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THE STATE OF FEDERAL CONTRACTING: OPPORTUNITIES AND CHALLENGES FOR STRENGTHENING GOVERNMENT PROCUREMENT AND ACQUISITION POLICIES

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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THE STATE OF FEDERAL CONTRACTING: OPPORTUNITIES AND CHALLENGES FOR STRENGTHENING GOVERNMENT PROCUREMENT AND ACQUISITION POLICIES

TUESDAY, JUNE 16, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
ORGANIZATION, AND PROCUREMENT,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 2154, Rayburn House Office Building, Hon. Diane E. Watson (chairwoman of the subcommittee) presiding.

Present: Representatives Watson, Connolly, Cuellar, Quigley, Bilbray, and Duncan.

Staff present: Bert Hammond, staff director; Valerie Van Buren, clerk; Adam Bordes and Deborah Mack, professional staff; Dan Blankenburg, minority director of outreach and senior advisor; Adam Fromm, minority chief clerk and Member liaison; Stephen Castor, minority senior counsel; and Ashley Callen, minority counsel.

Ms. WATSON. The Subcommittee on Government Management, Organization, and Procurement of the Committee on Oversight and Government Reform will now come to order.

Today's hearing will examine our current laws and regulations governing agency procurement and acquisition practices and review plans for implementing new requirements contained in recently enacted legislation.

The subcommittee will also seek additional information from administration witnesses about his priorities and objectives for improving governmentwide procurement and acquisition policies.

If there are opening statements, written statements and other materials, without objection, the Chair and ranking minority member will have 5 minutes to make opening statements followed by opening statements not to exceed 3 minutes by any Member who seeks recognition.

Without objection, Members and witnesses may have 5 legislative days to submit a written statement or extraneous materials for the record.

I want to welcome today's witnesses and open the hearing on what is the subcommittee's first attempt of this Congress to strategically examine the state of Federal procurement throughout our civilian and military agencies. And our distinguished witnesses

from both panels will be giving testimony. We look forward to their testimony.

Before we begin, however, I regret to inform my colleagues that the Office of Management and Budget, despite my continued efforts to persuade them otherwise, have declined to provide us a witness this morning.

At the beginning of this Congress, I was looking forward to having a new administration, because refusal to testify before this committee became all too commonplace with this administration's predecessor. President Obama, to his credit, has made it clear that he understands the value and the necessity for strong oversight and government programs. And I will give him a little credit; I do think they are waiting for their chief administrator. But, still, I think they needed to send somebody.

So today's hearing is a broadbased discussion on just beginning to open up the process of Federal procurement, something that cost our government over half a trillion dollars annually. I believe not having OMB at the table this morning makes our duty to perform diligent oversight on these topics all the more difficult. I strongly encourage the White House to become engaged with our committee on these matters so we can have a more constructive and cohesive relationship moving forward.

The Federal Government is the largest global purchaser of goods and services, spending $517 billion last year alone.

This amount is more than double of what was spent on contracting at the beginning of this decade, with a significant portion dedicated to our increased needs in the areas of homeland and national security.

At the same time, our government's shrinking acquisition work force has fewer hands on deck to manage the escalating number of contracts that are awarded annually.

These factors have contributed greatly to a less competitive contracting process with little oversight, which results in explosive cost and uneven incomes for both civilian and military programs or outcomes.

According to the GAO, our government's procurement and acquisition deficits, deficiencies, are considered to be a high-risk management challenge across multiple agencies.

At DOD alone, GAO recently reported approximately $296 billion in cost overruns of 95 major weapons systems under development. Other significant contracting deficiencies at our agencies include the excessive awarding of contracts to contractors that have been disbarred, suspended, or have been performing poorly.

It should be noted that many of these issues were echoed in other GAO work examining the role of contractors involved with contingency operations in Iraq and Afghanistan as well as a recent interim report to Congress from the Commission on Wartime Contracting.

So today I am hoping our agency witnesses will tell us what changes are underway to remedy the problems identified by GAO and those cited in previous congressional oversight proceedings. In particular, I am interested in hearing how both our civilian and military agencies are adhering to the new contracting requirements

and changes authorized in the recently enacted stimulus legislation and Clean Contracting Act.

I also would like to hear how our stakeholder panelists are meeting the compliance challenges associated with these changes while striving to improve the quality of services they provide.

Once again, I am sorry that OMB is not with us today so we could hear their views, but we will have to proceed without their input. And I will guarantee you that in the very near future, someone will come in from that agency.

So with that, I thank our panel for joining us today and look forward to their testimony.

And I would like now to go to the ranking member.

Mr. BILBRAY. Thank you, Madam Chair.

Madam Chair, I want to thank you for this hearing, and I know this goes on procedurally to always thank the Chair for the hearing, but I think that the more that we find out about the challenges of accountability in the budget, the more we realize, especially in our procurement subcommittee, what a huge task we have before us.

Madam Chair, I think that we will all agree that previous administrations have been, let's just say, let down by the lack of oversight, especially the last administration. And, sadly, I think that there are people on both sides of the aisle and on both sides of this dais that perceive oversight as an adversarial relationship.

Sadly, that is the perception, but I would have to say that oversight should be perceived about as adversarial as a safety check up when you go to your Virginia or your D.C. DMV. They require you to check to make sure that the brakes work, that the windshield wipers are on, that the safety devices are working.

And to perceive our procedure as adversarial would be just as much as saying that I resent going in and making sure that my windshield wipers will work when the rain starts coming down, that my brakes are not going to fail when I need it in a panic stop. I think that we have to understand this may be a bit of a nuisance to everybody who has to play it, but in reality, it is essential to be able to make the system work.

The Founding Fathers never meant that the executive branch would operate in isolation; that the oversight of the Congress was an essential part of the plan. And, sadly, with such an essential component like OMB, they not only place us in a situation, missing at this time, they not only place us in a situation of not being able to fulfill our responsibilities to work with them, but the fact is they blind us. This is almost like the windshield wipers have gone out today because they don't have a critical component here, and so we will have a blind spot. And hopefully by working with the administration, we can take care of that blind spot and get them to participate in this.

So I would just like to say that I think that the Chair has approached this in an appropriate manner. We are here to make sure or to do all we can too avoid the problems of the past, to learn from the failures of the previous administration, and to help this administration get over those humps and address the challenges of the future.

And we are part of the team, but we have to have the team working together. We need all of us in the huddle, and right now, we have a major, let's just call it a running back, that is missing in this huddle, and hopefully we can get that running back out from wherever he or she is and back in this huddle.

So, Madam Chair, I will ask that my written opening statement be introduced into the record and just state that I hope that in the future, we have the whole team huddling up to address this challenge.

[The prepared statement of Hon. Brian P. Bilbray follows:]

EDOLPHUS TOWNS, NEW YORK
CHAIRMAN

DARRELL E. ISSA, CALIFORNIA
RANKING MINORITY MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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Statement of Rep. Brian Bilbray, Ranking Republican Member
Subcommittee on Government Management,
Organization, and Procurement

"The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
June 16, 2009

Thank you Chairwoman Watson for holding this hearing.

Today the Subcommittee examines one of its top priorities – federal acquisition policy.

I would like to note at the outset the absence of a witness from the White House Office of Federal Procurement Policy – the office charged with leading the implementation of the Administration's acquisition strategy – is unfortunate. Either the Administration is snubbing our Committee or it admittedly does not have the personnel in place to coordinate federal procurement policy. Either way, it is not a good sign.

The challenges facing our acquisition system are greater than ever before. Since 2001, the U.S. has experienced dynamic changes in the areas of military operations and homeland security. The tragedy of 9-11, the wars in Iraq and Afghanistan, spectacular natural disasters like Hurricane Katrina, and the alarming rise in the effects of illegal immigration have imposed new acquisition obligations on the federal government.

The amount of taxpayer dollars expended by federal agencies on an annual basis continues to substantially increase. Spending by the agencies in Fiscal Year 2008 was up 13 percent over Fiscal Year 2007. Last year, including purchase card transactions, the Federal government spent $546 billion on goods and services. Approximately seventy percent of this was by the Defense Department.

The trend in acquisition policy is to better-position the government to take advantage of commercial items and to leverage resources across the agencies.

Under the GSA Multiple Award Schedule program, long-term governmentwide contracts are negotiated with commercial firms. The GSA Schedule program allows agencies access to over 11 million commercial goods and services through increasingly innovative ordering systems.

The GSA Schedules program is one of a number of initiatives employed to encourage agencies to use commercially available goods and services. Agencies are encouraged to carefully examine their requirements with a view towards increasing the number of competitive bids for each contract. To the extent agencies can conform their needs to what is most readily available in the commercial marketplace, opportunities for increased cost savings and better overall supplier performance will continue.

The key to leveraging these inter-agency initiatives, however, is strong leadership from OMB and the Office of Federal Procurement Policy.

Currently this office is without a Director. We are having today's hearing without a witness from this important office. This raises some obvious questions about whether the Administration is intent on making federal acquisition policy a priority.

Thank you again. We look forward to today's testimony.

Ms. WATSON. Thank you, and I now yield to Mr. Connolly of Virginia.

Mr. CONNOLLY. I want to thank you, Chairwoman Watson, for holding this subcommittee hearing and for your ongoing efforts to address the need of acquisition reform in particular.

We have made some progress in raising awareness of the challenges and opportunities we face. I have noticed more references to the pending Federal brain drain recently whereby one-third of the Federal work force will be eligible for retirement by 2012 and nearly half within the decade.

There also seems to be more awareness about the lack of growth in acquisition personnel during the previous administration, even as the value of contracts doubled.

These are all positive signs, that is to say the recognition of the problem, because at the heart of all the challenges and opportunities of acquisition policy is our personnel.

I am personally gratified that there's a growing recognition of the challenge which may represent the single greatest opportunity for this subcommittee, Madam Chairwoman, to have a substantial positive impact on Federal policy. With a sufficient number of highly skilled properly compensated staff, we can address our most pressing contracting issues, the caliber and quantity of our personnel matters, more than the volume of regulations within which we will have contractors operate.

Properly compensated acquisition personnel with good benefits have less of an incentive to leave the government and go work in the private sector side of contracting. This addresses both the need to increase our work force and avoids conflicts of interest that can arise with a revolving door between government and the private sector.

A strong salary and benefit package can both attract and retain the highly skilled personnel whose acumen will be necessary to manage increasingly large, complex contracts. This committee has been making progress on this part with the Federal Retirement Reform Act. Though the Senate has not taken up these reforms yet, we have made significant progress in the House.

The Paid Parental Leave Act is also an important part of our comprehensive effort to improve compensation packages with which to recruit and retain Federal workers. One area we have not yet addressed legislatively is telework. I hope this committee, Madam Chairwoman, will have a hearing and mark up H.R. 1722, the Telework Improvement Act. Today's employees demand those kinds of benefits, and they will help us in both recruitment and retention.

There are procedural reforms we also need to make, and I know we will get into those. But I do believe, Madam Chairwoman, that this hearing will be very helpful as we examine the challenges we are facing in the Federal work force, particularly those in acquisition and management of large complex contracts.

I thank the Chair.

