency and the Department of Transportation have and retain the authority effectively to administer the Federal laws within their purview.
  - ✓ Would give contractors limited measure of protection (comparable to but less than the protection that Federal officials enjoy when exercising their discretion).
  - ✓ Would limit the legal expenses that inflate the cost of the recovery.
  - ✓ Would block court actions that could stall the recovery from the hurricane.
  - ✓ Would follow Safety Act requirements by creating a Federal cause of action for any claims arising out of, relating to, or resulting from certain activities.
  - ✓ Would give the Federal courts exclusive jurisdiction over any such cause of action, and sets reasonably limits on any resulting liability.
  - ✓ Would preclude any recovery of punitive damages, or prejudgment interest.
  - ✓ Would limit any recovery of non-economic damages and requires the government contractor to be given credit for any collections from any collateral sources (e.g., insurance).
  - ✓ Would entitle the contractor, as an extension of the Government agency for which it is working, if the COE certifies that the work is necessary for the recovery from Katrina, to assert the Government contractor defense.

ISSUES TO CONSIDER: SMALL BUSINESS

Small business, whether local or from "unaffected" regions, are essential to any solution. Small businesses often are more nimble than many of their large business counterparts that have multiple approval layers and compartmentalized capabilities. And many small Government contractors certainly can perform as well as any large business. The key to success is proper due diligence.

Areas that should be considered in developing policies shaping the appropriate role of small businesses in emergency contracts include:

- A somewhat controversial suggestion has been made to temporarily suspend specific socio-economic prime contracting goals.
  - ✓ In the short term, this may be necessary to ensure that the immediate needs of the local community are addressed since it may be difficult to find enough small businesses to meet the statutory goal, especially within the local community.
  - ✓ However, general small business goals could remain in place to ensure that ALL small businesses still have an opportunity to be considered.

- When a prime contract goes to a large prime contractor, strong small business subcontracting plans should be in place.
  - ✓ Prime contractors should be encouraged to have pre-positioned subcontracts that can be called upon to meet the specific circumstances.

- Contracting officers should assess a small business' capability based on the following:
  - ✓ Bonding strength.
  - ✓ Past performance history (including work in the commercial market or for state and local governments).
  - ✓ Financial capacity and working capital.
  - ✓ Ability to perform on larger contracts.

- Opportunities must be provided for all qualified small businesses.
  - ✓ Ensure use of the Rule of Two (reasonable expectation of obtaining offers from two or more small business concerns).
  - ✓ Review implementing regulations for Stafford Act changes – although the interim regulation (FAR § 26.202) comports with the statute, in practice it may have the practical effect of encouraging geographically restricted awards to large businesses and relegating small businesses to "second class" status. Interim FAR § 26.202(a)(3) reads:

    The contracting officer shall also consider whether a local area set-aside should be further restricted to small business concerns in the designated area.
  - ✓ Consider whether interim procedures implementing the local area preference should be revised to provide that – prior to conducting such a procurement on a geographic basis only – the contracting officer should justify reasons for not utilizing a small business set-aside for the requirement.
  - ✓ Ensure inclusion of all qualified small businesses. FAR Chapter 18 (Emergency Contracting), should allow use of other small businesses. Any small business set-aside under this section to be conducted without regard to the advantaged or disadvantaged status of eligible small businesses.

- Establish pre-positioned contracts with qualified small businesses in various regions. This would allow an agency to have a stable of capable small businesses available, whether it is those in the immediate vicinity or from other regions – especially when the local area is devastated.

- Size Standards
  - ✓ $3-5million threshold standard (or higher) could be applied to all small businesses for emergency contracts for sole source awards – and not just 8(a) HUBZone and tribally owned.

- Thousands of small businesses are capable Government contractors and are knowledgeable of the statutes and regulations governing Government contracting. However, in the wake of Hurricane Katrina, contracting with non-traditional Government contractors was a challenge at both the prime and subcontract level (particularly in subcontracts). Due diligence is needed when contracting with businesses that do not normally do Federal business. The following need to be considered:
  - ✓ Ability to provide competitive pricing.
  - ✓ Need for training/education.
  - ✓ Compliance with certification or licensing requirements.
  - ✓ Ability to track contract costs and document performance – inability causes problems when auditing and reimbursing on contracts.
  - ✓ Use technical capability analysis (followed by establishment of a fixed hourly labor rates to be used by all contractors and subcontractors for similar work).
  - ✓ Improve understanding of Federal contracting requirements and documentation
  - ✓ Understand flow-downs to subcontractors and vendors.

ISSUES TO CONSIDER: LOCAL ECONOMY

Defining a "local business" is a politically charged issue. The current standards are confusing, leaving many companies wondering if they qualify or not. The Stafford Act provides certain flexibilities to take into account what is needed to respond to the disaster and to help the local community. In addition, waiving certain laws, while necessary in the short term, may have long term unintended consequences on local economies. Furthermore, local businesses should not necessarily have a lock on contracts since they may be reeling from the disaster and would not make an initial good choice to perform the work. To regain normalcy, bringing in outside contractors in the initial stages may be required.

Areas that should be considered in working within the local economy:

- Stafford Act – contracting officers may set-aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete.

- Issues related to definition of a local business.
  - ✓ Inclusion of price preference for local companies.
  - ✓ Overnight start-up companies formed to take advantage of opportunities.
  - ✓ Solicitation should expressly define local business for the purposes of the contract.

- Challenges in identifying local businesses immediately following a disaster.
  - ✓ While companies exist – there may be difficulty in finding qualified businesses capable of performing.
  - ✓ Local company employees may have been evacuated, making it difficult for local firms to perform the necessary work in the immediate aftermath.
  - ✓ Housing employees can increase costs and decrease productivity.
  - ✓ Scarce food and lodging available.

- Impact of waiving labor laws.
  - ✓ Brings potential for hiring out-of-state workers at lower wages than usually paid for similar work during non-emergency scenarios.
  - ✓ Brings potential for contracting with less qualified companies.

Recently enacted legislation addresses issues related to the local economy:

- FY2007 Department of Homeland Security Appropriations Act (P.L. 109-295).
  - ✓ Requires written justification for not awarding contracts to an organization, firm, or individual residing or doing business primarily in the area affected by such major disaster.
  - ✓ Requires transitioning of work performed under contracts in effect on the date on which the President declares the emergency or major disaster to organizations, firms, and individuals residing or doing business primarily in any area affected by the major disaster or emergency, unless the head of such agency determines that it is not feasible or practicable to do so.

ISSUES TO CONSIDER: DATABASE ON QUALIFIED CONTRACTORS

When responding to a disaster, agencies have little time to use the normal solicitation process. Contacting companies that can perform the mission and knowing who are viable, qualified companies is essential if the Government wants the best value for the community and quickest response. However, many qualified local businesses that normally do not do business with the Government would not be in any existing Government databases or on any agency schedules. Developing a special database of such contractors would be a valuable tool in emergency response situations.

Areas that should be considered in shaping an appropriate database include:

- The Government should maintain an interactive database that provides instant information to contracting officers. This tracks with a GAO recommendation that agencies develop a central information source for contracting and officials to contact about contracts. This would provide knowledge of contractor capabilities and prices by identifying commodities and services and establishing vendor relationships before they are needed, to include:
  - ✓ Types of product/services required.
  - ✓ Preferred GWAC/Other vehicle(s) for that product service or GSA Schedule by vendor for less common products/services.
  - ✓ 'Expedited buying guide' link to that vehicle.
  - ✓ Summary of appropriate actions to take in sole source, unusual and compelling circumstances when other alternatives are unavailable.
  - ✓ FEMA and Army Corps had established "hot lines" on contracts during Hurricane Katrina, but was it too little too late? Companies had difficulties in getting through on the "hot lines"
  - ✓ Hurricane Contracting Information Center established after Hurricane Katrina, and operated through participating agencies: Department of Commerce, Department of Interior, General Services Administration GSA, SBA, National Emergency Resource Registry)

- GSA e-library identifies FSS Contractors by locations and socioeconomic status.

- GSA is establishing an Office of Emergency Recovery and an Office of Historic Preservation.
  - ✓ Encourages private sector help in standing up office/working in it (on volunteer basis) in a time of emergency.

Recent legislation addresses the issue of databases of qualified contractors:

- FY2007 Department of Homeland Security Appropriations Act (P.L. 109-295)
  - ✓ Requires the establishment and maintenance of a registry of contractors who are willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities.

- H.R. 4427 (sponsored by Rep. Bennie Thompson in 109th Congress), not adopted.
  - ✓ Requires Secretary of Homeland Security to establish and maintain a database of small businesses for purposes of consultation by Federal agencies prior to awarding contracts related to declared emergencies.

ISSUES TO CONSIDER: CONTINGENCY CORPS and CONTINGENCY PLANS

With Hurricane Katrina, there were few contracting officers in place and fewer still that were knowledgeable of the statutory and regulatory tools available. Developing a specially trained cadre of contracting officials within various agencies who could be called upon in times of emergencies is a necessary step to ensure that proper contracting procedures are in place and to manage oversight and accountability. Several recommendations already have been identified.

Areas that have been raised in several reports to address contingency corps and plans include:

- Mobilize contracting personnel from various locations
  - ✓ Sufficient qualified contracting personnel that can stay longer than 30 days

- Recommendations of Government Accountability Office
  - ✓ Ensure sufficient numbers of trained staff who have clear responsibilities and guidance for overseeing contractor performance
  - ✓ Provide sufficient numbers of field level contracting staff with the authority needed to meet mission requirements
  - ✓ Formalize assigning and communicating disaster related responsibilities, with joint training for government and contractor personnel
  - ✓ Develop knowledge of contractor capabilities and prices by identifying available commodities and services and establishing vendor relationships before they are needed
  - ✓ Establish a scalable operations plan to adjust the level of capacity required to effectively respond to the need
  - ✓ Formally assigning and communicating disaster-related responsibilities with joint training for government and contractor personnel

- Recommendations of Department of Homeland Security
  - ✓ Establish an acquisition system under which each requirement has a well-defined mission and a team that includes a program manager, a contracting officer, a financial manager, and other professionals necessary to achieve mission results
  - ✓ Buildup the department's acquisition workforce to ensure it has a "qualified cadre of professionals" now and in the future

- Recommendations from Chief Acquisition Council
  - ✓ Develop procedures and guidance on best practices
  - ✓ Establish directories of individuals with expertise in emergency procurement
  - ✓ Establish directory of existing contracts that could be relevant to future emergencies
  - ✓ Ensure knowledge of existing rules that are sufficient to meet agencies' contingency needs

- Develop an Emergency Plan.
  - ✓ During Procurement Systems Review, need to develop an emergency contracting plan.
  - ✓ On military bases, contracting offices have plans in place for emergencies that may happen on the base. This includes a list of contractors who agree to support the base in an emergency. Agreements are entered into with these contractors with telephone numbers including home phone numbers, for after hours, and had a list for different types of disciplines that would be needed. The bases also often have procurement personnel on call that have the emergency telephone numbers for after work hours and weekends. And, telephone numbers for base contracting offices (outside the area), if needed for additional support.
  - ✓ Consider whether this type of planning for a local community could work as efficiently as it would in the military environment in a disaster of the type of Hurricane Katrina.
  - ✓ Identify different organizations across the country that could supplement logistics and the purchasing and contracting effort for the agencies affected by a disaster.

- Initial Responder Guidance
  - ✓ Plan for complete self sustainment – initial seven days of food, water, housing, fuel, ice, manpower and material, medical and safety support.
  - ✓ Set up communications – this is vital, though difficult.
  - ✓ Prepare in advance for meeting cost standards for record keeping and competition of purchases in very short period of time.
  - ✓ Prepare to invoice for work from hour one.
  - ✓ Consider r ability to support initial cash outflow.
  - ✓ Develop a supply and support plan.

Recently enacted legislation attempts to tackle many of these issues:

- FY2007 Department of Homeland Security Appropriations Act (P.L. 109-295).
  - ✓ Requires DHS Secretary to establish a National Advisory Council to ensure effective and ongoing coordination of Federal preparedness, protection, response, recovery, and mitigation for natural disasters, acts of terrorism, and other man-made disasters.
  - ✓ Requires strategic human capital plans.
  - ✓ Requires FEMA Administrator to develop plans to establish and implement a Surge Capacity Force.

Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest

Task Force on Service Contracting

May 17, 2005

Established by

Contract Services Association

In Conjunction With

Professional Services Council
National Defense Industrial Association
Information Technology Association of America

Task Force on Service Contracting

Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest

Task Force on Service Contracting

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EXECUTIVE SUMMARY

I. EXECUTIVE SUMMARY

A service is considered to be any "thing," or "class of procurement," that is not manufactured, or does not require manufacturing – in other words, a service is not a tangible product, even though the service itself may produce some tangible outcome or output.

Over the past decade, Federal spending has shifted from primarily acquiring goods (hardware or supplies and weapons systems) to acquiring services. As of 2004, Federal dollars spent on services exceeded 50% of the total Federal budget for the Department of Defense (DOD), and more than 75% is being spent within NASA and the civilian agencies. Just as the Federal budget demographics have shifted so has the private sector, with service contractors reaping the benefits and expanding their businesses; traditional hardware suppliers are moving into the service contracting arena; and increasing numbers of small business are participating in the Federal services market.

The service contracting sector endorses the acquisition and post-award administration processes used in the commercial marketplace. However, even though the service provider business area is becoming one of the fastest growing segments within the Federal government, the ability to successfully compete in the Federal marketplace for services is more difficult than it should be. This difficulty results from the myriad of unique Federal rules and regulations, the uncertainties associated with performance-based processes and procedures used in the Federal arena, and the impact of various special Federal labor laws, (e.g., Service Contract Act, etc.) that may apply. The Federal acquisition community should work to ensure that the Federal government utilizes the best the commercial market has to offer while adhering to the core public laws that form the basis for Federal acquisitions.

To date, service contracting has been a lowly stepchild compared with its "sexier" counterpart in hardware procurements; and reforming the way services are acquired has lagged behind improvements in hardware and weapons systems acquisition. The passage of the 2003 Services Acquisition Reform Act (SARA) was a major step forward in improving the contracting practices for services in order to provide the Federal government with access to the best in commercial practices for services.

Yet SARA is only the tip of the iceberg. Recognizing this fact, the Contract Services Association, in conjunction with several of its industry partners, established a *Service Contracting Task Force.* The purpose of the Task Force was to review – with a clean slate approach – relevant statutes and regulations, starting with Part 37 (Service Contracting) of the Federal Acquisition Regulation (FAR). The Task Force also was charged with balancing the rights of both the private and public sectors, ensuring that any recommendations were in the best interests of the Government and the U.S. taxpayer. In mid-2004, four working groups were established. The Task Force members determined that these four working groups covered the dominant issues affecting service contracting: categories of services, performance-based acquisition (which evolved into acquisition management and planning), multiple agency contracting vehicles (e.g., Federal services schedules and other multiple award contracts), and Part 37 (Service Contracting regulations).