[The prepared statement of Hon. Gerald E. Connolly follows:]

Opening Statement of Congressman Gerald E. Connolly

Subcommittee on Government Management, Organization, and Procurement

"The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"

June 16th, 2009

Thank you, Chairwoman Watson for holding this Subcommittee hearing and for your ongoing efforts to address the need for acquisition reform. We have made some progress in raising awareness of the challenges and opportunities we face. I have noticed more references to the pending federal brain drain recently, wherein one third of federal employees will be eligible for retirement by 2012 and nearly half within a decade. There also seems to be more awareness about the lack of growth in acquisition personnel during the previous administration, even as the value of contracts doubled. These are all positive signs because at the heart of all the challenges and opportunities of acquisition policy is our personnel. I am personally gratified that there is a growing recognition of this challenge, which may represent the single greatest opportunity for this Subcommittee to have a substantial positive impact on federal policy.

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A strong salary and benefits package can both attract and retain the highly skilled personnel whose acumen will be necessary to manage increasingly large, complex contracts. This Committee has been making progress on this front with the Federal Retirement Reform Act. Though the Senate has not taken up these reforms yet, we have made significant progress in the House. The Paid Parental Leave Act is also an important part of our comprehensive effort to improve compensation packages. One area we have not addressed legislatively is telework: I hope this Committee will have a hearing and mark up H.R. 1722, the Telework Improvements Act. Today's employees demand these kind of benefits that encourage a healthy work/family balance, and it is incumbent upon us to report this legislation so that it has a chance of passing in the 111th Congress.

There are procedural reforms we also need to make. We cannot continue to allow contractors to conduct oversight of other contractors' contracts. This system seems designed to create conflicts of interest, which is why the contracting community itself would like to see it reformed. Elimination of this process represents an outstanding opportunity to insource tasks that most groups recognize as inherently governmental. We also need to create incentives for our acquisition staff to manage contracts for longer periods of time. Turnover in contract management creates more cost for contractors and, more importantly, reduces our capacity for oversight.

Even reforms such as these, implemented correctly, are still personnel oriented. We need to let our skilled acquisition workforce manage contracts in a time frame that is related to the contract itself. We need to let federal employees conduct oversight of contracts with private entities. Ultimately, we need to retain and hire good staff and compensate them appropriately. I think this has been the central lesson we have learned from this Subcommittee and Committee's work thus far, and I hope that we may explore it further today.

Questions for Panel #1 (gov't acquisition employees from OMB, DoD, GSA):

Q: What factors do you consider when deciding whether to insource or outsource a particular function, and what feedback have you received about outsourcing and insourcing decisions?

Q: It seems that short tenures of contract managers is a common problem that drives up costs and potentially reduces the quality of the product. What is the average length of stay for contract managers overseeing private contracts on behalf of the federal government?

Q: Frequent changes in contract managers, changing conditions in the field, and other factors often cause agencies to change aspects of contract requests in the midst of a contract being fulfilled. How much of an impact does this have on cost overruns?

Questions for Panel #2 (industry, union reps, advocacy):

Q: Do federal agencies seem to have a consistent and rational method of deciding whether to insource or outsource different tasks?

Q: Is it your experience that contract managers on the federal side often have short tenures or high turnover?

Q: Is it your experience that agencies often change project requests after contracts have been signed, and does this have any impact on costs generally or cost overruns in particular?

Ms. WATSON. Thank you.

I now yield to Mr. Duncan of Tennessee.

Mr. DUNCAN. Well, thank you very much, Madam Chairwoman, and thank you for calling this very important hearing.

I regret that some other previously scheduled meetings are not going to allow me to be here for much of it, but I do want to express some concerns that I have, and hopefully maybe the witnesses will later address some of these.

I remember last year when we had the hearing on steroids and had Roger Clemens, the famous baseball player, and this room was packed with reporters and the cameras. And the next week we had a hearing, another hearing, on reforming the Federal contracting process, much more important, and no reporters and no cameras. And that's sort of the way this is in our celebrity age that we live in. Although I do think that our steroid hearings did some good in calling to the attention of young athletes and their families to the dangers of steroids, but this is a very, very important topic.

And the concern I have was touched on by the gentleman from Virginia just now when he talked about the revolving door between the government and the government contractors. We see that most clearly in the Defense Department. I remember 4 or 5 years ago reading an article in the International Herald Tribune about the revolving door at the Pentagon and how that all the big Defense contractors and small Defense contractors hire all the retired admirals and generals.

And then as a result of that, we saw about a year ago, when the GAO came out with a report and said that the Defense Department have had $295 billion in cost overruns on just their 72 largest weapons systems.

That should have just shocked and horrified people, especially anybody that considers themselves to be a fiscal conservative, because they have almost a $295 billion cost overrun on just their 72 largest contracts and didn't count all the cost overruns that might have been present in the thousands of other large-, medium-, and small-sized contracts.

But it seems to me, when you look deeply into any Federal contract, it's always some sort of sweetheart insider-type deal, because—not only the Pentagon—but almost all the government contractors hire former Federal employees, former high-ranking Federal employees. And then they go back to the Department's agencies for which they worked, and they get these lucrative sometimes, just ridiculously exorbitant contracts, and that shouldn't be going on.

It's gone on, I guess, for almost forever, and I suppose we can't stop it, but I wish there was something we could do to stop all these sweetheart insider transactions that are found in almost every Federal contract.

Thank you.

Ms. WATSON. Mr. Quigley of Illinois.

Mr. QUIGLEY. Thank you, Madam Chairwoman.

Is it appropriate to ask you if OMB has given you a reason for not appearing?

Ms. WATSON. They have said that they don't have a director. And we suggested that someone come over, and they pretty much said they were told not to send anyone.

Mr. QUIGLEY. They pretty much said what?

Ms. WATSON. That they were told not to send anyone. So we will be following it. There will be somebody here next time.

Mr. QUIGLEY. And I guess just to respond, if they don't feel that they can be here because they don't have a director, I hope they can act appropriately otherwise and things don't stop functioning.

But, again, I thank you for your efforts here and just simply would ask that my written remarks be given to the record.

[The prepared statement of Hon. Mike Quigley follows:]

Mike Quigley

I want to thank Chairwoman Watson for convening this hearing today.

And I want to thank our panel of experts for their time and for sharing their expertise with us.

Since 2001, we have seen a distinct shift toward the use of private contractors and away from the use of in-house government workers.

In fact, the portion of private contractors at the Pentagon grew to 39 percent of its workforce, from the previous 26 percent prior to September 11.

And in the last eight years, government contracts have more than doubled to $500 billion.

With so many of our tax dollar flowing to private contractors, we must ensure that our investments are being spent efficiently and wisely.

Unfortunately, numerous reports continue to reveal that millions of taxpayer dollars are being wasted and abused.

The GAO investigated 95 major defense projects and found cost overruns that totaled $295 billion.

This kind of unnecessary spending is unacceptable.

As Department of Defense spending comprises almost three quarters of the government's total procurement -

I am especially interested to learn what can be done to reform defense procurement.

Thank you again Chairwoman Watson for calling attention to the issue of government acquisition.

I look forward to working with you and the other subcommittee members to find concrete solutions to the pervasive issues that plague our acquisition system.

Ms. WATSON. Without objection.

Mr. Cuellar.

Mr. CUELLAR. Thank you, Madam Chair.

Again, thank you for holding this important meeting.

I also am disappointed that they couldn't send somebody. I know they could have sent somebody. I am sure they have a higher upper that could have come here, to at least be up here and give limited testimony.

I strongly disagree when an agency does that, when the legislators are calling for oversight, and they don't even have the courtesy at sending somebody at least to provide some limited information. I hope that when that arises in the future, we could huddle up a little bit before and talk about some steps we could take to make sure it doesn't happen again. I am sure they are going to send somebody next time, but there's always somebody they can send, even if it's in a limited testimony.

Ms. WATSON. Well noted, Mr. Cuellar.

Mr. CUELLAR. Thank you.

Madam Chairman, this is an important hearing because I think, as the Members have said, this procurement has become very complex, has become very costly.

When you look at the services part of it, there's always the question, what is government supposed to be doing? What is the private sector? Who is doing what? I think it's about, what, 60 percent of the procurement might be in services. So there's a lot of questions.

But one of the things that we certainly would like to see is what SARA, the Acquisition Advisory Board, and I think GAO have also come up with significant policy recommendations, and I am one of those who, I don't like to see reports, but if there are some good recommendations, I hope that we could implement, help implement some of those recommendations.

Because I know the GAO and the other folks do a lot of work. Some of those recommendations might not work, but I know a lot of them are good recommendations. And I hope we can have a followup on some recommendations on that.

But otherwise, Madam Chair, I appreciate all the work that you are doing.

Ms. WATSON. I just want to explain to the Members and the audience, this is a beginning of a series of hearings on competitiveness, procurements, etc. It is a broad span through all the agencies and departments of the government.

This is just the beginning, but we do hope to gather enough information where we can make recommendations to the full committee to set up a policy, standards by which each department must following. And I can't emphasize enough, this is just the beginning of a series of hearings. We will notify you in plenty of time when we have our next hearing, and I do appreciate the Members that are here.

If there are no additional opening statements, and I see no other Members from either side, the subcommittee will now receive testimony from the witnesses before us today.

We will now turn to our first panel, and it is the policy of the Committee on Oversight and Government Reform to swear in all

witnesses before they testify, and I would like to ask you both to please stand and raise your right hands.

[Witnesses sworn.]

Ms. WATSON. Let the record reflect that the witnesses answered in the affirmative. Thank you.

I will now introduce our panel.

Mr. Shay Assad is the Acting Deputy Undersecretary of Defense for Acquisition and Technology at the Department of Defense. There he is responsible for all acquisition and procurement policy matters, including acquisition and procurement strategies for all major weapons systems programs, major automative information systems programs and services acquisitions.

Welcome.

Mr. David Drabkin is the Acting Chief Acquisition Officer at the General Services Administration. He is responsible for developing and reviewing acquisition policies, procedures and related training for the GSA and Federal acquisition professionals through the Federal Acquisition Institute, Civilian Acquisition Advisory Committee, Federal acquisition regulation and GAO's acquisition materiel and training programs.

I ask that each of the witnesses now give a brief summary of your testimony and to keep this summary under 5 minutes in duration if possible.

Your complete written statement will be included in the hearing record.

So, Mr. Assad, please proceed.

STATEMENTS OF SHAY ASSAD, DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION POLICY, U.S. DEPARTMENT OF DEFENSE; AND DAVID A. DRABKIN, ACTING CHIEF ACQUISITION OFFICER, GENERAL SERVICES ADMINISTRATION

STATEMENT OF SHAY ASSAD

Mr. ASSAD. Thank you, Madam Chairwoman.

Madam Chairwoman, Ranking Member Bilbray and members of the subcommittee, my name is Shay Assad. I am the Director of Defense Procurement, and I also serve as the Acting Deputy Undersecretary of Defense for Acquisition and Technology. Thank you very much for providing me the opportunity to participate in this hearing today.

In January 2007, I testified before the Readiness and Management Support Subcommittee of the Senate Armed Services Committee. At that hearing, I was asked to comment on the then recently completed work on the SARA panel or Acquisition Advisory Panel, authorized by Section 1423 of the Service Acquisition Reform Act of 2003. At that time, I testified that I agreed with most of the panel's recommendations and that we would busy addressing the recommendations of their report.