"If we were to start from scratch, where would we go?" was the premise with which each working group began. The findings include:

> *Categories of Services.* The initial effort focused on developing a listing of the dominate categories of services, and analyzing any unique characteristics that might impact on the acquisition of that category. Ultimately, it was determined that services could simply be broken into two components, commercial services and non-commercial or developmental services – no

separate listing of categories is needed beyond that. The Task Force proposes three legislative recommendations relating to commercial services, Time and Material/Labor Hour commercial contracting, and Assistance and Advisory Services. The key regulatory recommendation of the Task Force is to amend FAR Part 2.1 (Definitions) to place "services" on an equal footing with items. In addition, the Task Force recommends moving cost reasonableness requirements of catalog and market prices to FAR Parts 12, 13 and 15 since assessing cost reasonableness is a critical component of sound commercial service acquisition.

Performance-based Acquisition. Originally, the intent was to examine the broader scope of "service" contracting versus the recent trend toward performance-based acquisition (PBA). It was determined that by highlighting "performance-based" contracting, officials focus their attention on methodology, rather than the necessary and broader focus on acquisition planning – a strategy or approach that asks: "what is the requirement" and "how best can the needs of the Government be met?" With regard to PBA, no further legislative changes are needed since Congress already has taken significant steps toward promoting PBA. Rather, a greater emphasis on "services" and contract methodology will enhance and support the FAR and the procurement/project management community in acquisition planning, to include post-award management and oversight. With that in mind, a thorough review of the FAR was undertaken, and the Task Force recommends several regulatory changes (e.g., to FAR Part 7 and 15). It should be noted that specific agency FAR supplements and implementing guidance also may require revision.

Multiple Agency Contracting Vehicles. Where Schedules contracts and other multiple award vehicles were long reserved for spares and support to weapons in the inventory, these same mechanisms increasingly are the contract vehicles of choice for services. There also is a significant shift away from agency unique contract vehicles and agency unique requirements. The Task Force recommendations focus on the General Services Administration Schedules, and methods to improve the ability of agencies to maximize the clear and unique benefits afforded by the Schedules.

Part 37 (Service Contracting). Originally formed to review small business issues, it was determined that attempting to resolve "hot button" issues such as contract bundling, set-asides or size standards is easily the subject for a future Task Force. Therefore, the focus turned to a section-by-section analysis of FAR Part 37 (Service Contracting) to determine which sections needed general revision, and which needed some modifications to provide contracting officers sufficient guidance in using small businesses as service providers. The Task Force recommends several initial revisions to FAR Part 37. The Task Force, however, believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned in other Parts of the FAR.

In sum, the Task Force determined that many of the processes, procedures, and policies contained in the Federal Acquisition Regulation and its various supplements need to be revisited to assure the Government has full and free access to all commercial capabilities available. Issues such as those outlined in this report, as well as contract type, labor laws, and non performance-based requirements need a critical analysis to ensure that as many barriers to the Federal services sector be eliminated. Certain barriers (e.g., the need for security clearances and the lengthy resulting screening process) may never be effectively reduced – and were outside the purview of this review. Those barriers, however, that inhibit sound business practices need to be viewed with a critical eye to ensuring the Federal services sector takes advantage of the efficiencies and innovations available from the commercial services marketplace.

ACKNOWLEDGMENT

Much of the work of the Task Force was built on the on-going efforts already being done by various industry coalitions, particularly the Acquisition Reform Working Group.

In addition to the leadership of the Contract Services Association, the Task Force consisted of representatives from the Professional Services Council, the National Defense Industrial Association, and the Information Technology Association of America. Dozens of volunteers from individual companies and law firms, as well as the Defense Acquisition University and individual procurement specialists within the Army and Air Force shared their expertise with the Task Force.

While space does not permit acknowledging and thanking each one individually, without their dedicated support, the work of the Task Force could not have been possible. The commitment and dedication of the acquisition community, both public and private, to improving Government processes is tremendous.

GENERAL OVERVIEW

II. GENERAL OVERVIEW

In mid-2004, a multi-association Service Contracting Task Force was established to review laws, regulations and policies affecting service contracting. This work should complement on-going Government and industry efforts, including the Acquisition Advisory Panel (1423 Panel) enacted by the Services Acquisition Reform Act, and organized in February 2005.

The Task Force created four working groups, focused on the dominant themes in service contracting, to accomplish this mission:

- Categories of services;
- Performance-based acquisition (which evolved into acquisition management and planning);
- Contract vehicles (e.g., Federal services schedules and other multiple award contracts); and
- Part 37 (Service Contracting regulations).

Each group was tasked with considering the following questions:

- ✓ From an overall policy perspective, if we could start today with a clean slate, how should we look at Government service contracting?
- ✓ What are the various categories of service contracting?
- ✓ How does FAR Part 37 (Service Contracting) interact (or conflict) with other FAR provisions? Should there be a separate service contracting section in today's more integrated acquisition environment?
- ✓ What are the relevant contracting laws, policies, agency guidelines, regulations and supplements?
- ✓ What regulations are potential obstacles? What currently works? What is no longer necessary (e.g., are special rules still needed to govern advisory and assistance services)?
- ✓ What are the key procurement tools (e.g., type of contract, contract clauses, incentives)?

The objective of each working group was to develop recommendations to improve Government service contracting. Throughout the process, the Task Force met with Government contracting representatives as appropriate.

Is current FAR guidance adequate to cover services? That was the primary question with which the Task Force began its review. At one point, the Task Force even considered whether having a separate part in the Federal Acquisition Regulation (FAR) for service contracting was still necessary. In the end, the Task Force determined that interim revisions should be made to Part 37 (Service Contracting), reserving for a future date an analysis of whether Part 37 policies and procedures would be better realigned elsewhere in the FAR. The Task Force reviewed other FAR sections that are relevant to service contracting, including:

FAR Part	
2	32
11	35
15	36
16	38
19	39
22	41
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Concurrently, the Director of Defense Procurement and Acquisition Policy for the Department of Defense (DOD) commissioned Jefferson Solutions to summarize major provisions of Federal laws, regulations (proposed and final rules), and policies that relate to service contracting. A matrix of such provisions was submitted to DOD in August 2004. In addition, Jefferson Solutions was tasked with proposing improvements to:

- *Protecting the best interests of the Government;*
- *Ensuring effective, efficient and fair award of contracts for services;*
- *Ensuring that policies and regulations provide appropriate guidance concerning the post-award administration of contracts for services;*
- *Incorporating commercial best practices wherever possible; and*
- *Eliminating inconsistencies in, and among existing laws, regulations and policies.*

The work of this industry Task Force, and that of the Defense Department, should be viewed as complementary efforts aimed at recommending improvements in the service contracting arena that will provide the best value for the taxpayer and protect the interests of the Government customer.

In addition, section 1423 of the 2003 Services Acquisition Reform Act (SARA) authorized the creation of an Acquisition Advisory Panel to review laws and regulations related to commercial practices, which was fully established in February 2005. It is hoped that the Panel will include the Task Force recommendations in its discussions, and build on the work already done.

Furthermore, a March 2005 report (GAO-05-274) by the Government Accountability Office (GAO) noted that the Department of Defense (DOD) is the largest purchaser of contract services. DOD spent over $118 billion in fiscal year 2003, representing a 66 percent increase since fiscal year 1999, and 57% of DOD's procurement dollars. GAO also noted that the upward trend is expected to continue as DOD relies more on contractors to execute specific aspects of its mission. This dependence on private sector contractors reinforces the need to ensure that laws and regulations governing service contracts are adequate, and provide contracting officials with the tools necessary to obtain the best value for the taxpayers, using the best commercial practices available. The relevant issues are addressed throughout this report.

CATEGORIES OF SERVICES WORKING GROUP

III. CATEGORIES OF SERVICES WORKING GROUP

A. Executive Summary

The services segment of Federal spending now exceeds product and item spending. As a result, the industrial base is changing rapidly with new entrants, large corporations acquiring niche companies, and very large omnibus contracts, etc.

The "Categories of Services" working group's initial efforts were to develop a listing of major categories of services, and analyze any unique characteristics that might impact the acquisition of that particular category. The working group collectively felt that essentially all services categories could be narrowed to two major acquisition components – commercial services and non-commercial or developmental services. As part of its research, the working group reviewed existing legislation and conference report language to fully understand the legislative intent of relevant services acquisition-related measures. It seemed clear that legislation in the services area continued to focus on expanding the Government's access to commercial capabilities under similar terms and conditions that the services are offered to the general public. But some of the enacted legislative measures also established Government unique controls designed to assess the value and reasonableness of each commercial item or service transaction. In particular, the limitations on the use of Time and Material/Labor Hour (T&M/LH) contracting was viewed as a barrier impacting commercial acquisitions. The Task Force recommends statutory revisions to the commercial service definition, as well as clarifications related to the use of T&M/L-H commercial contracting, and the performance period for Advisory and Assistance Services.

In addition, the working group undertook a review of all relevant parts of regulatory guidance under the Federal Acquisition Regulations (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS) to identify any regulatory revisions that might facilitate the Task Force's objectives. In general, the Task Force believed that the regulatory guidance for non-commercial or developmental services was balanced, and protected both public and private sector interest – and needed no major revision.

In addressing commercial service acquisition, however, the Task Force makes several recommendations. The Task Force proposes amendments to FAR 2.1 (Definitions for Commercial Items and Services) to place "services" on an equal footing with items. Additional proposed revisions include moving the cost reasonableness requirements of catalogue and market prices to FAR subparts 12, 13 and 15. It was collectively recognized that assessing cost reasonableness is a critical component of sound commercial service acquisition; however, these references in FAR 2.1 add no value and potentially introduce confusion in the definition. The Task Force has developed line in /line out revisions to FAR 2.1, 12, 13 and 15. These revisions include a discussion and justification for all proposed changes.

B. Initial Findings

The current realties in the Federal marketplace indicate that all sectors of Government acquisition are now spending more on services support of mission requirements than is spent for supplies and equipment. This fact has resulted in a need for a comprehensive review of how the Federal government acquires and manages services requirements.

The working group's initial efforts were to develop a listing of major categories of services, and analyze any unique characteristics that might impact the acquisition of any particular category. It was assessed that each of the major categories set forth below did not require special treatment to acquire these particular services.

Engineering Services	Financial / Insurance Services
Communication Services / Internet / Van Services	Profit / Non-profit Services
Security and Guard Services	Construction Services/ Masonry, Carpentry, Paving, Roofing etc.
Advisory and Assistance Services	Food/ Catering Services
Consulting Service	Child Care Services
Mechanical, Electrical, HVAC, Plumbing Services	Fire Support Services
Telecommunication Services / wire and wireless	Janitorial / Lawn Maintenance Landscaping /Painting Services
Research and Development Services	Laboratory Services
Travel Services	Moving Services
Commercial Aviation and Transportation	Rental / Leasing Services
Aviation Maintenance and Flight Services	Printing Services
Accounting and Legal Services	Mortuary Services
Medical / Dental Services	Information Technology Services
Training Services	
Automotive and Mechanical Services	
Architectural Services	

It was determined that these services categories could be narrowed to two major acquisition components – commercial services, and non-commercial or developmental services. The Task Force also developed the following definition for "services:"

> *A service is considered to be any "thing," or "class of procurement," that is not manufactured or does not require manufacturing, i.e. a service is not a tangible product, even though the service itself may produce some tangible outcome or output.*

The Task Force developed this definition to provide clarity in its discussions. However, the Task Force decided there was no need to insert this definition into the Federal Acquisition Regulation (FAR) since to do so may cause some confusion in the FAR as it relates to commercial services.

C. Legislative Review

The working group reviewed existing legislation and conference report language to fully understand the legislative intent of services acquisition measures. It seemed clear that legislation in this area continued to focus on expanding the Government access to commercial capabilities under similar terms and conditions as services as are offered to the general public. At the same time, additional legislation also established Government unique controls designed to assess the value and reasonableness of each commercial item or service transaction.

The regulatory implementation of the 1994 Federal Acquisition Streamlining Act (FASA) left open areas for continued improvement in the methods the Government uses to obtain commercial products and services. Additional issues were addressed by the 1996 Clinger-Cohen Act, which further refined the Truth in Negotiations Act (TINA) and the Cost Accounting Standards (CAS) application to commercial services. Regulatory revisions bolstered market research and price analysis techniques for commercial items, and enabled subcontractors to share the benefits of commercial item financing and performance-based payments. Further attempts to address commercial practices related to the acquisition of services were accomplished through the 2003 Services Acquisition Reform Act (SARA). However,

notwithstanding these impressive legislative and regulatory efforts, a number of troubling issues remain unresolved.

The Task Force proposed legislative revisions in the following three areas:

- Commercial Services Definition
- Time and Material Commercial Contracting
- Advisory and Assistance Services

Each of the above changes are summarized below, and more fully addressed in the attachments.

Commercial Services Definition

The 1994 Federal Acquisition Streamlining Act (FASA), and its implementing regulations, contained significant and important new language defining a commercial item. In simple terms, FASA defines a "commercial item" as any item that is sold or leased or licensed to non-Government customers or is offered for sale, lease or license, including those items that evolve from commercial technology, and those commercial items that are modified for Government purposes. Thus, the Federal government is able to have greater access to previously unavailable advanced commercial products and technologies, which has resulted in millions of dollars in savings to the taxpayer. The 1996 Clinger-Cohen Act took additional steps to ensure that the Federal government had access to commercial practices when buying products and services. However, while "services" was covered, the primary focus for both FASA and Clinger-Cohen was on the acquisition of hardware. Recognizing that "services" are an increasingly important component of Government contracting, Congress enacted the 2003 Services Acquisition Reform Act (SARA) to provide Government acquisition officials with the necessary tools to acquire "services" using best commercial practices.

However, today buyers and sellers of commercial services are still confronted by two difficult requirements. First, FASA defines "commercial item" in such a way that, in order to qualify, services have to be sold in the commercial marketplace at established catalog or market prices for specific tasks. Second, in implementing FASA, the Government interpreted FASA's accompanying conference report to bar contracts based on hourly rates – that is, Time and Materials (T&M) and Labor Hour (LH) contracts. In combination, these two restrictions present a formidable barrier to market entry, and create a market condition that is contrary to customary commercial practice. This leaves buyers and sellers with few alternatives. The 2003 SARA attempted to clarify these two issues but, fell short of a complete solution.

The multi-association/ multi-industry Acquisition Reform Working Group (ARWG) annually develops a number of legislative proposals that are aimed at bringing Government procurement policies closer to customary commercial practices. The ARWG annual report regularly includes recommendations on the acquisition of commercial items and services – and has sought clarification for some of the outstanding issues. For example, working with the Senate Armed Services Committee, language was developed that encouraged the Department of Defense (DOD) to authorize use of other than firm-fixed price (FFP) contracts for the acquisition of ancillary commercial services when such contracts are commonly used in sales to the general public. ARWG also has recommended a sweeping definition for "commercial services" to be included in the definition of "commercial items." The ARWG definition has yet to be accepted by Congress.

The Task Force believes that the definition of commercial services does not need to be conceptually different from commercial items. If the service is of a type offered and sold in the commercial marketplace, establishing a credible basis for demonstrating its market acceptance, then the service should qualify as a commercial item. Beyond that, the definition does not need to state that:

- ✓ The service can be performed by a different source or time as the item;
- ✓ The service has to be sold at a catalog or market price; or
- ✓ The service cannot be bought under T&M contracts.

Furthermore, the Task Force noted that, in the commercial market, there is no practical difference between ancillary and non-ancillary services.

Attachment 1 outlines the Task Force's rationale for the recommended legislative revision to the "commercial services" definition.