Today's hearing provides an excellent opportunity to provide an account of where we are with respect to the panel's recommendations and how we will move forward in light of the present circumstances. In fact, the Congress is taking up many of the panel's recommendations adopted into law via the National Defense Authorization Act of 2008 and 2009. The panel's thoughtful report

continues to provide a framework for improvement and to inform ongoing initiatives related to commercial practices, performance-based acquisition, small business utilization, the acquisition work force and the role of support contractors and the use of Federal procurement data.

On April 6, 2009, the Secretary of Defense announced his intention to significantly improve the capability and capacity of the Defense acquisition work force by increasing the size of the work force by 20,000 employees through fiscal year 2015. This will restore the organic acquisition work force to its approximate 1998 levels of 147,000 people and address longstanding shortfalls in the Defense acquisition work force. It is the first significant growth since the military buildup in the 1980's and the downsizing that occurred during the 1990's.

The Secretary's initiative is the overarching human capital strategy to revitalize the acquisition work force. The Department's growth strategy directly supports the President's March 4, 2009, memorandum's objective to ensure that the acquisition work force has the capacity and the ability to develop, manage and oversee acquisitions appropriately.

The Defense acquisition work force is critical for improving acquisition outcomes for the Nation's $1.6 trillion investment in major weapons systems. The objective is straightforward, to ensure DOD has the right acquisition capability and capacity to produce the best value for the American taxpayer and for the soldiers, sailors, airmen and Marines who depend on weapons and products and services that we buy.

In addition, as you all know, the Department is aggressively pursuing major reforms to our acquisition system. These efforts have been given a high priority by President Obama and Secretary Gates and have recently been complemented by the strong bipartisan commitment to reform registered by Congress via the Weapons Systems Acquisition Reform Act. Let me take a moment to mention some of the reforms that both the Secretary and Deputy Secretary Lynn have articulated: First, to improve the discipline of the acquisition process. Each major program will be subject to a mandatory process entry point, the Materiel Development Decision prior to Milestone A. This will ensure that programs are based upon approved requirements and a rigorous assessments of alternatives.

To reduce technical risk, we will refine program requirements and inform our cost estimates. Our practice will be to conduct competitive prototyping and complete Preliminary Design Reviews before we enter into Milestone B, engineering management and development.

We will employ independent technical reviews to certify the majority of program technologies before we will permit a program to progress to the costly phases of development.

And, finally, we will complete independent cost estimates at each decision point in the acquisition process to ensure programs are adequately funded and to reduce the risk of costs spiraling out of control.

To align profitability with performance, we have taken up several initiatives: Contract fee structures will be tied to contractor performance. We will eliminate the use ofunpriced contractual actions

whenever possible, and we will assure that the use of multiyear contracts is limited to circumstances when real substantial savings are accrued to the taxpayer.

To prevent programs from ballooning in cost and stretching its schedule, we will use more fixed price development contracts. We will also institute new mechanisms to prevent endless requirements creep, in which the desire for an ever-elusive perfect system can result in no system being delivered at all.

Of course, none of these reforms will work unless we are prepared to reform or cancel weapons programs that are not on track to provide our warfighters what they need when they need it at a fair and reasonable price to our taxpayers. Those hard decisions are reflected in the proposed budget for next year.

In summary, the Department is determined to improve the effectiveness of our overall acquisition system. As Secretary Gates and Deputy Secretary Lynn have mentioned, being tough-minded on acquisition reform is part of being serious about a strong Defense.

Every dollar we save through acquisition reform is another dollar we can devote to the capabilities of our troops—our troops need today and tomorrow. This is what the taxpayers expect and what our warfighters deserve.

Thank you, Madam Chairwoman.

[The prepared statement of Mr. Assad follows:]

**HOLD UNTIL RELEASED BY THE
HOUSE COMMITTEE
ON OVERSIGHT AND
GOVERNMENT REFORM**

STATEMENT BY

MR. SHAY D. ASSAD

ACTING DEPUTY UNDER SECRETARY OF DEFENSE

(ACQUISITION & TECHNOLOGY)

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION & PROCUREMENT
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

**DEPARTMENT OF DEFENSE
DEFENSE PROCUREMENT AND ACQUISITION POLICY**

THE STATE OF FEDERAL CONTRACTING: OPPORTUNITIES AND CHALLENGES FOR STRENGTHENING GOVERNMENT PROCUREMENT AND ACQUISITON POLICIES

JUNE 16, 2009

**HOLD UNTIL RELEASED BY THE
HOUSE COMMITTEE
ON OVERSIGHT AND
GOVERNMENT REFORM**

Chairwoman Watson, Ranking Member Bilbray, Members of the Subcommittee:

My name is Shay Assad and I am the Director of Defense Procurement and Acquisition Policy. I am also presently serving as the Acting Deputy Under Secretary of Defense for Acquisition and Technology, in the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics (AT&L). After serving tours on board two Navy destroyers, I began my career in acquisition thirty-two years ago as a Naval Procurement Officer at the Naval Sea Systems Command. I left the Navy in 1978 and joined the Raytheon Company. Over my twenty-two year career at Raytheon I held a variety of contracting and operational positions ultimately serving as a corporate Vice President, a Senior Vice President, and finally, as Corporate Executive Vice President and Chairman and Chief Executive Officer of one of its major subsidiaries. I retired from Raytheon in July 2000. In 2004, I entered Government service as the senior civilian contracting official for the U.S. Marine Corps where I was responsible for, among other things, all Marine Corps contracting in a combat environment. In April 2006, I was promoted to serve as the Director of Defense Procurement and Acquisition Policy where, among other things, I am responsible for all contacting policy related to contracting in a combat environment. I am also the functional leader for those who do contracting in a combat environment.

I want to thank you for the opportunity to appear before you and to participate in today's discussion. I'll begin with a short opening statement; my longer official written statement has been provided earlier to be included as part of the record

In January 2007, I testified before the Senate Armed Services Committee, Readiness and Management Support Subcommittee. At that hearing, I was asked to comment on the then recently completed work of the Acquisition Advisory Panel, an entity created by the Congress and authorized by Section 1423 of the Service Acquisition Reform Act of 2003. At that time, I testified that I agreed with most of the Panel's recommendations and that we would be busy addressing the recommendations of their report. Today's hearing provides an excellent opportunity to provide an account of where we are with respect to the Panel's recommendations and how will we move forward in light of present circumstances. In fact, the Congress has since taken up many of the Panel's recommendations, adopted into law via the National Defense Authorization Acts for Fiscal Years 2008 and 2009. The Panel's thoughtful report continues to provide a framework for improvement and to inform on-going initiatives relating to commercial practices, performance-based acquisition, small business utilization, acquisition workforce, the role of support contractors, and the use of federal procurement data.

The most significant element of the Acquisition Advisory Panel's comprehensive body of work that has since been addressed by both the Congress and the Department of Defense has been the recommendations relating to the acquisition workforce. The Panel rightly recognized there has been a "mismatch between the demands placed on the acquisition workforce and the personnel and skills available within that workforce to meet those demands." In 2001, the Defense Department spent $138 billion on contracts, and in 2008 spending reached $396 billion -- $202 billion of it was for services. During this period, the size of the organic Defense acquisition workforce (civilian and military)

remained relatively flat while dollars spent on contracting actions over $25,000 more than doubled. Additionally, there was also a significant increase in use of contractor support personnel

On April 6, 2009, the Secretary of Defense announced his intention to significantly improve the capability and capacity of the Defense acquisition workforce by increasing the size of the workforce by 20,000 through fiscal year 2015. This will restore the organic acquisition workforce to its 1998 levels of approximately 147,000 and address long standing shortfalls in the Defense acquisition workforce. It is the first significant growth since the military build-up in the 1980's and the downsizing that occurred during the 1990's. The Secretary's initiative is the overarching human capital strategy to revitalize the acquisition workforce.

The Department's growth strategy directly supports the President's March 4, 2009 memorandum's objective to ensure the acquisition workforce has the capacity and ability to develop, manage, and oversee acquisitions appropriately. The Defense acquisition workforce is critical for improving acquisition outcomes for the nation's $1.6 trillion investment in major systems. The objective is straightforward: to ensure DoD has the right acquisition capability and capacity to produce best value for the American taxpayer and for the soldiers, sailors, airmen and marines who depend on the weapons, products and services we buy.

This strategy increases the size of the acquisition workforce by 15% -- 20,000 through fiscal year 2015. As an integral part of this strategy, the Department will convert approximately 10,000 contractor support positions to full-time government employee

positions. This will create a better balance between our government workforce and contractor support personnel and ensure that critical and inherently governmental functions are performed by government employees.

The Department's strategy will increase and improve the Department's oversight capabilities, thereby ensuring we get what we pay for; ferret out waste, and assist in combating contract fraud. We will increase our contracting and contract oversight workforce, to include the Defense Contract Management Agency and the Defense Contract Audit Agency. We will increase our organic acquisition and program management capability, such as program managers, systems engineers, and other acquisition professionals. This will also include critical professionals such as our competition advocates and small business specialists. The Components have done extensive bottoms up planning and have started deployment of growth hiring and other workforce initiatives which support the Secretary's strategy.

A key part of the Department's strategy to improve the Defense acquisition workforce is to build up our contract pricing capability. In order to ensure we get a better deal for the taxpayers and the soldiers, sailors, airmen and marines who depend on the weapons, products and services we buy, we will add approximately 800 contract cost/price analysts to the workforce through FY 2015. To align our policy and pricing organizations with the Secretary's strategic vision, the Office of Defense Procurement and Acquisition Policy (DPAP) is working with the Department's Senior Procurement Executives and the Defense Acquisition University ensure the contract pricing workforce is properly sized, equipped, and trained. Our objective is to ensure that the contract

pricing workforce has the right capability and capacity to ensure we are paying fair and reasonable prices for the weapons, products, and services we buy. As part of that effort, for example, we just held and sponsored a two and half-day Contract Pricing Conference that was attended by over 300 government pricing and contracting professionals from 84 separate military commands or DoD organizational units and nine Federal (non-DoD) agencies.

An important element of workforce success is employee satisfaction and motivation. Through the Defense Acquisition Workforce Development Fund, we have numerous initiatives under way that will improve the employee value proposition for our acquisition professionals and the attractiveness of an acquisition career. These initiatives include deliberately improving the technical and leadership capability of our military and civilians. We will also improve our employee recognition programs by expanding awards for top performing exceptional individuals.

Of course, many of the Acquisition Advisory Panel's findings and recommendations related to the acquisition of services. In Fiscal Year 2008, approximately half of the Department's contract obligations were associated with the acquisition of services. The magnitude of this activity demands a disciplined oversight framework. We have developed and implemented that framework employing a strategic, department-wide approach to improve the effectiveness of DoD contract management with specific emphasis on contracting for services. This comprehensive architecture for the acquisition of services executes the requirements Congress established in Section 812 of the National Defense Authorization Act for Year 2006. We have refined the process

to require the military departments and defense agencies to submit to OSD for review and approval all acquisition strategies for service acquisitions valued at $1 billion or more to ensure these programs employ the basic tenets that are foundational to success. For example, we are using the opportunity provided by the review and approval process to shape service acquisitions to severely curtail the use of new time and materials contracts and to demand competition for task orders on indefinite delivery, indefinite quantity (IDIQ) contracts. These are two significant areas that the Acquisition Advisory Panel addressed in their report.

The Acquisition Advisory Panel also noted that post-award contract monitoring needs to be improved. The National Defense Authorization Act for Fiscal Year 2008 picked up on this finding in the Section 808 requirement for the Department to implement "Independent Management Reviews" of service acquisitions in the post award phase. The Department's implementation approach for Section 808 entails a robust Peer Review process to influence consistency of approach, ensure the quality of contracting, and drive cross-sharing of ideas (best practices and lessons learned). For all acquisitions valued at $1 billion dollars or more, the Department assigns an independent Peer Review team, which is comprised of senior contracting leaders and attorneys from outside the military department or defense agency whose procurement is the subject of the review, to meet with acquisition teams to assess whether the acquisition process was well understood by both government and industry. Similarly, military departments and defense agencies have developed and are executing plans to accomplish Peer Reviews within their respective organizations for acquisitions valued at less than $1 billion. Since the

beginning of Fiscal Year 2009 when the Peer Review initiative was instituted, the Department's senior leadership has conducted 31 Peer Reviews; 20 of which were for service acquisitions. Peer Review teams travel to the site of the executing acquisition organization and the process involves three phases before contract award as well as assessments after contract award to critically assess the program and provide recommendations to improve the business arrangement. Executing acquisition teams receive immediate feedback and are held accountable to address disposition of Peer Review team recommendations. In addition, the broader DoD acquisition community will benefit as we disseminate information about the trends, lessons learned and best practices that have been identified in the course of the Peer Reviews.

To provide a common basis for review at all levels, we have issued "Criteria for the Acquisition of Services." This policy articulates the specific tenets that comprise DoD's Architecture for the acquisition of services. There are twelve (12) tenets that are assessed prior to contract award. Nearly all of these tenets mirror the findings of the Acquisition Advisory Panel. For example, one tenet emphasizes the imperative of developing service acquisition requirements in such a way that can be clearly articulated in the contract in performance-based terms. Our focus on this aspect is reflective of the Panel's finding that solicitations often include only a loosely defined statement of functional requirements. In addition, the Department employs eight (8) tenets which are assessed in post-award Peer Reviews. One key post-award tenet entails a critical assessment of whether or not the program has adequate contractor surveillance in place—another focus area from the Panel's report. The associated review criteria provided by

this policy form the basis for metrics to gauge the degree to which the architecture is being implemented to achieve the desired performance and results across the Department.

We are also using Strategic Sourcing to more effectively acquire services. For the Department, the foundation for Strategic Sourcing (SS) is spend data and portfolio analysis and management. Each year, the DPAP SS office performs spend analyses of services and supplies and equipment and provides the information to the Military Departments and Other Defense Agencies to improve decision-making and sourcing strategies. To perform a comprehensive analysis of DoD spend, the SS office developed 15 portfolios based on similar goods/services. These portfolios are standard across the annual spend analyses. The office first analyzed services spend in FY06 and issued the Strategic Plan for the Strategic Sourcing of Services in October 2008. In FY09, it completed its first spend analysis of supplies and equipment to achieve a 360-degree view of DoD procurement spend. Now that the analysis of supplies and equipment is complete, we will update the Strategic Plan to include direction for the procurement of supplies and equipment.

In May FY09, the Department began to focus on the alignment of best sourcing approaches within portfolios across the 69 DoD contracting activities. Aligning best practices within portfolios facilitates optimum uses of contract types, contract administration, acquisition IT tools, and organizational models with the result of efficiently and effectively meeting mission needs. It also improves competencies of the acquisition workforce by fostering functional and specialized skills within these portfolios. Initially, the Department will pursue the portfolios of Knowledge Based

Services (to include Advisory and Assistance type contracts) and Medical Supplies and Equipment. Joint working groups, comprised of senior acquisition professionals with portfolio-specific experience and skills, will review the DoD annual spend analyses, identify best practices within their respective portfolios, and provide recommendations for implementing these best practices across the Defense enterprise.

The Department has also issued guidance on the proper use of award fees following a December 2005 Government Accountability Office report and recent legislation, The intent of the guidance to ensure award fees are linked to desired outcomes and commensurate with contractor performance. In addition, in our peer reviews of all acquisitions over $1 billion, we exam how the Defense Components are using award fees to improve contractor performance. The Department is also in the process of revising the Defense Acquisition Regulation Supplement to incorporate related changes required by Section 814 of the FY 2007 National Defense Authorization Act, Section 9016 of the FY 2007 Defense Appropriations Act, and the FY 2009 National Defense Authorization Act. Although the Department still has more work to do, a (discussion) draft 2009 follow-up GAO report indicates where the revised policies have been applied, the results have been hundreds of millions of dollars in cost savings and better use of government funds.

Additionally, as all of you know, the Department is aggressively pursuing major reforms to our acquisition system. These efforts have been given a very high priority by President Obama and Secretary Gates and have recently been complemented by the strong bi-partisan commitment to reform registered by Congress via the Weapons

Systems Acquisition Reform Act. Let me take a moment to mention some of reforms we have underway:

(1) To improve the discipline of the acquisition process:

--Each major program will be subject to a mandatory process entry point, the Materiel Development Decision prior to Milestone A. This will ensure programs are based on approved requirements and a rigorous assessment of alternatives.

-- To reduce technical risk, refine program requirements and inform our cost estimates, our practice will be to conduct competitive prototyping and complete Preliminary Design Reviews before we initiate a program.

-- We will employ Independent technical reviews to certify the maturity of program technologies before we will permit a program to progress to the costly final phases of development. And finally,

--We will complete independent cost estimates at each key decision point in the acquisition process to ensure programs are adequately funded and to reduce the risk of costs spiraling out of control.

(2) To align profitability with performance, we have several initiatives. Contract fee structures will be tied to contractor performance. We will eliminate the use of unpriced contractual actions, whenever possible. And, we will ensure the use of multiyear contracts is limited to instances when real, substantial savings are accrued to the taxpayer.

(3) To prevent programs from ballooning in cost and stretching in schedule, we will use more fixed-price development contracts. We will also institute new mechanisms to prevent endless "requirements creep" in which the desire for an ever-elusive perfect system can result in no system being delivered at all.

Of course, none of these reforms will work unless we are prepared to reform or cancel weapons programs that are not on track to provide our warfighters what they need when they need it. Those hard decisions are reflected in our proposed budget for next year. In sum, the Department is determined to improve the effectiveness of our acquisition system. As Secretary Gates and Deputy Secretary Lynn have mentioned, being tough minded on acquisition reform is part of being serious about a strong defense. Every dollar we save through acquisition reform is another dollar we can devote to the capabilities our troops need today and tomorrow. This is what the American taxpayers expect and what our warfighters deserve.

Going forward, one of the significant elements of the Panel's work that has yet to be fully addressed are the recommendations relating to the proper role of support contractors. As noted earlier, the Department will convert approximately 10,000 contractor support positions to full-time government employee positions, ensuring that critical and inherently governmental functions are performed by government employees. On May 28, 2009, the Deputy Secretary of Defense issued guidance to assist DoD Components with developing and executing plans to meet these requirements. He noted that our planned in-sourcing is a high priority of the Secretary of Defense and that in-sourcing has been included as a metric in the Department's Performance Budget

submission. The Deputy Secretary will be receiving quarterly reports on the Department's progress.

The Department is also reviewing the requirements of the recently passed Weapons System Acquisition Reform Act of 2009, Public Law 111-23, and assigning responsibility for implementation within the Department. We recognize that there will be required changes to 5000.02 and the Defense Federal Regulation Supplement and personnel actions to be undertaken. We will be proceeding with these efforts expeditiously.

SUMMARY

Again, thank you for the opportunity to address current initiatives for the Defense acquisition workforce. I look forward to working with you and keeping you apprised of our progress. Thank you for your support.

Ms. WATSON. Thank you.
Mr. Drabkin.

STATEMENT OF DAVID A. DRABKIN

Mr. DRABKIN. Thank you, Madam Chairwoman and Ranking Member Bilbray and members of the subcommittee, since you have placed my statement in the record, I would like to address three issues in the 5 minutes that you have allotted me that I think merit your attention as they do mine every day.

Those three issues deal with our acquisition work force; the tools available to that acquisition work force; and then three separate policy considerations that ought to guide everything we do in Federal acquisition.

As far as GSA's acquisition work force, I am pleased to report to the committee that we are working on a succession plan that will help us address exactly how many people we need to do the work that we are given each year and to make sure that we recruit and retain those people through the life of a standard Federal career.

Currently, we suffer from a deficit in the competencies in skills in certain year groups. This is a principal result of the fact that during the 1990's, we chose not to hire people as part of our attempt to reduce the size of the government work force.

I am not criticizing that decision, but the result of that decision is, now, as we look for people between their 10th and 20th year of service, we don't have very many. And as we look at folks in between their 20th and 30th year of service, we are facing the possibility of almost 50 percent of our work force retiring by the year 2012. The only thing that has kept our retirements down, I believe, is the current state of the economy.

Our work force is the key way we get jobs done. I mean, when you talk about oversight, when you talk about writing good contracts, when you talk about getting best value for the taxpayer, it's not done by a machine. It's not done by a policy. It's done by an individual who is trained and equipped to sit down at the table, not only negotiate a contract that represents the best value to the government but then who has the time and ability to manage that contract to a successful conclusion.

Today, most of our contracting officers are measured on how many contracts they award. And as soon as they award one, they have to move on to awarding the next and don't have the time they would like to devote to making sure that the effort they put into negotiating a good contract results in a good result to the taxpayer when the contract is concluded.

We expect to complete our succession plan sometime by the end of this fiscal year in accordance with the direction Congress has given all Federal agencies to address succession planning.

The second issue I think we need to talk about is tools. Despite the fact that this is an IT-rich environment, despite the fact that we buy IT for everybody else, the acquisition community lacks the kind of IT tools it needs to leverage the existing work force and to help them avoid making simple mistakes.

In a hearing I testified in before the full committee not terribly long ago on EPLS, the question was, why did you award contracts to individuals who were on the EPLS about 30 times over 5 years?

And the answer was, somebody made a mistake. But had they had the proper tool in place, the opportunity to make that mistake, to check automatically the EPLS, would have been reduced; not impossible that the mistake would have occurred, but it would have reduced it.

And so we are looking in GSA at adopting and acquiring a tool which may be a single solution or a system of systems that will allow us to automate the entire process, thus leveraging the work force we have and ensuring that mistakes that can be avoided by use of a transparent tool will be avoided.

Finally, the issue of policy is important to look at. The President has done something, I think, quite unusual. In the last several months, the first several months of his presidency, he has talked about acquisition a number of times, including issuing on March 4th a guidance document to the Federal Government on acquisition. And in that document, he talked about two key principles: competition and transparency. These are not new principles. These are not principles that we weren't aware of and didn't work with before, but it's essential that we understand competition in today's changing environment and that we spend our efforts and time making competition a reality.

And by the way, Madam Chairman, in your opening statement, you said that competition had been reduced. Actually, as a percentage of the whole, our statistics show that competition has not been reduced. It's about the same it was and has been over the last decade.