Time and Material / Labor Hour Contracting

The use of Time and Material (T&M) and Labor Hour (LH) contracts and subcontracts for the acquisition of services is a common commercial practice. The 2003 Services Acquisition Reform Act (SARA) provides statutory authority for the limited use of T&M/LH contracts to acquire commercial services where award by the Government is based on competition. However, it was silent on the use of T&M/LH prime and subcontracts for commercial services in sole source procurement situations. Normally, the statutory authority granted to the Government applies to prime contractors in performance of their contracts. Historically, statutory authority granted at the prime contract level is typically applied at the subcontract level. Thus, it could be inferred from SARA that the use of T&M/L-H subcontracts for commercial services would be restricted to procurements based on competition. It is a virtual certainty that contracting officers and prime contractors would view it that way.

In competitive awards of Firm Fixed Price (FFP) service contracts, prime contractors are free to use any type of subcontract that best satisfies performance of the contract. The price reasonableness of the prime contract has been established by the competition, and the prime contractor assumes the risk of performance. Conversely, in competitive awards of Cost Reimbursement service contracts, prime contractors are restricted to subcontract types that satisfy Government compliance requirements, in particular those set forth in the "Allowable Cost and Payment" clause. The price reasonableness of the prime contract will be based on an audit, negotiation, and settlement of actual allowable costs incurred. This situation is unacceptable to most commercial companies.

The Task Force recommends that the appropriate statutes be amended so that the requirement for competition or justified sole source be permitted in the award of commercial service T&M/LH. Pursuant to the above, *Attachment 2* develops the Task Force's legislative recommendations to fully apply the ability to use T&M/LH contracts in commercial item and services acquisition.

Advisory and Assistance Services

In the FAR, Advisory and Assistance Services (A&AS) are defined as services provided to support or improve agency organizational policy development, management and administration. Furthermore, A&AS services are used to obtain outside points of view, advice, opinions, and the skills of noted experts to support complex operational organizations. While A&AS contracts are segregated in the FAR, the assessment of what is and what is not A&AS is somewhat unclear when considering all the components of service contracts – which provide an identifiable task, rather than furnishing an end item of supply, and may be either a non-personal or personal contract. As a result, the lines between what is and what is not A&AS can be subjective and often blurred in the FAR.

With this background, Congress addressed, in the FY2005 National Defense Authorization Act, the performance period for multi-year task and delivery order contracts, which can be issued for a base five year term with an extension for up to an additional five years. However, Congress did not change the

performance period for A&AS contracts. A&AS continues to have a total five (5) year period of performance limitation. The similarities, and in some cases the overlap, between other service contract efforts and those defined as A&AS raise the question of why the A&AS as a subcategory of services should have contracting limitations different from those now permitted for all other service or item acquisitions. The Task Force sees no need for a different performance period for A&AS contracts versus other types of task and delivery order contracts, and recommends that this distinction be eliminated. The Task Force's recommendation, and rationale, is in *Attachment 3.*

D. Regulatory Review

The working group also undertook a review of all relevant parts of regulatory guidance under the FAR and DFARS to identify whether further regulatory revisions might facilitate the Task Force's objectives. The working group determined that for the most part the regulatory guidance for non-commercial or developmental services was balanced, and protected both public and private sector interests. Accordingly, no revisions have been proposed to these elements of the FAR or DFARS.

The Task Force focused its recommendations on regulatory revisions affecting commercial contracting of services. It is important to recognize the guiding principals of the FAR to maximize the use of commercial products or services and the regulatory flexibility established in the FAR 1.102 (d) that states:

> *In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interest of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.*

In addressing commercial items or services, the Task Force proposed amendments to FAR 2.1, (Definitions for Commercial Items and Services). The first change would be to place "services" on an equal footing with items. Additional proposed revisions were to move the cost reasonableness requirements of catalog and market prices to FAR subparts 12, 13 and 15. It was recognized that assessing cost reasonableness is a critical component of sound commercial services acquisition; these references in FAR 2.1, however, add no value and potentially introduce confusion in the definition. It was the belief of the Task Force that this guidance more properly belongs in the elements of the regulations that addresses price reasonableness and pricing policy.

An additional recommended revision is to remove from the definition those categories of services such as installation services, maintenance services, repair services and training services, which also are known as ancillary services. As a practical matter, in the commercial market place there is no substantive difference between ancillary and non-ancillary services. The bifurcation of services within the commercial item definition has caused confusion in the Government marketplace because they conceptually overlap.

The Task Force also proposed revisions to selected subparts of FAR Parts 12, 13 and 15 with the objective to bolster the guidance to the contracting officers in evaluating commercial item and services prices. This revision stressed that reasonableness can be assessed through a variety of methods, including through competition, market surveys, or a review of past vendor contracts. It is important to note that the General Services Administration's (GSA) Federal Supply Schedule pricing practices relies heavily on past contract prices in negotiating and establishing schedule prices. The Task Force recognized the practical realities that commercial services could be acquired either competitively or on a sole source basis. The Task Force identified several examples of unique commercial services that could be justified for sole source procurements under the FAR. Accordingly, it is important to remove competition as a mandated standard in commercial item acquisition. It is the view of the Task Force that it should be clear

that sole source acquisitions of commercial services should require further market research to assess the reasonableness of a vendor's price.

The Task Force recommends revising the current guidance in FAR Part 12 (Acquisition of Commercial Items) to recognize "services" on an equal footing with commercial item acquisitions, and that price reasonableness can be assessed by a review of past contracts. The Task Force also recommends adding language to FAR subpart 13.106-3 (Award and Documentation), with the intent to solicit vendors to provide documentation on previous and current sales to further support price reasonableness assessments. As stated above, this is an established practice in GSA. Furthermore, the Task Force would clarify in this subpart that price catalogues are not always maintained by commercial service vendors, or may not be kept current in hard copy catalogues. To this end, the Task Force recommends amending FAR 15.402 (Pricing Policy) to add to the reference of "catalogue prices" a review of vendor web pages, including a review of active and/or previous contracts for similar items or services.

The regulatory revisions outlined above can be found in *Attachments 4-9*.

Attachment 1 – Legislative Recommendation to Redefine Commercial Services

The Task Force believes that the definition of commercial services does not need to be conceptually different from commercial items. If the service is of a type offered and sold in the commercial marketplace, establishing a credible basis for demonstrating its market acceptance, then the service should qualify as a commercial item.

Rationale

The 1994 Federal Acquisition Streamlining Act (FASA) divided services into two groupings. These groupings were contained in the commercial item definition at paragraph 5 (installation services, maintenance services, repair services, training services – also known as ancillary services) and paragraph 6 (services for specific tasks performed or specific outcomes – also known as professional and technical services).

These groupings of services are an outgrowth of the 1993 Acquisition Law Advisory Panel (commonly known as the Section 800 Panel). Initially, the definition of commercial item focused on manufactured products. The Section 800 Panel later realized that ancillary services needed to be included in the definition of commercial item, as well. It made no sense to the Section 800 Panel to permit streamlined commercial item acquisition methods for manufactured products but not permit the same methods for the services necessary to install, maintain, and repair the manufactured products. The Section 800 Panel did not conclude that non-ancillary services should be excluded. Rather, the Section 800 Panel stated that there was not enough information, at that time, to consider the question of non-ancillary services.

As a practical matter, in the commercial market place there is no substantive difference between ancillary and non-ancillary services. The bifurcation of services within the commercial item definition has caused confusion in the Government marketplace because conceptually they overlap. For example, installation services, maintenance services, repair services, training services also are services for specific tasks performed or specific outcomes to be achieved.

The Task Force offers the following comments on specific provisions to which changes are being proposed; the recommended statutory changes, with a line-in/line out, follows this discussion –

- *Paragraph (1) Any item other than real property, that is of a type customarily used by the general public or by non-governmental entities for other than government purposes*

  Comment: This initial element of the definition of commercial items requires the item or service to be used by non-governmental entities to qualify. It seems reasonable that some elements of the state and local government marketplace generally has, and continues to use, commercial items and services. For example, commercial communications services routinely are used in local and state government public safety missions. Commercially available, interoperable hardware items and systems also are used by these entities to link critical elements of state and local government police and fire departments. Under the definition above, however, these commercial items (sold to non-Federal entities) would not be defined as a commercial item. As a result the Government may be establishing a barrier that may limit its access to a broad range of commercially available items and services routinely used by state and local governments.

- *Paragraph (5)(i): Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item.*

Comment. The addition of this provision was intended to address a provision originally included in FASA, which required ancillary services to be provided to the Government with the same workforce as used to provide services to the general public. This FASA provision proved to be unworkable and was removed by Congress (ref. Section 805 of the FY 2000 National Defense Authorization Act).

Inasmuch as Paragraph (5)(i) merely voids a provision previously imposed by FASA, it does not have to be part of any new definition. The basic thrust of the FAR's structure at FAR 1.102-4(e) which states: *"... absence of direction should be interpreted as permitting the Acquisition Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority."* In other words, it is unnecessary to state that commerciality of services does not rest on "whether such services are provided by the same source or at the same time as the item."

- *Paragraph (5)(ii): The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government*

  Comment. This provision also was recommended by the Section 800 Panel so that the Government and commercial services are provided by the same workforce, plant, or equipment. The Section 800 Panel concluded that there must be some reasonable expectation that the service provided to the Government also will be provided to the general public. However, requiring that services be provided by the same workforce, plant, or equipment already has been acknowledged to be unworkable and removed by Congress.

  That similar services be contemporaneously provided to the general public clearly falls within the present definition of commercial item, which requires the commercial item to be "of a type customarily used by the general public." There should be no issue with respect to terms and conditions since Government purchaser establishes the terms and conditions, as expressed at FAR 52.212-4 and FAR 52.212-5. Plus, it is well known that the Government imposes terms that are unlike those applied in the commercial marketplace (e.g., FAR 52.212-5, "Statutes and Executive Orders").

- *Paragraph (6)(first sentence): Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.*

  Comment. The provision related to "services of a type offered and sold competitively" clearly falls within the present definition of commercial item which requires the commercial item to be "of a type customarily used by the general public."

  The provision related to "substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved" is a carryover from a provision that had been contained in the Truth in Negotiations Act (TINA) as an exception. This provision was removed from TINA by the 1996 Clinger-Cohen Act. This provision, unfortunately and unnecessarily, makes pricing a condition to meeting the definition of commercial item. Guidance on established catalog or market pricing already is expressed at FAR 15.403-3(c). As it is, this provision is laying the foundation for bad law (see Envirocare of Utah, U.S. Court of Federal Claims, No. 99-76C).

- *Paragraph (6)(second sentence): This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved.*

  Comment. The provision has been interpreted to mean that Time and Material (T&M) and Labor Hour (LH) contracts are not permitted for the purchase of commercial services. This prohibition is more appropriately dealt with at FAR 12.207 on contract types and under 16.601(A) addressing types of contracts. It does not need to be part of the definition of commercial services.

- *Paragraph (6)(i) and (ii): This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.*

  Comment. This provision is strongly opposed by industry as perpetuating concepts that are widely acknowledged to be outmoded and obsolete, especially price catalogues are not always maintained by commercial service vendors, or may not be kept current in hard copy catalogues. These paragraphs are no longer needed.

Recommendation:

Based on the rational outlined above, the Task Force proposes the following line in line out revision to the statutory definition of "commercial items"

"Commercial item" means -

(1) Any item, other than real property, that is of a type customarily used by the general public or by ~~non-governmental~~ other than Federal Government entities for purposes other than Federal Government purposes, and-

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for-

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Any ~~Installation services, maintenance services, repair services, training services, and other services if~~ Service of a type offered and sold in the commercial marketplace for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

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

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

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

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

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

(6) Any item, combination of items, or service referred to in paragraphs (1) through (5) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(7) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Attachment 2 – Legislative Recommendation to Time and Material Contracts

The Task Force recognizes that the use of Time and Material (T&M) and Labor-Hour (LH) contracts and subcontracts for the acquisition of services is a common commercial practice. Indeed, the Task Force questioned if T&M/L-H contracts are prevalent in the commercial sector, then why is not this fact the test for determining acceptability for the Government? Legislative and regulatory provisions addressing T&M/LH commercial contracts should address this fact.

The commercial customer knows in advance the fixed rate per day or hourly basis but may not, in many instances, be able to precisely determine how long the services will be required. For example, Otis Elevator contracts with thousands of building managers to maintain and repair, as necessary, building elevators. Since there is no way to determine, prior to trouble-shooting, exactly what the problem is and what parts will be required to repair the elevator and get it back into running order, a traditional fixed-price contract is not appropriate. Commercial contracts generally provide for repair parts at fixed prices but do not limit the number or type of parts for individual repairs. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. This is seen as a positive cost control measure. The competitive forces of the commercial marketplace demand that quality services are provided in an efficient manner so that unnecessary time and material and labor hours are not spent.

Rationale:

The 2003 Services Acquisition Reform Act (SARA) provided statutory authority for the limited use of T&M contracts to acquire commercial services where award by the Government is based on competition. However, it was silent on the use of T&M and LH prime contracts and subcontracts for commercial services in sole source procurement situations. Normally, the statutory authority granted to the Government applies to prime contractors in performance of their contracts. Historically, the statutory authority granted at the prime contract level is typically applied at the subcontract level. Thus, it could be inferred from SARA that the use of T&M subcontracts for commercial services would be restricted to procurements based on competition. It is a virtual certainty that contracting officers and prime contractors would view it that way.

A prevailing business model is for Government prime contracts for services to be issued to "Government qualified" segments of multi-segment corporations. Many such corporations also have commercial segments providing world class services that will not do business with the Government either directly or indirectly. These commercial segments are unwilling to invest in the infrastructure necessary to establish compliant contract cost accounting systems that would bill the Government in accordance with the unique terms and conditions of Government contracts (e.g., "Allowable Cost and Payment" clause). These commercial segments normally do business with their commercial customers on a Firm Fixed Price or T&M/LH basis.

In competitive awards of Firm Fixed Price service contracts, prime contractors are free to use any type of subcontract that best satisfies performance of the contract. The price reasonableness of the prime contract has been established by the competition, and the prime contractor assumes the risk of performance. Conversely, in competitive awards of Cost Reimbursement service contracts, prime contractors are restricted to subcontract types that satisfy Government compliance requirements, in particular those set forth in the "Allowable Cost and Payment" clause. The price reasonableness of the prime contract will be based on an audit, negotiation, and settlement of actual allowable costs incurred. This situation, however, is unacceptable to most commercial companies.

SARA now authorizes T&M/LH contracts, if awarded competitively, and basically accepts the notion that price reasonableness of hourly rates can be established by competition. The Task Force recommends that while competition does support price reasonableness, competition should not be viewed as the only method to secure price reasonableness. Market surveys and review of past contracts also provide insight into the reasonableness of offered prices. The Task Force believes that awards of T&M/LH contracts should be permitted on both a competitive as well as sole source basis, if properly supported. Under T&M/LH contracts, the prime contractor assumes the risk of performance against negotiated T&M/LH rates. The same logic also follows for T&M/LH subcontracts. In addition, since many corporations do not conduct competition for interdivisional work, the requirement for competition may preclude the use of interdivisional resources. Applying SARA's competition rule to subcontracts and interdivisional transfers would limit the Government's access to these commercially available services.