But because of the size of the dollars we are spending, the gross number of dollars that have been awarded in an other than full and open competition have increased. But the percentage of dollars has stayed relatively the same.

Transparency is important. I would simply mention to the committee, even though my time is up, that the United States is the most transparent acquisition system in the world. I just recently concluded a meeting with my colleagues from Taiwan, Korea, Italy and Canada, and they are amazed at the amount of information we provide the taxpayers and the citizens on government procurement. You can literally find out every contract we award any time of the day or night.

And, finally, integrity, which goes to Mr. Bilbray's comment about oversight. We would like to do more oversight. But, unfortunately, as a result of a decision made many years ago, all of our internal auditors, which public companies have under Sarbanes-Oxley, have been taken away and made part of the IG's Office. So as a manager, I have no internal audit function to assist me in providing oversight on a regular basis as any good manager would.

I can certainly talk for much longer, but I appreciate the committee's indulgence in my exceeding my allotted time.

Thank you, ma'am.

[The prepared statement of Mr. Drabkin follows:]

STATEMENT OF

DAVID A. DRABKIN
ACTING CHIEF ACQUISITION OFFICER

U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

JUNE 16, 2009

INTRODUCTION

Chairwoman Watson, Ranking Member Bilbray, thank you for this opportunity to appear before the Committee to discuss the "State of Federal contracting: [emphasizing the] Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies." I will address aspects of our implementation of statutory requirements in acquisition policies, development of the Federal acquisition workforce, acquisition tools available to our managers and contracting officers, and measures that we take to ensure that procurement policies and practices are properly implemented.

I assumed the position as GSA's Senior Procurement Executive in June of 2000 after having served 20 year's in the Department of Defense in various positions including the Assistant Deputy Under Secretary of Defense (Acquisition Reform, Acquisition Process and Policies) and the DoD Deputy Program Manager for the Pentagon Renovation. I now serve as the Acting Chief Acquisition Officer in GSA.

ACQUISITION POLICY DEVELOPMENT

GSA's Office of the Chief Acquisition Officer shares responsibility with the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA) for writing the Federal Acquisition Regulation (FAR). Contents of the FAR derive from statute, executive order, regulations, and recognized need.

FAR content is affected by current laws that govern agency procurement and acquisition practices. For example, in relation to the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) (the Act or ARRA), we issued five FAR changes. Policies set in these five separate cases:

- Prohibit using funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.
- Establish reporting requirements for Federal Government contractors receiving ARRA funds, including amounts received, projects or activities for which funds are to be used, estimated number of jobs created or retained, and information regarding subcontractors.
- Following OMB guidance, require the posting of pre-solicitation notices on FedBizOpps (FBO); implement unique requirements for announcing contract awards; establish unique requirements for entering awards into the Federal Procurement Data System (FPDS); promulgate unique requirements for contracts, orders, and modifications exceeding $500,000; and set unique requirements for actions that are not fixed price or competitive. The FAR also implements the ARRA provision that requires contractors to identify the names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded.

- Grant Inspectors General, the Recovery Accountability and Transparency Board, and Government Accountability Office (GAO) authority to examine any contractor records and to interview any officer or employee of the contractor, grantee, sub-grantee, or agency regarding ARRA transactions.
- Establish protections against reprisal for employees of private contractors who disclose to Federal officials information reasonably believed to be evidence of gross mismanagement, gross waste, or violations of law related to contracts using ARRA funds.

Following the enactment of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417), we issued or are preparing FAR cases that:

- Prevent personal conflicts of interest for contractor employees performing acquisition functions;
- Limit the length of noncompetitive contracts in unusual and compelling circumstances;
- Establish requirements for purchasing property and services pursuant to multiple award contracts to include publishing a notice in FedBizOpps;
- Address when cost-reimbursement contracts are appropriate and preparation of acquisition plans to support actions taken;
- Prevent the abuse of interagency contracts;
- Set limits on pass-through charges;
- Revise award fee language to link fees to acquisition objectives;
- Address cost determinations and price reasonableness;
- Allow GAO to interview current contractor employees when conducting audits;
- Require the establishment of a database of suspended or debarred contractors for use by contracting officers and suspension and debarment officials.

Similarly, following the enactment of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (P.L. 110-181), the FAR Council issued or is preparing to issue FAR cases that:

- Clarify submission of cost or pricing data on noncommercial modifications of commercial items;
- Clarify rules regarding the procurement of commercial items;
- Extend authority for using simplified acquisition procedures for certain commercial items;
- Establish new competition requirements for task and delivery order contracts
- Add requirements for market research;
- Require public disclosure of justification and approval documents for noncompetitive contracts;
- Set procurement goals for native Hawaiian-serving institutions and Alaska native-serving institutions.

We also work to keep the FAR in compliance with Executive Orders, by, for example:

- Implementing parts of E.O. 13495, which requires that an incoming service contractor must, in good faith, offer employees of the predecessor contractor a right of first refusal for employment under the successor contract, so established workers aren't displaced by the establishment of a new contract.
- Implementing E.O. 13496, which requires Federal contractors and subcontractors to post notices in all plants and offices informing their employees of their rights under the National Labor Relations Act.
- Implementing E.O. 13502, which encourages Federal departments and agencies to consider the use of project labor agreements for Federal construction contracts valued at more than $25 million.
- Implementing E.O. 13494 regarding labor relations costs.

Further, on March 4, 2009, President Obama issued a Memorandum regarding government contracts that drew considerable attention in the media, throughout government, and in industry. The Memorandum emphasizes five areas of focus in government contracting that need particular attention: (i) competition; (ii) contract type; (iii) oversight; (iv) inherently governmental activities; and (v) the acquisition workforce. All five areas have been the focus of considerable attention in recent years, including enacted and pending legislative initiatives. At GSA, we have focused much attention on FAR content that is related to these five aspects of government contracting.

In addition to maintaining the FAR, GSA is conducting a comprehensive review and update of the General Services Administration Acquisition Regulation (GSAR), GSA's FAR Supplement, to make it current, improve clarity and simplify procedures. The result of the update will ensure that GSA's procurements continue to reflect compliance with applicable laws and regulations.

In March 2008, GSA established a 15-member advisory panel to review and make recommendations related to GSA's Multiple Award Schedules (MAS) pricing and price-reduction policies. Comprised of procurement experts from government and industry, the MAS Advisory Panel was created under the authority of the Federal Advisory Committee Act (FACA). The FACA was enacted in 1972 to ensure that advisory-committee advice is objective and accessible to the public. The panel has accepted comments during a series of public meetings in Washington, DC, the first meeting of which was held in May 2008.

The MAS Panel is providing independent advice and recommendations to GSA on pricing and price reduction provisions of the MAS program. The Panel has reviewed the schedules' most favored customer provisions and price reduction policies and provisions in the context of current commercial pricing practices. The panel will recommend those changes, if any, that are considered necessary to strengthen the MAS program and enable it to continue to negotiate the lowest overall prices for federal customers. The MAS Panel will issue a report to the Administrator of General Services. We expect a report from the Panel by the end of June 2009.

ACQUISITION WORKFORCE

Proper implementation of policies received from all sources and captured in the FAR is dependent on a well trained acquisition workforce. In accordance with OMB/OFPP Policy Letter 05-01 (OFPP 05-01), GSA has expanded the definition of its acquisition workforce to include virtually all employees who "touch" the acquisition process. This definition continues to include GS-1102s, 1105s and 1106s. We have implemented the Federal Acquisition Certification Programs developed by OMB for contracting officers, contracting officer technical representatives and program and project managers. Training is provided through courses that we develop ourselves and through courses available from the Federal Acquisition Institute (FAI). We oversee the agency-wide Contracting Officer Warrant Program and ensure that all warranted contracting officers have been properly trained. GSA is ensuring that its acquisition workforce maintains required professional certifications.

The FAI is under the auspices of the GSA OCAO and serves as a Government-wide training resource for civilian agencies. FAI coordinates with organizations such as the Office of Federal Procurement Policy, Chief Acquisition Officers Council, and the Interagency Acquisition Career Management Council to develop and implement strategies to meet the needs of the current and future acquisition workforce. In conjunction with its partners, FAI seeks to ensure availability of exceptional training, provide compelling research, promote professionalism, and improve acquisition workforce management.

The NDAA of 2008 and 2009 outlined a number of tasks that would benefit the acquisition workforce community. Some of these tasks were accomplished and others are in process.

- Skill gaps were researched and identified. Training was recommended to address these skill and competency gaps.
- FAI added more training sessions nationwide to meet the mandatory training requirement for the acquisition workforce.
- FAI will have a new Senior Executive Service position entitled Associate Administrator for Acquisition Workforce Programs.
- In accordance with the NDAA 08:
  - Our Chief Human Capital Officer (CHCO) organization has received expedited hiring authority to recruit persons into the acquisition workforce.
  - Both CHCO and OCAO developed a GSA Succession Plan for the acquisition workforce.
  - The OCAO is working on the establishment of a Contingency Contracting Corps. Members of this corps will be available to deploy in response to an emergency or major disaster or a contingency operation, both within or outside the continental United States.

Although the ARRA did not specifically address the acquisition workforce, our CHCO may use the OPM authorized excepted service temporary appointments to meet the exceptional hiring needs. Appointments under this authority cannot extend beyond September 30, 2012. Also, these positions are solely for the purpose of performing duties in support of projects related to ARRA requirements.

Right-sizing the GSA Acquisition Workforce

Recruiting and retaining members of the acquisition workforce is challenging. Education requirements are strict and pay levels in the private sector or even within the Federal government, particularly in DoD, can be higher than GSA can now offer. The OCAO is working with CHCO to review and determine how best to recruit and retain employees. In order to gain the correct mix or right-size the acquisition workforce, our office is:

- Researching how to increase the current journeyman level for contracting officers from GS-12 to GS-13 consistently across the agency;
- Educating managers on retention and recruitment tools.

GSA is also developing an Acquisition Workforce Succession Plan that will assist in managing GSA's Acquisition Workforce from recruitment to retirement. The Succession plan will allow GSA to make decisions about hiring, training and retention with a view to having sufficient trained and skilled acquisition workforce members to meet GSA's acquisition mission.

AUTOMATED ACQUISITION TOOLS

The Acquisition Committee for eGov (ACE), a formal subcommittee of the CAO Council responsible for overseeing government-wide information technology solutions supporting the acquisition community, has overall responsibility for directing the development of acquisition tools used throughout the acquisition community. Within GSA's OCAO, the Office of Acquisition Systems leads our Integrated Acquisition Environment (IAE) and develops the acquisition tools used by the Federal acquisition workforce, private vendors, and members of the general public.

These automated tools include:

- WDOL: Wage Determinations On-Line (www.wdol.gov) The WDOL website provides a single location for federal contracting officers to obtain Service Contract Act (SCA) and Davis-Bacon Act (DBA) wage determinations (WDs) required for each contract action.
- ORCA: Online Representations and Certifications Application (www.bpn.gov/orca) ORCA allows vendors to enter their representations and certifications information electronically once for use on all federal contracts. It also allows contracting officers to view and download completed vendor records.

- FPDS: Federal Procurement Data System (https://www.fpds.gov) FPDS is the central repository of information on federal contracting. The system contains detailed information on contract actions over $3,000 (FY 2004 and later data). The system can identify who bought what, from whom, for how much, when and where. In addition, FPDS provides standard reports and ad hoc reports. (Contracts awarded using ARRA funds will be reported to the Federal Procurement Data System (FPDS). ARRA actions are denoted by the Treasury Account Symbol which is recorded in the FPDS contract report.)
- FBO: Federal Business Opportunities (FedBizOpps) (www.fedbizopps.gov) FBO is the single government point-of-entry for posting solicitations. It allows commercial vendors and government buyers to post, search, monitor, and retrieve opportunities solicited by the entire federal contracting community. FBO also enables federal agencies to securely disseminate sensitive acquisition-related technical data for solicitations to approved business partners. (Contract opportunities including ARRA funds are denoted by a flag.)
- eSRS: Electronic Subcontracting Reporting System (www.esrs.gov) eSRS facilitates reporting of accomplishments toward subcontracting goals.
- EPLS: Excluded Parties List System (www.epls.gov) EPLS is a governmentwide, web-enabled database of parties excluded from receiving federal contracts or certain subcontracts and from certain types of federal financial and non-financial assistance and benefits.
- CCR: Central Contractor Registration (www.ccr.gov) CCR is the single point of registration for vendors wanting to do business with the federal government. It collects Electronic Funds Transfer (EFT), business lines, and socio-economic data. CCR has also expanded to the grantee community.
- FedReg: Federal Agency Registration (www.ccr.gov) FedReg is the single point of agency buyer/seller information for intra-governmental transfers. It is the federal agencies "yellow pages" and contains information about federal entities that buy and sell from other federal entities. CCR validates new CCR registrations with existing FedReg records.
- While not the financial responsibility of IAE, the Past Performance Information Retrieval System (PPIRS) (www.ppirs.gov) takes functional direction from the IAE Program Management Office (PMO). PPIRS provides timely access to past performance information.

An additional requirement found in Section 872 of the 2009 NDAA calls for a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants. This new database is to be used by Federal officials having authority over contracts and grants, and it must identify any person awarded a Federal agency contract or grant in excess of $500,000. Regarding such persons, the database shall include a brief description covering the most recent 5-year period regarding: any civil, criminal, or administrative proceeding; any termination of a grant or contract; any suspension and debarment; any administrative agreement entered into to resolve a suspension or debarment; or any non-responsible source finding. The ACE recently agreed to a plan to meet Section 872 requirements. DoD will lead the government-wide development and implementation effort of this new tool.

EPLS, one of the tools mentioned above, was the subject of a previous hearing before this committee. I can tell you that we are working to ensure contract identification numbers and related address information is correct and included for each record in the system. We are investigating the use of a common identifier like a DUNs for individuals (roughly 55K of the 60K active EPLS records are for individuals). We have already taken steps to enhance search capabilities and to advise users how to properly search records, and we are taking steps to keep the points of contact list updated. We are reviewing the process to enter debarment information into EPLS that requires users to validate information using authoritative sources like Dunn and Bradstreet and the CCR System. Finally, we have developed a feed from EPLS to CCR to flag records in CCR that are on the debarment list. The capability will be put into production in August 2009. As noted in our response to Chairman Towns' letter regarding EPLS, we will provide a separate written response to his concerns.

Internally, GSA is beginning the acquisition process for an end to end system of systems to facilitate GSA's acquisition mission. Once acquired, the system will allow GSA to leverage both its human resources and policies and processes in performing its acquisition mission.

ASSURING PROPER IMPLEMENTATION OF ACQUISITON POLICIES

While proper implementation of policy is paramount, we would be remiss if we did not verify that those policies were being properly implemented by our acquisition workforce, regardless of how well trained or equipped they may be. Beginning in Fiscal Year 2009, the OMB directed that Federal agencies implement review of their acquisition programs using the A-123 Acquisition Assessment Tool. This involves the standardized assessment of internal controls over acquisition activities and programs in the context of the four established cornerstones of review: policies and procedures; organizational alignment and leadership; human capital; and information management and stewardship. At GSA, through the Procurement Management Review Division, Office of Acquisition Integrity, and the Office of the Chief Information Officer, we have fully implemented this process, in partnership with the Office of the Chief Financial Officer, as part of our GSA-wide Procurement Management Reviews. In addition, we continue to conduct traditional transactional procurement reviews, reviewing contract files in all GSA regions and major contracting activities, for compliance with applicable acquisition statutes, regulations, and policies. Each review results in a final report to the region or contracting activity and action plans that address areas that need improvement. In addition, we gather best practices that are shared with all regional and Service contracting activities.

Further, we use suspension and debarment as a prophylactic measure to prevent the Government from doing business with companies or individuals who demonstrate a lack of present "responsibility," a term of art in use in the government since at least the 1950s in the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulation (FPR), the forerunners of today's Federal Acquisition

Regulation (FAR). We have, over time, expanded the definition of responsibility to include what a company does corporately, not just on government contracts. We have also adopted a government-wide policy prohibiting the placement of orders against contracts where the contractor has been suspended or debarred. We do not require the termination of existing contracts because a company has been suspended or debarred unless a proper determination is made under the FAR.

Recent developments in the area of contractor ethics, integrity, and requirements for voluntary disclosures have resulted in new grounds for debarment and suspension of Federal government contractors under FAR Subpart 9.4. These new grounds involve the failure to disclose, in connection with the award, performance, or closeout of a contract, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery or other gratuity violations; violation of the civil False Claims Act; and significant overpayments on the contract.

ARRA requires that contracts funded under the Act should be awarded as fixed-price contracts through competitive procedures to the "maximum extent possible." Competition is, and likely will remain, a focus of acquisition reform in the coming years. The Director, Office of Acquisition Integrity, is the Competition Advocate for GSA, and is charged with overall responsibility to encourage and promote competition in GSA procurements. This Fiscal Year, the GSA Competition Advocate has hosted telephone conferences of Service and Regional Competition Advocates for the purpose of sharing best practices, exploring new initiatives and discussing specific issues, such as competition requirements of ARRA. At the GSA Expo, the GSA Competition Advocate met with the Service and Regional Competition Advocates to discuss these issues and formulate plans for improving competition and for ensuring that we document our best practices and accomplishments. In addition, we are now reviewing all acquisition plans for procurements using ARRA funding to assure that adequate market research is conducted and that competitive processes are utilized to the maximum extent possible.

We strive mightily to capture accurately in the FAR new acquisition policies, to fully train the acquisition workforce, to properly equip them with automated tools, and to verify that the job is done correctly. We recognize that there may well be viable alternatives to the approaches we have taken, and we are open to suggestions on how to improve.

Madam Chairwoman, Ranking Member Bilbray, that concludes my prepared remarks. I would be pleased to answer any questions the Committee may have.

CHARRTS No.: HOGR-03-001
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congresswoman Watson
Witness: Mr. Assad
Question: #1

Question: The Defense Contract Management Agency has identified significant deficiencies in the work of KBR, Inc., including faulty electrical systems in facilities developed for use by our soldiers in Iraq. Yet KBR continues to be a major contractor for DoD in its operations overseas.

(a) What is DoD planning to do from a systemic perspective, not on an ad-hoc basis, to hold contractors like KBR accountable for errors that have resulted in fatalities or injuries? Have there been any sanctions or debarments of contractors or subcontractors at any tier involved with these accidents? If plans are in the works, what stage are those plans in?

(b) Please explain how GAO's recent findings regarding international contingency operations might improve the oversight and management of contractors in high threat areas and war zones? Is DoD evaluating its contingency operations protocols and policies in light of GAO's recent report?

Answer: (a) The Department has regulations in place to hold a contractor accountable when an action or actions are so serious or compelling in nature that it affects the present responsibility of the contractor, or violate the terms of a Government contract that warrant debarment. Each Agency has procedures to report, investigate, and refer for debarment matters that are appropriate for consideration or are based on conviction or civil judgment. These procedures, along with specific actions for debarment are set out in FAR 9.406. A contractor may be suspended for a serious action based on adequate evidence, pending the completion of an investigation or legal proceedings when it has been determined that immediate action is necessary to protest the Government's interest. These procedures are set out in FAR 9.407. There have been no debarments resulting from the stated accidents; investigations are ongoing.

(b) Over half of the personnel currently in Iraq and Afghanistan are contract employees, putting contracting (including monitoring, and achieving accountability and enforcement of the contracts) squarely at the forefront of our challenges in supporting expeditionary operations. It also invokes command-level issues: Commanders must have timely situational awareness of contracts and contractor personnel and assets on the battlefield, to properly plan, synchronize operations, and manage the supply chain. GAO recently reported that the Department is taking actions to track contracts and contractor personnel in Iraq and Afghanistan (GAO-09-538T, Testimony before the House Armed Services Committee, on April 1, 2009). The Department is establishing management controls over contractor personnel supporting joint operations through deployment in Iraq and Afghanistan of the Synchronized Predeployment and Operational Tracker (SPOT), which provides a central repository of information on US Government contracts and contractors supporting contingency operations. SPOT tracks the movement of

contractor personnel in and out of theater and at locations where major services are provided (Dining Facilities and Medical Facilities). SPOT uses Unique Identifier Cards/Documents for accountability and visibility of contractor personnel.

DoD continually evaluates its contingency operations protocols and policies. Within USD(AT&L), the Department has a dedicated Contingency Contracting team whose mission is to enable effective and efficient contracting in support of deployed forces, humanitarian or peacekeeping operations, and disaster relief through innovative policy, guidance, and oversight.

CHARRTS No.: HOGR-03-002
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congresswoman Watson
Witness: Mr. Assad
Question: #2

Question: The recently enacted Weapons System Acquisition Reform Act included a number of significant managerial and oversight provisions targeting wasteful cost overruns and poor investments in weapons systems. - Please describe where DoD is in implementing those changes, and what the most significant challenges are in meeting the legislation's requirements.- Will current limitations in the acquisition workforce hinder your ability to meet these legislative mandates?

Answer: The majority of changes directed by the statute fall into three categories: organizational/personnel changes, acquisition policy and process changes, and congressional reporting requirements. A draft directive-type memorandum implementing the required acquisition policy and process changes has been prepared and will soon go through the formal policy review and approval process. In the interim, those acquisition policy and process changes are being implemented real-time on individual programs as they come up for decision reviews. Additionally, as specified by the statute, a review of major defense acquisition programs not previously certified against the Milestone A and Milestone B certification criteria is underway. With regard to the organizational changes required, the initial implementation of the Director, Cost Assessment and Program Evaluation (D, CAPE) has been approved by the Deputy Secretary (who is performing the duties of the D, CAPE until an appointee is nominated and confirmed). The USD(AT&L) has designated a Director for Developmental Test & Evaluation and a Director for Systems Engineering. Effort to designate a senior official for performance and root cause analysis is also underway. The requirements for new and amended congressional reports have been logged into our tracking system and the responsible organizations notified of the due dates. The most notable implementation challenge is that the current "on-board" acquisition workforce levels are inadequate to execute increased workload requirements within the specified timeframes and the lead time necessary to identify "right skill set" candidates and complete hiring activities remains a challenge.