Recommendation:

The Task Force recommends that the appropriate statutes be amended so that the requirement for competition, or justified sole source, be permitted in the award of commercial service T&M/LH contracts. The Task Force further recommends that appropriate statutory, and regulatory guidance reference the fact that prime contractors have clear authority to subcontract on a T&M/LH basis for services that are sold to the general public on a T&M/LH basis. This recognizes that the prime contractor has the responsibility for establishing subcontracts and justifying contract type, terms and conditions. The Task Force also recommends congressional report language to address the subcontracting concerns outlined above; this statement also should be included in any implementing policy guidance.

AMENDMENT

Section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3387; 41 U.S.C. 264 note) is amended-----

by adding after subparagraph (B) (as so redesignated) the following new subparagraph:
"(C) subject to paragraph (2), authority for use of a time-and-materials contract or a labor-hour contract for the procurement of commercial services that are commonly sold to the general public through such contracts and are purchased by the procuring agency on a competitive basis ***or if fully justified on a sole source basis*** *";*

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Prime contractors should be free to use Time and Material (T&M) and Labor Hour (LH) commercial subcontracts for services in contract performance, subject to periodic Government review of purchasing operations through the Contractor Purchasing Systems Review process.

Attachment 3 – Legislative Recommendation to Advisory and Assistance Services

It was the Task Force's position that the realities of what is and what is not A&AS, as defined in the FAR can be confusing and often blurred in contract requirements. The similarities between other task order contracting and the A&AS raises the question of whether this distinction is still necessary? At a minimum, the Task Force recommends providing Advisory and Assistance Services Contracts with the same performance period as other multi-year task and delivery order contracts.

Rationale:

Section 813 of the Fiscal Year 2005 National Defense Authorization Act extends the performance period for "multiyear task and delivery order contracts" awarded by the Department of Defense (DOD) from a fixed maximum five-year term to a base five-year term with an extension for up to an additional five years. The agency also can make a determination in writing that exceptional circumstances warrant a longer contract period. However, this revision did not change the five-year maximum period of performance for a subset of task orders, called advisory and assistance services (A&AS) contracts, which are covered under 10 U.S.C. Section 2304b.

Both types of contracts should be treated the same, with the same flexibility provided to the Defense Department and the contracting officer to determine the appropriate period of performance necessary to meet agency needs. The rationale that Congress applied when adopting the changes to task order contracts covered by Section 813 also applies to A&AS contracts. Following standard procurement rules, these contracts are competed in both the base performance period and again on each task order over $100,000.

Permitting inclusion of these contracts would provide the following advantages:

- Minimizes Government acquisition time and costs.
- Complements and is consistent with Congress' recent legislation (Section 803 of the Fiscal Year 2002 National Defense Authorization Act) requiring task order competition for all DOD multiple-award contracts for task orders greater than $100,000 in value.
- Minimizes bid and proposal (B&P) costs, thus reducing overall costs to the Government.
- Avoids the large disruptions in ongoing support due to prime contract re-competition when the Government has multiple successfully performing prime contractors.
- Avoids wholesale movement of large workforces from one contractor to another and resulting in adverse impact to employee retirement benefits for those who have not completed the required vesting period or those who have to meet another vesting requirement with the new employer.
- Enables the Government to avoid program risk during critical program stages due to loss of program corporate knowledge of ongoing program activities.

Recommendation:

The Task Force recommends that Congress amend title 10, United States Code, to provide similar periods of performance for *all* types of task and delivery order contracts. The amendment below provides a conforming amendment to the existing coverage on advisory and assistance services:

> *Sec. ____ Section 2304b(b) of title 10, United States Code, is amended by striking all after the phrase "options, modifications, or otherwise," and inserting "may be for any period up to five years and may extend the contract period for one or more successive periods pursuant to an option provided in the contract or a modification of the contract. The total contract period as extended may not exceed 10 years unless the head of an agency determines in writing that exceptional circumstances necessitate a longer contract period."*

Attachments 4-8 – Line-in/Line-out of proposed FAR (Parts 2, 12, 13, 15) and DFARS revisions

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Attachment 4 – Line-in/ Line out of proposed FAR revisions to Commercial Services Definition

The definition in (Acquisition of Commercial Items) Part 2.1 for commercial items provides only limited treatment of commercial services. Further, this definition provides guidance to evaluate catalog or market prices which seems misplaced since there currently is a substantial body of regulation in FAR Parts 12, 13 and 15 currently addressing price reasonableness issues. These FAR references, however, continue to limit their application to commercial items, and fail to address commercial services sufficiently.

The current definition of a commercial item (FAR Subpart 2.101) does not provide the contracting officer with an effective definition of commercial services to provide an avenue to acquire commercial services using customary commercial practices. Contracting officers are faced today with a definition of services that either defines the services as being in support of a commercial item [Section (5) of the current definition] or details a definition of stand-alone services [Section (6) of the current definition] that is unnecessarily restrictive. The unnecessary restrictions in the definition of stand-alone services include the requirement for demonstrating that the services are sold competitively, in substantial quantities, and based on established catalog or market prices. These concepts are outmoded, having been removed from the Truth in Negotiations Act by the 1996 Clinger-Cohen Act (P.L. 104-106), and serve no useful purpose in the definition of commercial services.

Rationale:

The construction of the commercial item definition at FAR 2.101 makes the purchase of commercial services unnecessarily difficult or impossible at a time when commercial services are being sought by the Government more frequently than ever before. The alternative of purchasing commercial services under other than FAR Part 12 (Acquisition of Commercial Items) procedures is not an attractive option in many circumstances because providers of commercial services have not invested in systems necessary to comply with non-FAR Part 12 requirements – such systems simply are not required in the commercial marketplace. Accordingly, the most efficient mechanism to acquire commercial services is through the use of commercial practices as close as practicable to those experienced by commercial companies under normal market conditions.

Recommendation:

The Task Force recommends amending FAR Subpart 2.101 (Definitions of Commercial Items) to clarify the definition of stand-alone commercial services. The Task Force recognizes that this recommended revision would require a statutory change. [The corresponding recommendations addressing the legislative changes have been discussed and supported in Attachment 1 of this report]. The full text of this proposed amendment is provided below:

FAR 2.101 Definitions of Commercial Items.

Commercial item means —

(1) Any item, other than real property, that is of a type customarily used by the general public or ~~by non-governmental~~ Other than Federal Government entities for purposes other than Federal governmental purposes, and —

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for —

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Any ~~Installation services, maintenance services, repair services, training services, and other services if~~ Service of a type offered and sold in the commercial marketplace for use by the general public or other than Federal Government entities for specific task performed or specific outcomes to be achieved and under customary commercial terms and conditions.

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

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

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

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

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

(6) Any item, combination of items, or service referred to in paragraphs (1) through (5) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(7) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Attachment 5 – Recommended FAR revision on Determination of Price Reasonableness

While competitive acquisition is obviously a preferred acquisition approach, practical realities clearly indicate that in some limited circumstances commercial items and services may only be available from a sole provider. The FAR guidance must recognize that commercial item acquisition can be either competitive or sole source if properly justified. References to catalogue and market prices also must be reflective of current business environment. Catalogues and price lists are not necessarily published and, in some cases, discounting policies often are considered proprietary in commercial organizations. Recognizing the current services acquisition realities, and the evolving legislative revisions, it is important that FAR sections 12, 13 and 15 be updated to reflect approaches to fully assess price reasonableness.

Rationale:

In the current acquisition environment, the regulations need to advance the recognition of commercial services on equal standing with commercial items. The Task Force believes that commercial items referred to a tangible product and is clearly different than a commercial service. The Task Force interpreted a commercial service as: *a service is considered to be any "thing" or "class of procurement," that is not manufactured or does not require manufacturing – in other words, a service is not a tangible product, even though the service it self may produce some tangible outcome or output.* The Task Force further felt that additional guidance would be beneficial to clarify that reasonableness can be assessed through a variety of methods. These include competition, markets surveys of past or current contracts for the same or similar items, and catalogues or web-based published prices.

Recommendation:

The Task Force recommended expanding the references to commercial items to include commercial services. The guidance should provide clarity to the full range of methods for assessing the reasonableness of prices for commercial items and services. Market survey information, including reviews of active and past commercial contracts, could be an effective metric in validating a commercial vendor's pricing. Specifically, the Task Force recommended amending FAR Subpart 12.209 (Determination of Price Reasonableness) by adding references to commercial services, following the references to commercial items in the first and second sentence. This change clearly places services on equal footing with commercial items, and reflects the practical realities of today's Federal acquisition environment. This revision provides guidance on the variety of methods that could be considered in assessing the reasonableness of commercial items or services. The full text of this proposed amendment is provided below:

FAR 12.209 Determination of Price Reasonableness.

While the contracting officer must establish price reasonableness in accordance with FAR 13.106-3, 14.408-2, or subpart 15.4, as applicable, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items and services. Commercial items and services prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. Reasonableness can be assessed in a variety of ways including competition, market surveys that include a review of past or active vendor contracts, and review of any catalogue or other published prices if available. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

Attachment 6 – Recommended FAR Revision to Award and Documentation

While competitive acquisition is obviously a preferred acquisition approach, practical realities clearly indicate that in some limited circumstances commercial items and services may be provided by a sole provider. The FAR guidance must recognize that commercial item acquisition can be either competitive or sole source if properly justified. Therefore, FAR Subpart 13.106.3 (Award and Documentation) must recognize that commercial item and services acquisitions may be awarded on either a competitive, which is the preferred approach, or on sole source basis if properly justified.

Rationale:

It is equally important to clarify in this section of the FAR that the contracting officer can request commercial item or service vendors to provide supporting documentation which might support the commercial price as part of their proposal or to support negotiation. It is important that vendors dealing with the Federal government recognize the overarching need for data that support the reasonableness of all prices offered. This vendor obligation is particularly critical in a justified sole source acquisition of a commercial item or service.

The Task Force recognizes the absolute and legitimate obligation for the Federal government to assess and make determination regarding the reasonableness of any proposed vendor prices prior to making any award. The proposed changes are intended to clarify this obligation. These proposed changes recognize that in justified sole source awards further market research might be necessary to adequately judge the reasonableness of any vendor's proposed prices. The Task Force also believes it important to clarify that, in today's business environment, vendors may not have current published price list of catalogs to assist in the assessment of reasonableness. Consistent with the other proposed amendments, the Task Force notes that these changes should ensure that services are on equal footing with commercial items.

Recommendation:

The Task Force recommends amending FAR 13.106-3 (1) (Award and Documentation) to add language to clarify that, in assessing the reasonableness of any proposed price, awards can be made on either a competitive basis or through a justified sole source basis. If a sole source award is made, further market research likely would be required. Therefore, the Task Force recommends amending paragraph (ii) of FAR 13.106-3 to clearly establish an obligation for vendors to provide supporting information to the contracting officer to allow the assessment of reasonableness of all proposed prices. This data could include providing copies of current of past contracts for similar items. The Task Force also recommends amending paragraph (iii) of FAR 13.106 to recognize that current price lists or published catalogs may not be available. Finally, the Task Force recommends amending paragraph (3) of FAR 13.106-3 to recognize commercial services on equal standing in the regulation with commercial items.

The full text of this proposed amendment is provided below:

FAR 13.106-3 Award and documentation.

(a) Basis for award. Before making award, the contracting officer must determine that the proposed price is fair and reasonable.

(1) Whenever possible, base price reasonableness can be achieved through competition quotations or offers. Determining reasonableness in sole source awards requires further market research.

(2) If only one response is received, include a statement of price reasonableness in the contract file. The contracting officer may base the statement on —

(i) Market research;

(ii) Comparison of the proposed price with prices found reasonable on previous purchases including requesting vendors provide supporting documentation of current or previous contract sales;

(iii) Current price lists, catalogs, or advertisements if available. However, inclusion of a price in a price list, catalog, or advertisement does not, in and of itself, establish fairness and reasonableness of the price;

(iv) A comparison with similar items in a related industry;

(v) The contracting officer's personal knowledge of the item being purchased;

(vi) Comparison to an independent Government estimate; or

(vii) Any other reasonable basis.

(3) Occasionally an item or service can be obtained only from a supplier that quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantity required. In these instances, the contracting officer should inform the requiring activity of all facts regarding the quotation or offer and ask it to confirm or alter its requirement. The file shall be documented to support the final action taken.

(b) File documentation and retention. Keep documentation to a minimum. Purchasing offices shall retain data supporting purchases (paper or electronic) to the minimum extent and duration necessary for management review purposes (see subpart 4.8). The following illustrate the extent to which quotation or offer information should be recorded:

(1) Oral solicitations. The contracting office should establish and maintain records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases, this will consist merely of showing the names of the suppliers contacted and the prices and other terms and conditions quoted by each.

(2) Written solicitations (see 2.101). For acquisitions not exceeding the simplified acquisition threshold, limit written records of solicitations or offers to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

(3) Special situations. Include additional statements —

(i) Explaining the absence of competition if only one source is solicited and the acquisition does not exceed the simplified acquisition threshold (does not apply to an acquisition of utility services available from only one source); or

(ii) Supporting the award decision if other than price-related factors were considered in selecting the supplier.

(c) Notification. For acquisitions that do not exceed the simplified acquisition threshold and for which automatic notification is not provided through FACNET or an electronic commerce method that employs

widespread electronic public notice, notification to unsuccessful suppliers shall be given only if requested or required by 5.301.

(d) Request for information. If a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided (see 15.503(b)(2)).

(e) Taxpayer Identification Number. If an used, the contracting officer shall ensure that the copy of the award document sent to the payment office is annotated with the contractor's Taxpayer Identification Number (TIN) and type of organization (see 4.203), unless this information will be obtained from some other source (e.g., centralized database). The contracting officer shall disclose to the contractor that the TIN may be used by the Government to collect and report on any delinquent amounts arising out of the contractor's relationship with the Government (31 U.S.C. 7701(c)(3)).

Attachment 7 – Recommended FAR Revision on Pricing Policy

The current FAR Pricing Policy (FAR 15.403) fails to provide direction to the contracting officers that price support may be available in other than an established catalogue price list. Consistent with the other proposed recommendations, the FAR should reference that web-based technology has in some cases eliminated published catalogues. Further, the guidance should reference the need to review current or past relevant contracts to support a market price assessment.

Rationale:

It is a standard commercial practice to provide pricing information to customers, but not actual cost data. Therefore, the FAR language related to pricing policy should provide clear guidance to contracting officers that assessing the reasonableness of a proposed vendor's price need not be limited to published catalogues. As a result of the current web technology business environment, most vendors have replaced expensive catalogue publication with company internet web pages that may provide elements that support the obligation to assess the reasonableness of published prices. However, the Government should be able to request vendors to provide support in the form of past or current contracts to assist the contracting officer in performing market research and validating the reasonableness of prices offered. The FAR pricing policy (FAR 15. 403) provides guidance to contracting officers on methods to pursue in assessing the reasonableness of a proposed price.

Recommendation:

The Task Force recommends amending FAR 15 402 (i) to establish that vendor prices can be established through electronic or company web pages. The FAR should be further clarified to state that the contracting officer can assess market prices by requesting and reviewing active or previous contracts that contain prices for similar items or services. The Task Force also recommends amending paragraph (3) of this section to include a cross-reference to FAR 15.403-1, which provides prohibitions on obtaining cost or pricing data.