CHARRTS No.: HOGR-03-003
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congresswoman Watson
Witness: Mr. Assad
Question: #3

Question: GAO has taken DoD to task for multiple deficiencies in its procurement management practices, such as ineffective program development processes that result in product requirements being added late in the development process. These modifications often result in added costs and delays to a program's completion. - How is DoD improving its program and investment management processes to avoid costly modification to projects during the development process? - Is there a mechanism to weigh the justifications of adding new requirements once a project is under development?

Answer: We share this concern and have taken action to prevent modifications to requirements, often called "requirements creep," after a program has been initiated. In July 2007, the department issued policy directing the establishment of "Configuration Steering Boards" (CSBs) in each DoD Component, chaired by the acquisition executive, and with broad executive membership.

CSBs meet at least annually to review proposed requirements changes that have the potential to increase cost or extend schedule. Our policy intends that such changes be rejected, deferring them to future blocks or increments. No change will be approved unless funds are identified and schedule impacts mitigated. This policy largely has been placed in statute by section 814 of P.L. 110-417, and has been institutionalized in the December 8, 2008 revision to DoD Instruction 5000.02, the department's acquisition policy. It has been implemented in each of the department's components.

CHARRTS No.: HOGR-03-006
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #6

Question: At a March 31, 2009 meeting with Department of Defense officials, I was informed that all funding for projects managed by the Department - including all projects earmarked by members of Congress - is competitively bid. Could you please confirm that defense earmarks are currently awarded by the Department in a manner consistent with the federal regulations for competitive bidding?

Answer: DoD contracts are awarded in a manner consistent with the Federal Acquisition Regulations (FAR) and its supplements, which implement the Competition in Contracting Act (CICA). The FAR requires competition to the maximum extent practicable for contracts awarded using simplified acquisition procedures. For all other contracts the CICA and the FAR require full and open competition, where all in industry are given an opportunity to bid, unless certain exceptions exist. An earmark, like any other DoD contracting action, must comply with the federal statues and regulations regarding competition.

CHARRTS No.: HOGR-03-007
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #7

Question: It is well known that the majority of earmarks for for-profit companies fall within the bill making appropriations for the Department of Defense. It is equally well-known that the President of the United States recently expressed his unease with earmarks for private businesses when he described the practice as "the single most corrupting element" of the earmarking process. The Committee on Appropriations has recently indicated its support for putting an end to "the use of member earmarks awarded to for-profit entities as a functional equivalent of no bid contracts." Would your current process and approach to awarding defense earmarks in any way change if, consistent with other legislative language associated with fiscal year 2010 appropriations bills, the fiscal year 2010 defense appropriations bill includes a legislative requirement that specifically requires defense earmarks intended for for-profit entities "to be awarded under full and open competition?"

Answer: The Department supports the priorities identified by the Administration in its budget request. Earmarks by definition provide funding for priorities other than those requested by the Administration. As such, the Department supports putting an end to earmarks. Imposing a requirement for all such earmarks to be awarded using full and open competition is not appropriate. Full and open competition derives from the Competition in Contracting Act (CICA), which recognizes there are other legitimate means of competition; for example, actions using simplified acquisition procedures or limiting competitions to small business firms only. CICA also recognizes that there are legitimate reasons for non-competitive awards, when appropriately justified.

CHARRTS No.: HOGR-03-008
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #8

Pursuant to my March 31, 2009 meeting with Department of Defense officials, I asked the Department to provide relevant information on the competitive bidding process for a list of 162 congressionally directed earmarks in the FY 2008 Defense Appropriations bill (H.R. 3222; P.L. 110-116), including any relevant Justification and Approvals (J&As).

Question: In support of that request, I forwarded an initial written request to the Office of the Secretary of Defense on April 15, 2009 and a follow-up request specifically seeking the assistance of the Office of Acquisition, Technology, and Logistics on May 20, 2009. Although I received a paper copy of a portion of the Office of Management and Budget's earmark database that indicated the entities to which the Fiscal Year 2008 defense earmarks were awarded, to date I continue to wait for the requested information on the competitive bidding process for the subset of earmarks. Please provide me with a timeframe for the delivery of the information I have requested.

Answer: Your request of April 15, 2009 to the Secretary of Defense was assigned to the Office of the Comptroller for action. Representatives of Defense Procurement and Acquisition Policy in the office of the Under Secretary of Defense for Acquisition, Technology and Logistics worked with the Comptroller to develop the data call that the Comptroller sent out to the military departments and defense agencies to gather the requested information. The Comptroller submitted requested information to Representative Flake's staff on July 31, 2009 on 74 of the 160 earmarks requested. The military departments and defense agencies are aggressively working to provide the requested information on the remaining earmarks.

CHARRTS No.: HOGR-03-009
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #9

Question: Please provide a description of the legal and regulatory requirements for the Department of Defense to provide the public with access to information related to Defense contracts and the process used to award them, whether consistent with the federal regulations for competitive bidding or otherwise. In addition, do you believe that nearly three months is a reasonable timeframe for a member of Congress, sitting on the House Committee on Oversight and Government Reform, to wait for information on the competitive bidding process for a fraction of the defense contracts awarded for Fiscal Year 2008?

Answer: Except for certain limited exceptions, all federal agencies are required to synopsize contract actions greater than $25,000 in FedBizOpps which is the single point of entry for government business. Specifically, agencies are required to publicize the following: a notice of proposed contract action prior to issuance of a solicitation; the solicitation, including specifications, technical data and other pertinent information; a notice of contract award; and any justifications for other than full and open competition.

You ask whether I believe three months is a reasonable timeframe to provide information on the procurement process for some specified earmarks. It is my understanding that the office of the Comptroller shared the information it had readily available in its earmark database upon receipt of your request. As the earmark data base does not collect information specifically identifying the contract number for earmarks, it was not possible to provide information on the extent of competition or copies of any justifications for non-competitive awards without a manual data call. The Comptroller had to go to its counterparts in the military departments and defense agencies, which in turn had to identify the buying office that was provided the funding for the earmark. Once the buying office was identified, it had to manually provide the competition information and a copy of the justification and approval. This can be a time consuming process.

CHARRTS No.: HOGR-03-010
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #10

Though competitively bid, a cursory review of information in a paper copy of a portion of the Office of Management and Budget's earmark database appears to indicate that the preponderance of a subset of 162 congressionally directed earmarks in the FY 2008 Defense Appropriations bill (H.R. 3222; P.L. 110-116) were awarded, in whole or in part, to the intended recipient listed in the relevant earmark certification letter. Section Six of the Federal Acquisition Regulations includes an explicit list of circumstances under which federal contracting may proceed without providing full and open competition.

Question: In your experience, how often are Section Six exceptions utilized in defense contracting as a whole and specifically with regard to defense earmarks approved by Congress? Can these exceptions be exploited to circumvent an acquisition process involving full and open competition and guarantee that defense earmarks are awarded to the congressionally designated recipient? To your knowledge, as Director for Defense Procurement and Acquisition Policy, are you aware of contracting or bidding techniques other than the Section Six exceptions that can be employed to provide a contract to a pre-determined entity while simultaneously being able to say that competitive bidding requirements have been satisfied?

Answer: FAR Part 6 implements the competition requirements of the Competition in Contracting Act, as explained in the answer to Question #6. The Federal Procurement Data System captures information on the reasons an action is not competed and information is readily accessible to the public. In FY 2008, $252 billion or 64% of DoD obligations were competitively awarded. Of the actions that were not competitive, 4.5% or $18 billion were for actions typically not available for competition such as awards to Government activities, mandated by international agreement, authorized by statute for sole source awards to 8(a) firms, Service-Disabled Veteran Owned Small Businesses, Federal Prison Industries, etc., or brand name purchases for authorized resale in commissaries and exchanges. An additional 31.5% of DoD obligations were not competed based on the statutory exceptions to competition. There is no automated database that provides insight into the extent of competition achieved on congressional earmarks. The competition requirements in the FAR apply to all contract actions using appropriated funds.

CHARRTS No.: HOGR-03-011
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #11

Question: I have been informed that the Department is unaware of the intended recipient of defense earmarks, which in the House of Representatives are listed in the required financial certifications made public by the Committee on Appropriations. Yet, defense earmarks appear to often be awarded to congressionally designated recipients. How prevalent are contacts between Congressional offices and Department of Defense contracting personnel? What is your assessment of the role of contacts between Congressional office and the Department of Defense as it relates to contracting decisions?

Answer: I do not have insight into the extent to which there may be contacts between Congressional offices and DoD contracting personnel.

CHARRTS No.: HOGR-03-012
House Government Reform Committee
Hearing Date: June 15, 2009
Subject: "The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"
Congressman: Congressman Flake
Witness: Mr. Assad
Question: #12

Question: The President has directed agencies to utilize full and open competition as often as practicable, and to reconsider whether competition is required only in exigent circumstances. Who has the responsibility of ensuring that this occurs? What safeguards or oversight measures will be or are employed by the Department to ensure that full and open competition is or will be utilized as often as practicable?

Answer: There is a Competition Advocate designated for each executive agency who has responsibility for promoting competition, the acquisition of commercial items, and challenging barriers to competition. Within DoD we also have Competition Advocates assigned at each Buying Activity who are responsible for promoting competition within the Buying Activity. As the Director of Defense Procurement and Acquisition Policy, I act as Competition Advocate for DoD. I meet quarterly with the Component Competition Advocates to review progress towards goals established for the fiscal year. However, responsibility does not rest solely with the contracting community, but is a shared responsibility with the requirements and acquisition community. Maximizing competition requires a good understanding of the market place, the technical risks, and a clear description of the Government's requirement.

The Department has placed a strong emphasis on competition. For example, the Deputy Secretary of Defense in a memorandum of November 13, 2008 stressed the importance of open and transparent communication with industry as a means of promoting long-term viability and competitiveness of the industrial base supporting defense. The Under Secretary of Defense for Acquisition, Technology and Logistics recognized the benefits of competition in major weapon system development and required that strategies and funding for major weapon systems provide for two or more competing teams to produce prototypes. In addition to any reviews accomplished prior to approvals of acquisition plans or justification and approvals for other than full and open competition, the Department performs peer reviews on its largest acquisitions of supplies and services, and holds Defense Acquisition Boards prior to each milestone on a major weapon system acquisition.

Ms. WATSON. Thank you to both of the witnesses.

You have given us a lot of food for thought. And our Members this morning will be raising the questions that will extend your time.

We are very concerned about the oversight. And so what we are trying to do here is take a cursory look. And so I will raise some questions; I think both of you have probably answered them, but in a format, so we can really hear the changes and the recommendations that you make stated as a result of your statements. I am just going to just go through them again.

Because in response to President Obama's March 2009 memo on directives for agencies to report back on improving the FAR and agency-specific supplements, what types, and you have mentioned some, but let's get in the format, of recommendations or changes are your agencies making? And would you repeat, Mr. Assad, I did hear several?

Mr. ASSAD. Yes, Madam Chair, specifically, some of the things that we are doing these days, it was mentioned by one of the Members that we're spending a tremendous amount of money on acquisition for Armed Services. We now spend more money on services within the Department than we do on major weapons systems, and last year, it exceeded $200 billion.