The full text of this proposed amendment is provided below:

FAR 15.402 Pricing policy.

Contracting officers must —

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (e.g., established catalog prices, electronically published prices on company web pages or market prices or from a review of active or previous contract prices for similar items or services), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b) (1) or

(2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(ii) Cost information, that does not meet the definition of cost or pricing data at 2.101.

(3) Cost or pricing data. Except as provided by 15.403-1 the contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

(b) Price each contract separately and independently and not —

(1) Use proposed price reductions under other contracts as an evaluation factor; or

(2) Consider losses or profits realized or anticipated under other contracts.

(c) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for a price adjustment based upon the occurrence of that contingency.

Attachment 8 – Recommended Revisions to the DFARS

The Defense Federal Acquisition Regulation Supplement (DFARS) guidance at DFAR 212.301 (f) (ii) sets forth the requirement to request "Representations and Certifications" for all commercial item acquisitions over the simplified acquisition threshold. This reference in the DFARS also should include "services" along with commercial items. The acquisition of services now dominates discretionary spending in the Federal government, and the DFAR should similarly recognize commercial services on equal footing with commercial items.

Rationale:

As noted previously, the Task Force determined that commercial items may refer to a tangible product or manufactured end item. Services also may result in products as defined below by the Task Force:
a service is considered to be any "thing," or "class of procurement," that is not manufactured or does not require manufacturing – in other words, a service is not a tangible product, even though the service it self may produce some tangible outcome or output.

Recommendation:

The Task Force recommends amending DFAR 212.301 (ii) (Solicitation provisions and contract clauses for acquisition of commercial items) to add references to commercial services. The full text of this proposed amendment is provided below:

DFARS 212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225-7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225-7020, Trade Agreements Certificate.

(C) 252.225-7035, Buy American Act —Free Trade Agreements —Balance of Payments Program Certificate.

(ii) Use the provision at 252.212-7000, Offeror Representations and Certifications —Commercial Items, in all solicitations for commercial items and services exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.770-3), indicate on an addendum that "The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation."

(iii) Use the clause at 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provision at 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104-70(a).

(v) Use the clause at 252.232-7009, Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in 232.1110.

(vi) Use the clause at 252.211-7003, Item Identification, as prescribed at 211.274-3.

ACQUISITION MANAGEMENT AND PLANNING WORKING GROUP

IV. ACQUISITION MANAGEMENT AND PLANNING WORKING GROUP

A. Executive Summary

Over the last 10 years, Federal spending has shifted from primarily goods and real property to increasingly more dollars expended for services. By 2004, spending by the Department of Defense (DOD) for services exceeded 50% of the total DOD budget, and 75% of many civilian agency budgets.

Corresponding to this shift in budget demographics, there also has been a shift in the contracting mechanisms. Although indefinite delivery/indefinite quantity (ID/IQ) contracts were long reserved for spares and support to weapons in the inventory, as a result of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act these same mechanisms became the norm and the contract mechanism of choice. The concept or notion of a "contract" as executed 10 or more years ago has shifted to "orders" against base vehicles as the primary contracting norm – for both hardware and services. This shifting focus likewise appears to have created a shift in how agencies approach contracting, and the planning mechanisms used to ensure adequate controls are in place.

The working group's initial focus or mission was to examine the broader scope of "services" versus a focus on Performance-based acquisition as the identifying nomenclature. This approach resulted in the working group identifying various issues with the current Federal Acquisition Regulation's (FAR) treatment of services. The working group immediately recognized that the FAR is broad in scope. While specific rules have been created based on Government purchases and practices dating back many years, the FAR focus on goods and real property may have resulted in a culture wherein the workforce failed to recognize the overarching FAR principles applicable to services as well. In reviewing the FAR, and identifying those sections covering services, the working group questioned and discussed the actual FAR provisions and need for change.

In its review, the working group concluded that the current focus on technique, in this case "performance based," has the effect of shifting the attention from the "requirement," and selecting a procurement method based on the "requirement," to the technique as the driver. Therefore, the working group concluded that the focus should be shifted to "Services Acquisition" as the primary domain or nomenclature, with the term "performance-based" being reserved as but one mechanism or tool for acquiring services, but not necessarily the only one. And the selection of contract approach is best based on sound business rationale.

Furthermore, moving away from a hardware focus to a service focus still requires many of the basic acquisition skills commonly associated with hardware acquisitions. The working group recognized that service acquisitions can be extremely complex, and program management skills, tools and processes need to be applied to services acquisitions. The use of such tools as Integrated Master Plans and Integrated Master Schedules apply equally to a weapon system, an Engineering Support Contract for multiple functions or locations, or an Information Technology support contract. Encouraging the use of "systems thinking and planning" would improve services acquisition.

One point noted is that the FAR does not define the term "services." The Task Force concluded that a service could be defined as:

A service is considered to be any "thing" or "class of procurement", that is not manufactured or does not require manufacturing, i.e. a service is not a tangible product, even though the service it self may produce some tangible outcome or output.

While this working definition was considered critical, it was not determined to be necessary to change the FAR to incorporate the definition. It was believed, however, that such a distinction was necessary to disassociate the concept of physical products, and to have a point of departure for "performance based" as a tool or mechanism and not the end result.

Many of the issues and problems discussed overlapped with the other areas identified, particularly the "Categories of Services" and Part 37 working groups. For that reason, the issues of price reasonableness, competition and service contracting regulations are discussed therein. The following section outlines the initial findings of the "Acquisition Management and Planning" working group as it relates to those issues on which the working group focused.

B. Initial Findings

In its review, the working group considered the following issues and problems:

1. Pre-award – Acquisition Planning. The Task Force concluded that the pre-award and acquisition planning that specifically focused on services appeared to be missing and considered that the FAR's focus on goods, and perhaps weapon systems, created a culture that failed to recognize the differences between those types of acquisitions and the planning required for services. The working group determined that a discipline and skill for acquisition planning was just as necessary in service acquisitions as in hardware and weapons acquisitions. Such issues as market research, critical thinking about the requirement, life cycle support, and availability in the marketplace are equally pertinent in a service acquisition.

2. Types of contracts. The working group discussed whether FAR Part 16 (Types of Contracts) coverage was sufficient, challenging whether or not service contracts required a different pricing arrangement. An industry norm for services is Time and Material (T&M) and Labor Hour (LH) type of pricing arrangements. An additional point of discussion was payment terms; with the general consensus being that milestone billing or performance-based payments may be more appropriate for service contracts. It was determined that Part 16 coverage should be expanded to specifically address T&M/LH, or other contract pricing arrangements, with respect to services. In addition, performance-based as a technique more appropriately is covered in FAR Part 11 (Describing Agency Needs).

3. Award. The working group discussed the present requirements for best value, and the source selection process, including the evaluation itself and the use of past performance information. It was determined that not only may changes be required to the FAR but, in addition, many Service Source Selection Guides and other supporting information may need to be revised as well to reflect a focus on services. One challenge may be the potential emphasis on past performance as a major factor for selection in a service environment. The Task Force concluded there has been insufficient attention paid to a mechanism for developing past performance, although the Contract Performance Assessment Report System (CPARS) refers to service contracting across the Government. The CPARS information collected for hardware or weapons systems contractors focuses on schedule and cost, metrics which may not be the best measurement for services delivery. Schedule and cost, while important in the hardware and systems environment, are not necessarily the only or best indicator of future performance in the service sector. Such metrics as quality of service, responsiveness to client, in addition to cost control, may be better indicators for the service sector. In addition, it is not

unusual to have no CPARS prepared for service contracts. Although, the Past Performance Retrieval System (PPIRS) was a limited initial effort to capture service sector past performance information, its use has not been completely successful. To the extent that the source selection authority relies on past performance as indicators, work to create credible metrics and better application for services is required.

4. Incentives. Traditional hardware and systems contract strategies consider multiple contract incentive structures to motivate contractors – these include cost, schedule and performance generally linked to improving performance of the system or ensuring early delivery and reduced cost where appropriate. However, service providers or the services sector generally will not have such finite and concrete specification driven outcomes or performance requirements. Within the current cost and pricing framework, Award Fee is perhaps the most applicable method for motivating performance. However, Award Fee is subjective. When using Performance-based Acquisition, identifying the critical outcomes required, versus improved or enhanced delivery, can be difficult. Incentives and their application to Services requires additional work.

5. Post Award. The working group questioned whether the Defense Contract Management Agency (DCMA) infrastructure for the Department of Defense (DOD), and if requested for the Federal agencies, was sufficiently prepared for the oversight and administration of service contracts. Where DCMA in recent years has focused more on contractor systems and certification of those systems, services and the associated contractors systems are very different. There may be little investment in physical plants, manufacturing equipment, or quality systems. The General Accountability Office (GAO) has confirmed in their review of service contracts that administration is either weak or missing. Of 90 contracts reviewed, the report identified 26 where quality assurance was either lacking or completely absent with no personnel assigned to administer the contract. It is likewise this apparent lack of oversight that caused Congress to enact for DOD service contracts a requirement to create a management structure similar to that for major weapons systems (see Section 801of the Fiscal Year 2003 National Defense Authorization Act, PL 107-107). Each of the military departments have implemented this provision using different management models.

6. Professional vs. Non-professional. The working group considered that in the field of services the distinction between professional and non-professional is blurring as technology has altered the specific service being provided and the manner performed. The distinction between the Davis Bacon, Walsh-Healy, and Service Contract Acts, although necessary when formed, may no longer be pertinent. No additional recommendations were considered, except that certain legislative requirements will most likely not be changed (e.g., the Service Contract Act or the Davis Bacon Act). Additional research and/or study is required to determine if these statutes are still pertinent, or how they may be updated, in the context of today's environment.

As the working group struggled through a "definition of services," it became fairly clear that one issue predominates, especially for the Congress – the determination of "fair and reasonable" as it relates to the pricing of service contracts. It was recognized that the Congress and the Federal agencies rightfully are concerned with the Government receiving a fair and reasonable price. This issue was discussed and coordinated with the "Categories of Services" working group for resolution.

C. Recommendations

In order to gather more definitive information and data regarding industry tools and techniques for buying services, the working group distributed a questionnaire to the membership of the respective industry associations. It is not known whether it was due to the timing of the questionnaire (in December, before

the holidays) or the wording of the questions, but the response to the survey was very limited. Therefore, the survey and its results cannot be considered with any statistical validity. The Task Force believes that a questionnaire to industry has merit, for the Government and Congress, in assessing true commercial industry practices. It is recommended that the questionnaire be refined, perhaps by the Acquisition Advisory Panel, and issued again to gather additional data and information on industry practices in acquiring services. The Task Force survey is found in *Attachment 9*.

The Task Force concluded that "performance-based" was a tool or technique, not an end result in, and of, itself. However, it also noted that industry and Government program managers may need increased awareness of the advantages in using a performance-based approach. *Attachment 10* outlines the benefits for both industry and Government. It is recommended that these be issued by Federal agencies to both project and contracts personnel as a guide for both Government and industry, and to encourage both parties to explore a greater reliance on the use of performance-based as a tool, regardless of the item being procured. This will further emphasize the critical relationship between requirements/project personnel and contract offices. It is further recommended that FAR Part 37.6 be moved to Part 11 (Describing Agency Needs) – retitled "Performance Based Acquisition" – and made applicable to all requirements' descriptions. Performance-based is a technique or tool that can apply to all procurements, whether for supplies or services, that merit a statement of work or statement of objectives.

While the Task Force determined that no legislative changes were required, it did conclude that more focus on the term "services" would enhance and support the FAR and the procurement/project management community. For example, FAR Part 7 (Acquisition Planning) provides an outline for an Acquisition Plan. Throughout that document are references to products or systems. Acquisition plans are roadmaps for the acquisition, and provide a valuable tool to ensure that all elements of the requirements are addressed in the acquisition. Enhancing this outline or creating a new one for services would improve the buying process. *Attachment* 11 addresses recommended changes to the FAR requirements on Acquisition Planning. In addition, questions remain on the application of FAR Part 7 to procurements accomplished under FAR Part 8 (Required Sources of Supplies and Services) or 13 (Simplified Acquisition Procedures). The Task Force would suggest that the concept of acquisition planning should apply across all acquisitions based on dollar value, including FAR Parts 8, 12 and 13.

A similar issue involves FAR Part 15 (Contracting by Negotiation), where the Task Force recommends adding the word "services" to several sections to further emphasize the importance of applying FAR Part 15 principles to service contracting. *Attachment 12* outlines the Task Force's recommended minor revisions to this Part.

While not making any specific recommendations on the education and training of the acquisition workforce, the Task Force likewise discussed and debated the "culture change" required within the acquisition community. It is recognized that better integration is necessary between the requirements and contracting domains. Reinforcing this integration and ensuring better education/training within both domains is critical to improving the acquisition process for both hardware/systems and services. The contracting domain cannot fix requirement's issues or problems. Changing this culture to recognize the underlying uncertainty in "requirements" definition, and the complexity associated with subsequent contract strategies, remains a challenge. Inherent in any "culture change" is also the associated management structures and reward systems to encourage appropriate and reasonable risk to achieve successful outcomes.

Attachment 9 – Survey on Performance-based Acquisition

Industry Questions on Performance-based Acquisition approaches:

1. Briefly describe your company's approach to the acquisition or contracting for services?

2. What type of contract does your company use when purchasing commercial services?

3. Given a Government preference for a "performance-based approach to contracting for services", please identify your perceived technical and contractual risks with a performance-based approach?

4. If your company operates both in the Government and commercial market place, please describe how your company purchases commercial goods and services from your suppliers as opposed to the Government?

5. What are the top three factors that you focus on to improve supplier performance?

6. Please describe your internal measures of effectiveness to assess supplier performance.

7. What would you recommend to the Government to improve or encourage enhanced use of the performance-based contracting approach for service requirements?

Attachment 10 – Synopsis of Benefits of Performance Based Acquisition

SELLING PBA TO GOVERNMENT PROGRAM MANAGERS (AND THEIR CONTRACTOR COUNTERPARTS)

Persuading Government program managers to "buy into" performance based acquisition (PBA) takes more than fiat. They need to know the tangible benefits to both parties; as well as the unique risks of PBA to both parties. Benefits and risks also are metrics, for PBA works best when both parties fully realize the potential benefits and effectively mitigate the potential risks. A related question is whether guidance in regulation and other sources promotes or impedes the ability of the parties to maximize benefits and mitigate risks.

1. Potential Benefits for the Government Program Manager.

- *You pay only for the performance that you get.* This is of great value for commercial services that are continuously performed, such as janitorial services, when rework is meaningless because the service is repetitively performed – leaving the Government with the choice of either paying in full or terminating for default. Performance-based contracts often include "tables of deductions," which are a form of "liquidated damages" that allows the Government to reduce pay when performance does not meet standards.
- *You shift liability for performance from the Government to the contractor.* When the Government uses "how to" specifications, those specifications come with an implied warranty; as long as the contractor complies with the specs, the contractor is not liable for performance problems.
- *You may obtain better competition.* "How to" specifications restrict competition to those firms which are willing and able to meet those specifications – that is, to do it your way. The further the "how to" specifications vary from commercial norms, the fewer the contractors able and willing to meet them – often the only competitor is the incumbent. The use of output oriented requirements also allows the potential offerors more flexibility in proposing differing approaches. These different approaches can become the discriminators in source selections.
- *You permit consideration of all potential commercial solutions.* The authors of "how to" specifications often lock themselves into a single technical solution – usually the tried and true approach last acquired; thus denying themselves the opportunity to benefit from advances in the commercial state of the art and the opportunity to compete solutions rather than the contractor's ability to conform to last year's solution.
- *You benefit from the expertise of the entire supply chain.* "How to" specifications are "flow down" specifications, thus squandering the often considerable performance expertise of firms on the lowest rungs of the supply chain.
- *You improve probability of satisfying the end user's actual need.* Contracts with tight "how to" specifications focus on compliance with specifications rather than on satisfying the Government's actual needs. The result is often suboptimal performance from the perspective of the intended beneficiaries of the service. Also with tight "how to" specifications the post award oversight process becomes more bureaucratic since the flexibility to make changes in methods of performance is more difficult. The use of performance requirements permits greater opportunities to improve the outputs and objectives of the acquisition.
- *You reduce Government quality assurance overhead.* In services contracts, "how to" specifications ordinarily take the form of methods – this, step by step, is how the Government expects the contractor to perform. This translates into monitoring the contractor's performance every step of the way, in terms of whether or not its employees are performing exactly as dictated

by the contract. In performance-based acquisitions, the contractor has to worry about supervising the workers; the Government worries only about outcomes – whether or not performance targets were attained.

2. Potential Risks for the Government Program Manager.

- *The risk of selecting the wrong technical solution from the wrong contractor.* "How to" specifications put all the competitors on the same playing field, with the only source selection question being: Which contractor is going to provide the effort at the lowest cost, which reduces the opportunities to make best value decisions and trade-off of costs for better performance. When the competition is performance-based, the question is which of the proposed technical solutions is most likely to succeed in accomplishing the Government's objectives – this in addition to the question of whether the contractor offering the most promising solution actually has the wherewithal to deliver the solution promised. The more non-commercial the service, the harder these questions become. When the competition is based on Statements of Objectives, the source selection challenge is even more daunting, because now you are evaluating competing statements of work and quality assurance surveillance plans against one another even for like technical solutions. The more varied the technical solutions, the more difficult for the Government to find the expertise to compare one against the other.
- *Greater likelihood of mistakes in estimating the costs of performance.* Generally, it is relatively easy to estimate the degree and type of effort required to perform against a "how to" specification. It is harder when the two parties are both estimating the cost of attaining performance standards without benefit of knowing exactly how the work is to be performed. The less commercial the service being acquired, the greater the risk of mistakes in estimating the effort required to perform.
- *The possibility that the costs and lead-time of trade-off analyses may outweigh benefits of performance-based contracting.* When competing solutions, you have to weigh and evaluate the cost effectiveness of each competing solution, in terms of satisfying the performance targets. The more varied the competing technical solutions, the more difficult and time-consuming the trade-off analysis. On larger, more complex acquisitions, this may stretch the lead time for award by months.
- *The challenge of writing objectively measurable, reliable, valid, and commercially practicable performance parameters.* The Achilles heels of performance-based contracting are the performance targets; the standards for measuring attainment of performance, and the methods and processes used in the post award performance phase. If the performance parameters are vague, invalid in terms of representing the Government's actual need, or verge on the impossible, it will be hard to hold the contractor accountable for its performance. Most disputes are over the meaning of the words that describe the performance.

3. Potential Benefits for Contractors

- *Greater flexibility in accomplishing Government objectives.* Not being locked into a "how to" means that the contractor is free to employ whatever approach it deems best.
- *Greater opportunities to profit from intellectual capital and past investments.* If the Government dictates a performance that varies in methods, equipment, and the like from the contractor's commercial norms, the contractor has to reinvest and take the risks associated with debugging changes in its methods and practices.
- *Greater opportunities to profit from the expertise of the entire supply chain.* This in fact has proven to be the most valuable benefit of the introduction of supply chain management.

Corporate America has in large measure shifted from flow-down of design specs to flow-up of design expertise; the results have been astounding in terms of reducing production lead-times; slashing costs, and improving quality.

4. Potential Risks for Contractors

- *Greater liability for performance*; the flip side of the shift in liability for performance problems from the Government designers to the contractor's designers.
- *Greater financial risks due to the preference for firm fixed price contracts.* To the extent that the Government insists on firm fixed price compensation arrangements, there is greater risk to the contractors especially when the service to be performed is not commercial.
- *Increases in proposal risks since the offeror has to be more imaginative in their proposed approaches and not simply proposing to a consistent solution set.*
- *Uncertainties about procedures and criteria for reducing pay*. Contractors have to worry about deductions for poor performance, worries exacerbated when the performance standards are vague, ambiguous, commercially impracticable, or not prioritized. This risk grows geometrically with the number of metrics. It may become difficult to determine where to focus managerial attention and contractor resources when chasing too many will-o'-the-wisps.
- *Uncertainties about procedures and criteria for award fee or other incentives*. Contractors cannot bank on reward when award criteria are vague, ambiguous, commercially impracticable, or not prioritized. As with deductions, this risk grows geometrically with the number of metrics. Focusing managerial attention and contractor resources again may be difficult to achieve.

The magnitude of these risks for the contractor is often related at least in part to the contractor's past experience in providing the service. When a contractor can offer a work design that has proven to be a winner in commercial markets, the risk is less and prospects for successful performance and maximizing the award criteria are greatest. When the service is noncommercial, there is a correspondingly higher risk of both technical and financial failure in meeting performance parameters at a price that yields a reasonable profit, or otherwise contributes to the financial goals of the business entity.

From the standpoint of the Government, the greater the uncertainty for the contractors, the less likely that the best contractors will even bid or submit a reasonable price (since the price has to be high enough to offset perceived monetary risks).

In short, performance-based contracting is no panacea. The contracting officer must take the time to weigh the benefits and mitigate the risks to both parties. However, when the acquisitions are planned, conducted and monitored correctly, the benefits to the Government outweigh the risks.

Attachment 11 – Recommended Revisions to FAR Part 7 (Acquisition Planning and Service Contracting)

FAR Part 7 (Acquisition Planning) provides an outline for an Acquisition Plan. Throughout that document are references to products or systems. Acquisition plans are roadmaps for the acquisition, and provide a valuable tool to ensure that all elements of the requirements are addressed in the acquisition. Enhancing this outline or creating a new one for services would improve the buying process. The Task Force's recommendations are highlighted in red in the appropriate text.

Recommendation:

FAR Part 7

"Order" means an order placed under a—

(1) Federal Supply Schedule contract; or

(2) Task-order contract or delivery-order contract awarded by another agency, (~~*i.e.,*~~ e.g., Governmentwide acquisition contract or multi-agency contract).

7.102 Policy.

(a) Agencies shall perform acquisition planning and conduct market research (see Part 10) for all acquisitions in order to promote and provide for—

(1) Acquisition of commercial items or, to the extent that commercial items/services suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq*.); and

(2) Full and open competition (see Part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

(3) Acquisition of services whether commercial or unique to satisfy and agency mission, requirement, or need.

(b) This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

(a) Acquisition background and objectives—

(1) *Statement of need*. Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort. If services are being acquired, describe the nature of the service, the underlying requirement generating the need and the availability of the service in the commercial market place.

(2) *Applicable conditions*. State all significant conditions affecting the acquisition, such as—

(i) Requirements for compatibility with existing or future systems or programs if intended acquisition is hardware related; and

(ii) Any known cost, schedule, and capability or performance constraints, whether hardware or services.

(iii) Whether the services to be acquired are of a non-recurring or recurring nature. If the services are of a recurring nature, describe the previous history and previous acquisition history.

(3) *Cost.* Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

(i) *Life-cycle cost.* Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle-cost estimates.

(ii) *Design-to-cost.* Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.

(iii) *Application of should-cost.* Describe the application of should-cost analysis to the acquisition (see 15.407-4).

(iv) *Service Costs.* Describe the manner and method for estimating the anticipated acquisition cost related to the service being acquired. If costs are based on hourly rates, describe the underlying rate methodology, i.e. Department of Labor, Commercial items.

(4) *Capability or performance.* Specify the required capabilities or performance characteristics of the supplies and/or services or the performance standards of the services being acquired and state how they are related to the need.

(5) *Delivery or performance-period requirements.* Describe the basis for establishing delivery or performance-period requirements (see Subpart 11.4). Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition. Explain the delivery or performance period for the contemplated services.

(6) *Trade-offs.* Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

(7) *Risks.* Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks. Discuss the technical, cost, and schedule risk associated with the contemplated services to be acquired. If the services are research and development, describe any technical risk in performing the contemplated effort.

(8) *Acquisition streamlining.* If specifically designated by the requiring agency as a program or service acquisition subject to acquisition streamlining, discuss plans and procedures to—

(i) Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development, or in acquiring services in recommending the most appropriate application and tailoring of contract requirements;

(ii) Select and tailor only the necessary and cost-effective requirements; and

(iii) State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory.

(b) Plan of action—

(1) *Sources.* Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services (see Part 8) and sources identifiable through databases including

the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at www.contractdirectory.gov. Include consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns (see Part 19), and the impact of any bundling that might affect their participation in the acquisition (see 7.107) (15 U.S.C. 644(e)). When the proposed acquisition strategy involves bundling, identify the incumbent contractors and contracts affected by the bundling. Address the extent and results of the market research and indicate their impact on the various elements of the plan (see Part 10).

(2) Competition.

(i) Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated, cite the authority in 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained.

(ii) Identify the major components or subsystems. Discuss component breakout plans relative to these major components or subsystems. Describe how competition will be sought, promoted, and sustained for these components or subsystems. (Not required for service acquisition)

(iii) Describe how competition will be sought, promoted, and sustained for spares and repair parts, or for services. Identify the key logistic and service milestones, such as technical data delivery schedules and acquisition method coding conferences, or preferred source/supplier efforts, that affect competition. If the services are of a recurring nature, describe how competition will be sustained and promoted over the life of the services.

(iv) When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition. Identify any known barriers to increasing subcontract competition and address how to overcome them.

(3) *Source-selection procedures.* Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives or requirement objectives (see Subpart 15.3).

(4) Acquisition considerations.

For each contract contemplated, discuss contract type selection (see Part 16); use of multiyear contracting, options, or other special contracting methods (see Part 17); any special clauses, special solicitation provisions, or FAR deviations required (see Subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see Subpart 7.4) and why; and any other contracting considerations. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm fixed price basis (see 37.102(a) and 16.505(a)(3)). Discuss the need for commercial item/service pricing methods. Discuss any contemplated organizational conflict of interest concerns. (9.5) Discuss unique terms and conditions contemplated and explain why required. The use of non-standard terms and conditions should be minimized.

(ii) For each order contemplated, discuss—

(A) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. 1422 and OMB Circular A-130 will be met (see 7.103(t) and Part 39); and

(B) Why this action benefits the Government, such as when—

(1) The agency can accomplish its mission more efficiently and effectively (*e.g.*, take advantage of the servicing agency's specialized expertise; or gain access to contractors with needed expertise); or

(2) Ordering through an indefinite delivery contract facilitates access to small business concerns, including small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.

(5) *Budgeting and funding.* Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required (see Subpart 32.7).

(6) *Product or service descriptions.* Explain the choice of product or service description types (including performance-based contracting descriptions) to be used in the acquisition. Explain the type of service and how performance based approaches will be used.

(7) *Priorities, allocations, and allotments.* When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them (see Subpart 11.6).

(8) *Contractor versus Government performance.* Address the consideration given to OMB Circular No. A-76 (see Subpart 7.3).

(9) *Inherently governmental functions.* Address the consideration given to OFPP Policy Letter 92-1 (see Subpart 7.5).

(10) *Management information requirements.* Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort.

(11) *Make or buy.* Discuss any consideration given to make-or-buy programs (see 15.407-2).

(12) *Test and evaluation.* To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release. (May not be required for services)

(13) *Logistics considerations.*(Not required for services) Describe—

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see Subpart 7.3) and distribution of commercial items;

(ii) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties (see Part 46); (iii) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data (see Part 27); and

(iv) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as "standard" so that future purchases of the equipment can be made from the same manufacturing source.

(14) *Services.* Describe any unique conditions associated with the services being acquired. Describe conditions under which the service will be delivered, and administered.

~~(14)~~ (15) *Government-furnished property*. Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition (see Part 45).

~~(15)~~ (16) *Government-furnished information.* Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

~~(16)~~ (17) *Environmental and energy conservation objectives.* Discuss all applicable environmental and energy conservation objectives associated with the acquisition (see Part 23), the applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502), the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

~~(17)~~ (18) *Security considerations*. For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored (see Subpart 4.4).

~~(18)~~ (19) *Contract administration*. Describe how the contract will be administered and identify the personnel or activity performing the administration. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced. Identify the specific methodology or technique for ensuring that services are delivered in accordance with the specified outcomes. For large service acquisitions or high dollar value service acquisitions identify the methods and techniques for program oversight and how such oversight will be maintained throughout the performance period.

~~(19)~~ (20) *Other considerations.* Discuss, as applicable, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

~~(20)~~ (21) *Milestones for the acquisition cycle*. Address the following steps and any others appropriate:

Acquisition plan approval.
Statement of work.
Specifications.
Data requirements.
Completion of acquisition-package preparation.
Purchase request.
Justification and approval for other than full and open competition where applicable and/or any required D&F approval.
Issuance of synopsis.
Issuance of solicitation.
Evaluation of proposals, audits, and field reports.
Beginning and completion of negotiations.
Contract preparation, review, and clearance.
Contract award.

~~(21)~~ (22) *Identification of participants in acquisition plan preparation.* List the individuals who participated in preparing the acquisition plan, giving contact information for each.

7.106 Additional requirements for major systems.

(a) In planning for the solicitation of a major system (see Part 34) development contract, planners shall consider requiring offerors to include, in their offers, proposals to incorporate in the design of a major system—

(1) Items which are currently available within the supply system of the agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source; and

(2) Items which the Government will be able to acquire competitively in the future if they are likely to be needed in substantial quantities during the system's service life.

(b) In planning for the solicitation of a major system (see Part 34) production contract, planners shall consider requiring offerors to include, in their offers, proposals identifying opportunities to assure that the Government will be able to obtain, on a competitive basis, items acquired in connection with the system that are likely to be acquired in substantial quantities during the service life of the system. Proposals submitted in response to such requirements may include the following:

(1) Proposals to provide the Government the right to use technical data to be provided under the contract for competitive future acquisitions, together with the cost to the Government, if any, of acquiring such technical data and the right to use such data.

(2) Proposals for the qualification or development of multiple sources of supply for competitive future acquisitions.

(c) In determining whether to apply paragraphs (a) and (b) of this section, planners shall consider the purposes for which the system is being acquired and the technology necessary to meet the system's required capabilities. If such proposals are required, the contracting officer shall consider them in evaluating competing offers. In noncompetitive awards, the factors in paragraphs (a) and (b) of this section, may be considered by the contracting officer as objectives in negotiating the contract.

Attachment 12 – Recommended minor revisions to FAR Part 15 (Contracting by Negotiation)

Consistent with its overall review, the Task Force recommends several sections in FAR Part 15 (Contracting by Negotiation) be revised to include the word "services," or other changes made, in order to ensure the proper focus on service contracting when using FAR Part 15. The Task Force's recommendations are highlighted in red in the appropriate text.

Recommendation:

15.203 Requests for proposals.
(e) Letter RFPs may be used in sole source acquisitions and other appropriate circumstances. Use of a letter RFP does not relieve the contracting officer from complying with other FAR requirements. Letter RFPs should be as complete as possible and, at a minimum, should contain the following:
(1) RFP number and date;
(2) Name, address (including electronic address and facsimile address, if appropriate), and telephone number of the contracting officer;
(3) Type of contract contemplated;
(4) Quantity, description, and required delivery dates for the item or services;
(5) Applicable certifications and representations;
(6) Anticipated contract terms and conditions;
(7) Instructions to offerors and evaluation criteria for other than sole source actions;
(8) Proposal due date and time; and
(9) Other relevant information; *e.g.*, incentives, variations in delivery schedule, cost proposal support, and data requirements.

15.209 Solicitation provisions and contract clauses.
(b)(1) The contracting officer shall insert the clause at 52.215-2, Audit and Records-Negotiation (10 U.S.C. 2313, 41 U.S.C. 254d, and OMB Circular No. A-133), in solicitations and contracts except those for—
(i) Acquisitions not exceeding the simplified acquisition threshold;
(ii) The acquisition of utility services at rates not exceeding those established to apply uniformly to the general public, plus any applicable reasonable connection charge; or
(iii) The acquisition of commercial items and services exempted under 15.403-1.

15.302 Source selection objective.
The objective of source selection is to select the proposal that represents the best value to the Government.

15.402 Pricing policy.
Contracting officers must—
(a) Purchase supplies and services from responsible sources at fair and reasonable prices. (See FAR 12.209 for Price Reasonableness for Commercial items and services). In establishing the reasonableness of the offered prices, the contracting officer must not obtain more information than is necessary. To the extent that cost or pricing data are not required by 15.403-4, the contracting officer must generally use the following order of preference in determining the type of information required:
(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).
(2) Information other than cost or pricing data:
(i) Information related to prices (*e.g.*, established catalog prices, electronically published prices on company web pages or market prices or from a review of active or previous contract prices for similar

items or services), relying first on information available within the Government; second, on information obtained from sources other than the offeror; and, if necessary, on information obtained from the offeror. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.
(ii) Cost information, that does not meet the definition of cost or pricing data at 2.101.
(3) *Cost or pricing data*. Except a provided by 15.403-1 The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.

15.403-1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).
(b) *Exceptions to cost or pricing data requirements*. The contracting officer shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require information other than cost or pricing data to support a determination of price reasonableness or cost realism)—
(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);
(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);
(3) When a commercial item or service is being acquired (see standards in paragraph (c)(3) of this subsection);
(4) When a waiver has been granted (see standards in paragraph (c)(4) of this subsection); or
(5) When modifying a contract or subcontract for commercial items or services (see standards in paragraph (c)(3) of this subsection).

(B) The determination that the proposed price is based on adequate price competition, is reasonable, and is approved at a level above the contracting officer; or
(iii) Price analysis clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or similar items or services, adjusted to reflect changes in market conditions, economic conditions, quantities, or terms and conditions under contracts that resulted from adequate price competition.

15.404-1 Proposal analysis techniques.
(2) The Government may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition. Such techniques and procedures include the following:
(iii) Comparison of costs proposed by the offeror for individual cost elements with—
(A) Actual costs previously incurred by the same offeror;
(B) Previous cost estimates from the offeror or from other offerors for the same or similar items or services;

MULTI-AGENCY CONTRACTING VEHICLES WORKING GROUP

V. MULTI-AGENCY CONTRACTING VEHICLES WORKING GROUP

A. Executive Summary

Contracting through the Federal Supply Schedules (FSS) managed by the General Services Administration (GSA) remains an extremely desirable and productive approach for fulfilling Federal agency requirements. The Schedules provide streamlined acquisition methods that provide Federal buyers broad flexibility to engage in best value service contracting. Recent changes to FAR Subpart 8.4 (Federal Supply Schedules) provide Federal buyers and sellers with clear guidance on the ground rules governing placing Schedule orders, and should serve to eliminate much of the confusion that previously surrounded the ordering process.

Starting from this perspective, the working group chose to focus on the GSA Schedules. A number of recommendations are made that are intended to further enhance the productivity of GSA Schedule contracts for services acquisitions. These recommendations improve the utility of Schedule contracts by providing increased transparency in the Government's proposed requirements (thereby promoting competition), process improvements and additional acquisition tools to make it easier for customers to use the Schedules, and greater training and awareness regarding the appropriate uses of Schedule contracts.

In addition, these recommendations seek to change the current perception within the acquisition community, particularly for the Department of Defense (DOD), that Schedule contracts are not preferred contract vehicles. GSA and DOD have a great deal invested in the success of the Schedule program. Historically, DOD has been the largest user of Schedule contracts. The Task Force urges these two agencies to continue a constructive dialogue for ensuring that the Schedules continue to support DOD's procurement needs, and that DOD buyers have the ability or discretion to access these contracts under appropriate circumstances.

B. Initial Findings

In undertaking its review, the working group began with the following questions and considerations:

- ✓ What is good about the current state of Schedule contracting?
- ✓ What is bad or problematic about the current state of Schedule contracting?
- ✓ What is the source of problems in the current Schedule environment?
- ✓ How can transparency be improved in GSA Task Order Placement?
- ✓ What structural changes, if any, should be made to the Schedules Program?
- ✓ What improvements need to be made in the Acquisition Tools?
- ✓ How should the problem of "revolving" reforms be address?
- ✓ Does an agency's use of an FSS contract or an external GWAC present unique problems or issues that would not arise under a "home grown" multiple award indefinite delivery indefinite quantity (IDIQ) contract?
- ✓ What new developments might be affecting agency (particularly DOD) use of GSA Schedules and Government-wide Acquisition Contracts (GWACs)?

C. Recommendations:

The Task Force believes the recommendations outlined below will improve Federal service contracting, and assist all Federal agencies to maximize the clear and unique benefits afforded by Schedule contracts.

1. Enhancements to E-Buy. Enhancements to e-Buy and the use of e-Buy would enable GSA to better serve Federal buyers and would promote greater transparency, and therefore competition, in the placement of GSA orders.

- e-Buy is currently capable of transmitting Schedule opportunities across multiple SINs and schedules. By transmitting opportunities across schedules or schedule SINs, more vendors will become aware of opportunities, which in turn should enhance competition. It also would allow vendors to anticipate contract scope concerns, and propose solutions involving alternative or multiple schedule vehicles. There appears, however, to be a lack of awareness within the agency buying community of these capabilities. To address this problem, the Task Force recommends that the acquisition community request from GSA comprehensive e-Buy training to familiarize itself with these capabilities. This would enable agency buyers to utilize e-Buy in a manner that provides greater transparency and minimize concerns regarding out of scope contracting.

- At the same time, GSA should communicate to the GSA vendor community that opportunities are not necessarily confined to one Schedule vehicle and that vendors are encouraged to offer solutions that may offer alternative or additional Schedule vendors from the vehicles (if any) identified in the Government's solicitation

- Agency buyers frequently express frustration with having to enter procurement data into multiple databases when utilizing Schedule vehicles. First, the data must be entered into e-Buy. Then it must be entered in the unique procurement data base maintained by the various service branches or buying activities. An elegant solution to this process would be to incorporate into e-Buy a capability to "punch out" procurement data entered into e-Buy directly into the customer database.

- Buying agencies are collecting "spend analysis" and other data on the effectiveness of other agency contracting vehicles. This data should be required to be available for future evaluation to enable agencies' ability to assess the efficacy of other agency contract vehicles. Because the obligation to collect this data may become an obstacle to use of GSA Schedule vehicles, it would be desirable to incorporate into e-Buy the capability to generate the kinds of data agencies seek to collect and evaluate. GSA cannot, however, determine for the agencies the types of data to collect. The Task Force, therefore, recommends that the agencies be encouraged to reach out to GSA for assistance in identifying the types of data to be collected to enable GSA to support customer requirements to collect and analyze post performance contract data.

- An enhanced e-Buy capable of fulfilling the objectives described above would greatly assist DOD buyers in complying with the requirements of the October 29, 2004 DOD Policy Memorandum regarding the "Use of Non-DOD contracts."

2. Categorization of Services. The issue of service categories as presented on the various schedule vehicles was repeatedly cited as a source of confusion in the discussions. In particular, a concern was expressed that the present organization of services on the various services Schedules contributed to confusion regarding contract scope issues. As a preliminary step to addressing this concern, the Task Force recommends that GSA examine the service categorization that are needed to support various approaches (particularly those being used by DOD) for procuring services in the future.

3. Distinguishing "Assisted"(third Party) Procurement from "Unassisted" (Requiring agency) Procurement. There continues to be some confusion in the difference between "assisted" and "non-assisted" or direct procurement. Assisted procurement is where the agency requiring organization

forwards its requirement outside the agency for procurement by a third party using a third party agreement. A non-assisted procurement is where the agency has the authority to procure under the term of the third party agreement and uses its contracting officers to contract for the requirement – even from another agency. It would seem apparent that the agency would have greater control in a non-assisted procurement since the order would be placed under the discipline established within the agency. The Task Force expects that an agency contracting officer, applying agency discipline would present less a risk for funding and scope compliance than an assisted procurement. Accordingly, agency regulations should reflect this risk difference. In line with that, the Task Force fully supports the principals of the "Get it Right" campaign.

4. Clarifying the Message. Notwithstanding the statement in the October 2004 DOD Policy Memorandum allowing the use of third party vehicles, the reaction of the services in local implementation guidance seem to discourage the use of the proven acquisition tools like GSA Schedules. As noted above, there have been problems with assisted buys, but relatively little adverse information on unassisted buys. Given the clear benefits offered by the Schedules program, the message communicated to the acquisition community should recognize that the use of the Schedules is still perfectly appropriate when the requirements of the FAR and agency supplements are executed.

5. Training vs. Marketing. Notwithstanding the recent revisions to FAR Part 8.4 (Federal Supply Schedules) and GSA training efforts, many buying activities lack a working knowledge regarding the process for placing direct orders against Schedule contracts. In addition, many of these buying activities appear to feel that they have been compelled or herded by GSA in the direction of seeking assisted buying services. This, in turn, has lead to possible resentment by the buying activities that GSA is primarily interested in marketing assisted buying services, as opposed to providing training on the use of the Schedules. To address this concern, the Task Force has two recommendations:

- Agencies should be encouraged to request that GSA provide hands-on training on placing orders from Schedule vehicles.

- In recognition of the fact that there are instances where agency buyers will need active assistance to consummate procurement, agencies should be encouraged to request that GSA provide a reduced form of assisted buying services (think of it as "Assisted Light") wherein GSA representatives come into the agency and perform the assisted services on the customer's site.

6. Acquisition Tools. The development of enhanced acquisition tools would be highly beneficial to promote the use of Schedule contracts. Examples include templates for developing and documenting Acquisition Plans, and fulfilling the requirements of the October 29, 2004 DOD Policy Memorandum on the "Use of Non-DOD Contracts." The agencies and GSA should collaborate on these tools to provide the maximum benefit to the acquisition community.

PART 37 WORKING GROUP

VI. PART 37 WORKING GROUP

A. Executive Summary

Recognizing that increasing numbers of small businesses are participating in the Federal services market, a small business working group initially was created to review the legislative and regulatory guidance related to small business service contracting.

However, once established the working group determined that it was beyond its scope to resolve "hot button" issues such as contract bundling, set-asides, subcontracting goals or size standards; those issues would be better addressed by a future taskforce. Indeed, the Contract Services Association and the Professional Services Council also are involved in a separate special task force focused specifically on the issues centered around contract bundling. Therefore, the working group's efforts were refocused on doing a thorough section-by-section analysis of FAR Part 37 (Service Contracting) to determine which sections needed to be modified, or changed, particularly with an eye to providing contracting officers sufficient guidance in using small businesses as service providers.

There was an initial discussion amongst the working group as to whether FAR Part 37 was necessary – or should it be eliminated, and references to service contracting be "beefed up" in other relevant FAR sections? The "Acquisition Management and Planning" working group also discussed the need for FAR Part 37, but deferred the full review to the Part 37 working group. If FAR Part 37 is to retained, the Task Force felt that references to small business were lacking, or even non-existent in FAR Part 37. If a contracting officer solely relied on FAR Part 37 to conduct service contracting, that individual would never know that there are specific requirements that must be fulfilled relating to small business. The Task Force, therefore, recommends initial changes to FAR Part 37 to address those small business contracting concerns – as well as a number of other substantive changes to FAR Part 37. The Task Force, however, believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned elsewhere in the FAR.

B. Initial Findings and Recommendations

The following summarizes the Task Force's recommendations for changes to FAR Part 37 to incorporate references to small business. The Task Force also made several general recommendations on the relevancy of certain sections of FAR Part 37 in today's contracting environment, and in light of the other Task Forces' analysis.

- Under scope, the Task Force suggests that the language referencing other service type contracting, as well as the Service Contract Act, might be more appropriately handled (or is already addressed) in other sections of the FAR. The Task Force also recommended adding a reference to requirements for set-aside contracts for small businesses.

- Under definitions, consistent with the findings of the "Categories of Services" working group, the Task Force determined that it was not necessary to identify individual categories of services – and instead recommended a minor clarification to the definition of a service contract. The Task Force recommends deleting the special definition for childcare services; whether it should be incorporated elsewhere in the FAR is left to the FAR Council to decide.

- As to Policy guidance, the Task Force recommended that a new section be added requiring the agency to recognize and utilize, where possible, socioeconomic provisions for small businesses found in FAR Part 19. The Task Force also recommends including language related to competition requirements

(moved from FAR Part 37.105), and also moving a provision related to inherently governmental functions to a new section, entitled "special acquisitions." Other language that is more appropriately addressed (or is already covered) in other sections of the FAR should be eliminated.

- The Task Force recommended that a new paragraph be added to FAR 37.103 (Contracting Officer Responsibilities) to ensure that due consideration is given to whether the acquisition should be reserved for small businesses.

- Language authorizing small business set-asides is recommended for inclusion in FAR 37.104 (Personal services contracts).

- Relative to the requirements in FAR Part 37.105 (Competition and Service Contracting), the Task Force recommends deleting this separate subpart and incorporating it into the policy statement at subpart 37.102.

- The Task Force recommends eliminating the separate reference (at FAR Part 37.108) to the Small Business Administration's Certificate of Competency and moving it to FAR Part 37.102 (Policy). The separate reference to the Service Contract Act (at FAR Part 37.107) would be moved to a new section (FAR Part 37.109) that also covers uncompensated overtime.

- Several other subparts in FAR Part 37.1 are recommended for deletion.

A line-in/ line-out of the specific recommendations to FAR Part 37.1 is found in *Attachments 13*. *Attachment 14* includes suggestions are how the various subparts in Part 37 may be realigned with other parts of the FAR should that eventually be considered.

Attachment 13 Line-in/ Line-out Recommendations of FAR Part 37 (Service Contracting)

37.000 Scope of part.

This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see Part 11) ~~(see Subpart 37.6)~~. This part also requires that contracting officers set-aside for small businesses all procurements for services performed in the United States exceeding $100,000 if there is a reasonable expectation of receiving offers at fair market value prices from at least two responsible small businesses concerns (see Subpart 19.502-2(b)). ~~Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39; and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).~~
[Strikeout should be moved to another section – to be determined.]

37.101 Definitions.

As used in this part-

~~"Child care services" means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching) foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.~~

"Nonpersonal services contract" means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

"Service contract" means a contract that requires that the ~~directly engages the time and effort of a~~ contractor ~~whose primary purpose is to perform~~ primarily perform an identifiable task which results in a deliverable other than a supply or product ~~rather than to furnish an end item of supply~~. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. ~~Some of the areas in which service contracts are found include the following:~~

~~(1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization or modification of supplies, systems or equipment.~~
~~(2) Routine recurring maintenance of real property.~~
~~(3) Housekeeping and base services.~~
~~(4) Advisory and assistance services.~~
~~(5) Operation of Government-owned equipment facilities, and systems.~~
~~(6) Communication services.~~
~~(7) Architect-Engineering (see Subpart 36.6).~~
~~(8) Transportation and related services (see part 47).~~
~~(9) Research and development (see Part 35).~~

37.102 Policy.

~~(a) Performance-based contracting (see Subpart 37.6) is the preferred method for acquiring services (Public Law 106-398, section 821).~~ *[The strikeout should be moved to Part 11]*
(a) When acquiring services, including those acquired under supply contracts, agencies must-
(1) Use performance-based contracting methods to the maximum extent practicable, as set forth in Part 11.
~~(i) Architect-engineer services acquired in accordance with 40 U.S.C. 541-544 (see Part 36);~~
~~(ii) Construction (see Part 36);~~
~~(iii) Utility services (see Part 41); or~~
~~(iv) Services that are incidental to supply purchases, and~~

(2) Use the following order of precedence (Public Law 106-398, section 821(a));
(i) A firm-fixed price performance-based contract or task order.
(ii) A performance-based contract or task order that is not firm-fixed price.
(iii) A contract or task order that is not performance-based.

~~(b) Agencies shall generally rely on the private sector for commercial services (see OMB Circular A-76, Performance of Commercial Activities, and Subpart 7.3)~~
~~(c) Agencies shall not award a contract for the performance of an inherently governmental function.~~
[Strikeouts moved to old Subpart 37.114 (new 37.108)]

~~(d)~~ (b) Non-personal service contracts are proper under general contracting authority.
~~(e)~~ (c) Agency program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.
~~(f)~~ (d) Agencies shall establish effective management practices in accordance with Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting, to prevent fraud, waste, and abuse in service contracting.
~~(g)~~ (e) Services are to be obtained in the most cost-effective manner, without barriers to full and open competition, and free of any potential conflicts of interest.
~~(h)~~ (f) Agencies shall ensure that sufficiently trained and experienced officials are available within the agency to manage and oversee the contract administration function.

(g) Agencies shall establish procedures to ensure that service contracts are awarded to small businesses to the maximum extent possible and that on contracts awarded to other than small businesses there are subcontracting plans in place to ensure that the maximum subcontracting opportunities are available for small businesses.
(h) In those service contracts for which the Government requires the highest competence obtainable, as evidenced in a solicitation by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures may not apply (see Subpart 19.6).
(i) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).
(j) The provisions of statute and Part 6 is this regulation requiring competition apply fully to service contracts. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.

37.103 Contracting officer responsibility.

(a) The contracting officer is responsible for ensuring that a proposed contract for services is proper. For this purpose the contracting officer shall-
(1) Determine whether the proposed service is for a personal or nonpersonal services contract using the definitions at 2.101 and 37.101 and the guidelines in 37.104;
(2) Determine whether there are small businesses available to perform the service.
~~(2)~~ (3) In doubtful cases, obtain the review of legal counsel; and
~~(3)~~ (4) Document the file (except as provided in paragraph (b) of this section) with-
(i) The opinion of legal counsel, if any,
(ii) A memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), and the conclusion that there are no small businesses available to perform the services.
(iii) Any further documentation that the contracting agency may require.
(b) Nonpersonal services contracts are exempt from the requirements of paragraph (a)(3) of this section.
(c) Ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.
(d) Ensure that reasonable efforts are undertaken to ascertain whether it is likely that the agency will receive offers from at least two small businesses capable of performing the work.

~~Ensure that contracts for child care services include requirements for criminal history background checks on employees who will perform child care services under the contract in accordance with 42 U.S.C. 13041, as amended and agency procedure.~~
[Strikeout should be moved to another section (to be determined) and combined with definition of "child care services" in 37.101 – if it is determined that this reference should remain]

37.104 Personal services contracts.

(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.
(b) Agencies shall not award personal services contracts unless specifically authorized by statute (*e.g.*, 5 U.S.C.3109) to do so. Agencies shall set aside personal service contracts for award to small businesses if there is a reasonable expectation of receiving offers at fair market prices from at least two responsible small business concerns.
(c)(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.
(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial

number of contractor employees would have to be taken strongly into account (see (d) of this section).
(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:
(1) Performance on site.
(2) Principal tools and equipment furnished by the Government.
(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
(5) The need for the type of service provided can reasonably be expected to last beyond 1 year.
(6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to-
(i) Adequately protect the Government's interest;
(ii) Retain control of the function involved; or
(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.
(e) When specific statutory authority for a personal service contract is cited, obtain the review and opinion of legal counsel.
(f) Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements which apply in acquiring the personal services of experts or consultants in this manner (*e.g.*, benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

~~37.105 Competition in service contracting.~~
~~(a) Unless otherwise provide by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).~~
~~(b) The provisions of statutes and Part 6 is this regulation requiring competition apply fully to service contract. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.~~
[Strikeouts moved to 37.102(i) and (j)]

37.1056 Funding and term of service contracts.

(a) When contracts for services are funded by annual appropriations, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section for certain service contracts, 32.703-2 for contracts conditioned upon availability of funds, and 32.703-3 for contracts crossing fiscal years).
(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 253l). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.
(c) Agencies with statutory multiyear authority shall consider the use of this authority to encourage and promote economical business operations when acquiring services.

~~37.107 Service Contract Act of 1965.~~
~~(a) The Service Contract Act of 1965 (41 U.S.C. 351-357) (the Act) provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts. Whether~~

~~or not the Act applies to a specific service contract will be determined by the definitions and exceptions given in the Act, or implementing regulations.~~
[Strikeout moved to old 37.115 (new 37.109)]

~~37.108 Small business Certificate of Competency~~
~~In those service contracts for which the Government requires the highest competence obtainable, as evidenced in a solicitation by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures may not apply (see Subpart 19.6).~~
[Strikeout moved to 37.102(h)]

~~37.109 Service of quasi-military armed force:~~
~~Contracts with "Pinkerton Detective Agencies or similar organizations" are prohibited by 5 U.S.C. 3108. This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a "quasi-military armed force," even though the guards are armed or the organization provides general investigative or detective services. (See 57 Comp. Gen. 524.)~~
[Strikeout should be moved to other section (to be determined)]

37.106 ~~110~~ Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.237-1, Site Visit, in solicitations for services to be per-formed on Government installations, unless the solicitation is for construction.
(b) The contracting officer shall insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated.
(c) The contracting officer may insert the clause at 52.237-3, Continuity of Services, in solicitations and contracts for services, when-
(1) The servic es under the contract are considered vital to the Government and must be continued without interruption and when, upon contract expiration, a successor, either the Government or another contractor, may continue them; and
(2) The Government anticipates difficulties during the transition from one contractor to another or to the Government. Examples of instances where use of the clause may be appropriate are services in remote locations or services requiring personnel with special security clearances.
(d) See 9.508 regarding the use of an appropriate provision and clause concerning the subject of conflict-of-interest, which may at times be significant in solicitations and contracts for services.
(e) The contracting officer shall also insert in solicitations and contracts for services the provisions and clauses prescribed elsewhere in 48 CFR Chapter 1, as appropriate for each acquisition, depending on the conditions that are applicable.

37.107 ~~111~~ Extension of services.

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause (see 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

~~37.112 Government use of private sector temporaries~~
~~Contracting officers may enter into contracts with temporary help service firms for the brief or intermittent use of the skills of private sector temporaries. Services furnished by temporary help firms shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. Acquisition of these services shall comply with the authority, criteria, and conditions of 5 CFR part 300, Subpart E, Use of Private Sector Temporaries, and agency procedures.~~
[Strikeout should be moved to other section (to be determined)]

~~37.113 Severance payment to foreign national~~

~~37.113-1 Waiver of cost allowability limitations~~

~~(a) The head of the agency may waive the 31.205-6(g)(6) cost allowability limitations on severance payments to foreign nationals for contracts that~~
~~(1) Provide significant support services for~~
~~(i) Members of the armed forces stationed or deployed outside the United States, or~~
~~(ii) Employees of an executive agency posted outside the United States; and~~
~~(2) Will be performed in whole or in part outside the United States.~~
~~(b) Waivers can be granted only before contract award.~~
~~(c) Waivers cannot be granted for~~
~~(1) Military banking contracts, which are covered by 10 U.S.C. 2324(e)(2); or~~
~~(2) Severance payments made by a contractor to a foreign national employed by the contractor under a DOD service contract in the Republic of the Philippines, if the discontinuation of the foreign national is the result of the termination of basing rights of the United States military in the Republic of the Philippines (section 1351(b) of Public Law 102-484, 10 U.S.C. 1592, note).~~

~~37.113-2 Solicitation provision and contract clause~~

~~(a) Use the provision at 52.237-8, Restriction on Severance Payments to Foreign Nationals, in all solicitations that meet the criteria in 37.113-1(a), except for those excluded by 37.113-1(c).~~
~~(b) When the head of an agency has granted a waiver pursuant to 37.113-1, use the clause at 52.237-9, Waiver of Limitation on Severance~~
~~Payments to Foreign Nationals.~~

[Strikeouts should be moved to other section (to be determined)]

37.108 Special acquisition requirements.

(a) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Performance of Commercial Activities and Subpart 7.3).
(b) Contracts for services which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority. Agencies must ensure that-
~~(a)~~ (i) A sufficient number of qualified Government employees are assigned to oversee contractor activities, especially those that involve support of Government policy or decision making. During

performance of service contracts, the functions being performed shall not be changed or expanded to become inherently governmental.
~~(b)~~ (ii) A greater scrutiny and an appropriate enhanced degree of management oversight is exercised when contracting for functions that are not inherently governmental but closely support the performance of inherently governmental functions (see 7.503(c)).
~~(c)~~ (iii) All contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious to third parties are required to identify themselves as such to avoid creating an impression in the minds of members of the public or Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. They must also ensure that all documents or reports produced by contractors are suitably marked as contractor products or that contractor participation is appropriately disclosed.

37.109 ~~115~~ Service Contract Act of 1965 and Uncompensated overtime.

37. 109-1 Scope.

The policies in this section are based on the Service Contract Act of 1965 (41 U.S.C. 351-357) and Section 834 of Public Law 101-510 (10 U.S.C. 2331).

37.109-2 General policy.

(a) The Service Contract Act of 1965 (41 U.S.C. 351-357) (the Act) provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts. Whether or not the Act applies to a specific service contract will be determined by the definitions and exceptions given in the Act, or implementing regulations.
~~(a)~~ (b) Use of uncompensated overtime is not encouraged.
~~(b)~~ (c) When professional or technical services are acquired on the basis of the number of hours to be provided, rather than on the task to be performed, the solicitation shall require offerors to identify uncompensated overtime hours and the uncompensated overtime rate for direct charge Fair Labor Standards Act-exempt personnel included in their proposals and subcontractor proposals. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.
~~(c)~~ (d) Contracting officers must ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to fulfill the Government's requirements (see 15.305 for competitive negotiations and 15.404-1(d) for cost realism analysis). When acquiring these services, contracting officers must conduct a risk assessment and evaluate, for award on that basis, any proposals received that reflect factors such as-
(1) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and
(2) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

37. ~~115~~ 109-3 Solicitation provision.

The contracting officer shall insert the provision at 52.237-10, Identification of Uncompensated Overtime, in all solicitations valued above the simplified acquisition threshold, for professional or technical services to be acquired on the basis of the number of hours to be provided.

Attachment 14 – Recommendations related to relocation of sections of FAR Part 37

There was an initial discussion as to whether FAR Part 37 was necessary – or should it be eliminated, and references to service contracting be "beefed up" in other relevant FAR sections? While deciding to maintain Part 37 at this time, with recommended interim revisions, the Task Force believes that further analysis is necessary to determine whether the policies in FAR Part 37 would be better realigned elsewhere in the FAR.

The following recommendations should serve as a starting point for that review.

- Definitions in Section 37.101 should be moved to FAR Part 2.101 (other than the definition of "child care services", which should be embedded with the one sentence policy in 37.103(d)).
- Section 37.102 (Policy) and paragraph (e) of 37.103(Contracting Officer Responsibility) should be merged with Subpart 37.6 and relocated in Part 11 (Describing Agency Needs).
- Sections 37.103 (Contracting Officer Responsibility), 37.104 (Personal Services Contracts) and 37.112 (Government Use Of Private Sector Temporaries) should be merged and relocated in Part 11 (Describing Agency Needs).
- Section 37.105 (Competition In Service Contracting) should be deleted.
- Section 37.106 (Funding And Term Of Service Contracts) and paragraph (c) of 37.110 (Solicitation provisions and contract clauses) should be relocated in Subpart 32.7 (Contract Funding).
- Section 37.107 (Service Contract Act) should be deleted (see Subpart 22.10).
- Section 37.108 (Small Business Certificate of Competency) should be relocated in Part 9 (Contractor Qualifications).
- Sections 37.109 (Services of Quasi-Military Armed Forces) should be relocated in Part 11, (Describing Agency Needs).
- Paragraphs (a) and (b) of Section 37.110 (Solicitation provisions and Contract Clauses) should be relocated in Part 11 (Describing Agency Needs).
- Paragraphs (d) and (e) of Section 37.110 (Solicitation provisions and Contract Clauses) should be deleted.
- Section 37.111 (Extension of Services) should be relocated in Subpart 32.7 (Contract Funding).
- Section 37.113 (Severance Payments To Foreign Nationals) should be relocated in Part 31, (Contract Cost Principles and Procedures).
- Section 37.115 (Uncompensated Overtime) should be relocated to Subpart 22.1 (Professional Employee Compensation).

- Sections 37.2 (Advisory and Assistance Services) and 37.114 (Special Acquisition Requirements) should be merged with Subparts 9.5 (Organizational and Consultant Conflicts of Interest) and 7.5 (Inherently Governmental Functions).

- Section 37.3 (Dismantling, Demolition, Or Removal of Improvements) should be relocated in Part 36 (Construction and Architect-Engineer Contracts).

- Section 37.4 (Nonpersonal Health Care Services) should be relocated in Part 11 (Describing Agency Needs).

- Section 37.5 (Management Oversight of Services Contracts) should be relocated in Part 46 (Quality Assurance).

- Section 37.6 (Performance-Based Contracting) should be relocated in Part 11 (Describing Agency Needs). The name of Part 11 should be changed to "Performance-Based Acquisition"; and the applicability should be to any contract for services, and also to any other contract that requires a statement of objectives or statement of work.

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