And what we are now doing is we have implemented a series of things called Independent Management Reviews where every procurement over $1 billion is given significant oversight, not only prior to the award of the contract but during the performance of that contract. Congress mandated that we do that in the NDAA 2008, and we have now got that in place.

But we have expanded on Congress's intent to not just be—services contracts over $1 billion, but, in fact, every contract, irrespective of what it's for, goes through an Independent Management Review. And so we look at it before we issue the RFP while the evaluation is going on to ensure that we have, in fact, a proper evaluation. And then, last, once the contract or the decision for award is made, that, in itself, is examined.

And then every year we review that contract to see if, in fact, the taxpayers are getting what they paid for. That process was put into play about 7 months ago. We have reviewed over 40 programs to date and are in the process of reviewing them. This is an ongoing thing. It requires the participation of senior executive service and/or general officers and flag officers to participate in these reviews whenever we can. It includes contracts managers, engineers, program managers, auditors, as well as the General Counsel's Office.

And the whole idea here is to ensure that we are, in fact, utilizing best practices across the Department and, second, that we are adhering to the regulations as we proceed with these procurements so that we can ensure that the taxpayers, that they are getting a fair deal, and the warfighters are getting what they need.

Ms. WATSON. Is this information going to be up online?

Mr. ASSAD. We are working right now with OMB to discuss how we could, in fact, put parts of this information online.

Many of these procurements are competitive in a source-selection nature. So there are certain aspects of it that we can't put online,

but certainly the results of it and the general findings, we are in the process of doing that right now.

Ms. WATSON. I think we were asleep at the switch in the last administration, and the oversight wasn't what it should have been. The public is very leery. And so they are talking about the debt we are in and the next generation to come and those yet unborn and so on.

I think we have to, in some way, try to weed out that information that might be classified and really put the information where people, the taxpayers, can see what we are doing.

It takes money in these conflicts. And to protect our military and to win, it's costly. Everyone has to sacrifice, but we have to give them a reason for feeling they have to sacrifice.

Mr. Drabkin.

Mr. DRABKIN. In GSA, we have instituted a procurement management review process. Actually, we instituted that process over 5 years ago now.

And in that process, we visit all of our major contracting facilities once a year. We randomly select contracts. We review those contracts, and we provide feedback to our colleagues on the quality of the contract file, the contracting—the acquisition plan and their management of that contract.

In addition, just recently, beginning last September, we added the A–123 reviews, which is OMB circular, which primarily used to focus just on the financial side, and now we have added an additional layer of review. We have added individuals to our team to do those kinds of reviews.

In addition to the reviews themselves, we bring in colleagues from other offices so that they can bring their experience to the review process and share their experience with their colleagues and so that they can also take lessons learned home to their own offices, things that they learned that were being done differently or uniquely somewhere else.

The result of this process, we believe, will be validated quite shortly, when the DOD-IG completes its review of GSA next year.

We believe that——

Ms. WATSON. Speak right into the mic, please.

Mr. DRABKIN. We believe that review—I think someone turned down the sound so it wouldn't get the feedback. We believe that review will validate the fact that not only have we have been getting it right, but we continue to get it right every day.

Ms. WATSON. My time is up, but I have one more question, and I will just give myself an additional minute.

And are any specific changes addressing the use of multi-award schedules going to be included in your submissions? And both of you, I would like you to respond.

Mr. ASSAD. Madam Chair, we are moving forward to a reduced number of multiple-award contracts that we have. These can be terrific tools for our people to use.

But one of the things that we want to make sure of is that they are, in fact, promoting competition and that they are not used as a mechanism simply to obligate funds. And so we are looking very hard at the practices that we are using to ensure that we provide fair opportunity. We are specifically looking at where we have

small businesses who have been awarded multiple-award contracts and who are capable of doing the work, that work is properly set aside for small businesses to compete on.

And so what you will see is a number of actions being taken by the Department to improve our competitive posture.

Last year we have actually set a record within the Department in terms of most dollars and the largest single percentage that we have ever competed. Having said that, it's not anywhere near enough, and we know that we need to improve.

And one of the areas that we can in fact improve upon, is in award of delivery and task orders under multiple-award contracts. And you will be seeing a number of policy statements coming out as well as policy guidance and information of the DFARS with regard to improving competitive opportunities in multiple-award contracts.

Ms. WATSON. Mr. Drabkin.

Mr. DRABKIN. Madam Chairwoman, I would first like to make a distinction between schedules, which is a program run by the administrator of GSA, and multiple-award IDIQ contracts, which we all have authority to run.

GSA's Schedules Program has always required competition. Our customers' compliance with that rule has, on occasion, been a little spotty.

As you probably are aware, almost 5 years ago, we developed a program called e-Buy, an electronic method, so that all Members, all contractors holding a schedule can be selected.

DOD, in fact, is required to use e-Buy when they use our Schedules Program and the number of bids or quotes that they have received has increased to an average of between three and six per competition, but they solicit from all scheduled holders.

On IDIQ contracts, there's always been a requirement for fair opportunity. It's a question of administration of that requirement that has been put in issue.

But I think the real issue is what Shay touched on, Madam Chairman, and that is also what we addressed, I served as a member of the SARA panel, and later, you will hear from our chairperson, Marcia Madsen, is that we probably have way too many IDIQ contracts in the government.

It costs us money to award those contracts and administer them. It costs industry money to compete for them, and I am not sure it contributes to competition or better pricing over all.

In the last Congress, there was a direction to OMB to better manage the number of IDIQ contracts governmentwide. And I believe once a new administrator is appointed in OMB and OFTP, that process will begin, and we will see some success in reducing the overall number of IDIQ contracts.

Ms. WATSON. Thank you.

I will now yield to our ranking member. I will give you an extra minute, Mr. Bilbray.

Mr. BILBRAY. No problem, Madam Chair. I think your question was quite appropriate and served the entire process and this committee.

Mr. Drabkin, I appreciate you pointing out—I think when we get into this, we've got to look at our successes. And we are the most transparent system in the world.

We just forget that, outside of Mexico, we are the only place where we don't follow the British Godforsaken parliamentary system, to where winner takes all, and the administration is nothing but an arm of the lower house. So I think as Americans, we always talk about other countries and think they are in our system. We have a very unique system, and it works.

And that's why this relationship between the executive branch and the legislative branch and the process of oversight is so important and needs to be not just cooperated with but embraced.

I guess, gentlemen, what I first want to talk about is, we really are in crisis on this issue. And what I worry about in crisis, when you look at how much of the budget cannot be accounted for in so many ways at a time that we are now are looking at almost another trillion dollars that we don't know how we are going to account for, there is this crisis.

And the problem with crisis is we always talk about tactical issues during crisis, and we ignore the opportunity to really now kind of learn from our mistakes and our challenges and look at the strategic. And I would like to sort of back off a second and take a look at the strategic.

The question over at DOD, we have interns that come in and participate in a training program basically, don't we?

Mr. ASSAD. Yes, sir.

Mr. BILBRAY. What percentage of those interns do we actually end up hiring after they have gone through the intern system?

Mr. ASSAD. We actually do very well in terms of hiring the interns. The real question is, can we retain them? And I would say that it's not unusual in our intern programs to see turnover of 30 to 40 percent.

Now, the question is, where are they going? Well, to some degree, they go to my brothers and sisters in the rest of the Federal Government. And while we hate to lose them in the Department of Defense, that, in and of itself, is not a bad thing. But, in fact, we do lose a number of them to industry, because we happen to have the finest training system in the world in terms of training people in acquisition and procuring at the Defense Acquisition University. It's without peer.

And so folks know that when they get somebody, especially an intern, through our training program, that they have been well trained.

And so what we are doing is that we are taking a number of steps, and to a certain degree, Mr. Congressman, this is all about leadership. It's—we are getting our leaders actively engaged in ensuring that they communicate with the work force on an ongoing basis in terms of their value—and I think the Secretary and Deputy Secretary have stood tall and basically said we are going to make a significant change in the size and capacity of our work force, and that has gone a tremendous way in terms of almost overnight of significantly improving the morale of the work force, because they see help on the way.

Mr. BILBRAY. So we basically absorb all our interns, and then it's just this revolving door?

Mr. ASSAD. Yes.

Mr. BILBRAY. Then they end up getting a better offer either in another department or outside?

Mr. ASSAD. Yes, I would say about 30 to 35 percent do that, yes, sir. We retain about two-thirds.

Mr. BILBRAY. Thirty to 35 percent come in—what percentage never get a job, do you think?

Mr. ASSAD. A very small number. You know, we do—there are some folks who either they decide this isn't for me, or we decide they are just never going to hack it. But that's a very small percentage.

Mr. BILBRAY. Yes, I will say this—I know the gentleman from Fairfax County may get concerned about this, but it's too bad we don't have the type of contractual arrangement with our civilian employees that we have with our military, basically saying, if we are going to spend this much time training you as a Naval aviator, we expect you to sign on for this long. And, you know, that kind of arrangement somewhere down the line, may be a radical concept now, but I think as we get in these challenges, we should be looking a lot.

I guess the issue comes down to retention though, too, as a lot of the institutional mindset. I think this administration ran a campaign that really should be setting the example of maybe how this administration should be looking at the modification of the Federal bureaucracy, and that is this administration captured young people and captured the potential for not only the young people but the technology that they are so comfortable with.

And I guess the issue there of retaining more of these young bright stars is, how we can change our internal operation, you know, section by section, to not only allow these young stars to use their new tools that they have but to embrace it and be brave enough? I know all of us here that are on the front row here may be less than comfortable with the technology and approaches that the people will find behind you or behind us, you know, not only are comfortable with but embrace and integrate into their day-to-day life.

And my question to you is, how can we modify the system to be more open to the junior Members who are coming up with their mindset and their new savvy and direct them to be the next generation of oversight?

Mr. ASSAD. Mr. Congressman, we are making a number of changes in that regard, and, frankly, it's not just the younger or those less experienced or those more comfortable in the information technology age; the fact of the matter is we need to do a much better job within the Department and across Federal Government in sharing information and knowledge about the business deals that we have. How do we do business with different contractors?

It is not unusual to have certain products being bought from the organizations within the Army, Navy, and Air Force and having never had them talk to one other about doing business with the very same company that sells to all three. So what we are doing

is we are about to make a remarkable change in how we collect and disseminate especially business information.

DCMA is going to become the cost-analysis center for us and so that our young employees will be able to log on, immediately go in a Web-based tool into that DCMA data base, get the information they need quickly and then be able to process that so that they can understand what are the terms of the business deal that they are getting.

The fact of the matter is that we are—we are not as capable as a number of organizations in terms of being able to share that information, but we are getting there. And I think you will see a significant change over the next couple of years, especially in the way we share business deal information.

Mr. BILBRAY. Well, Mr. Drabkin, my biggest concern is that there are a number of us that are in a position to make decisions, and almost as if—you know, I grew up along the border. And the one thing I have learned very quickly is, no matter how much you learn a language; it's not the same as growing up with it. You think certain ways.

And I think our generation, if I may expand the relationship, will always have a blind spot that we need to do translation to understand what these kids are up to with their technology and their approach, only because they grew up with it. This is their primary way of thinking.

How do we figure out how to tap into that? It's almost like man's first experiment with fire or with nuclear power; we may, you know—first of all, it intimidates us to some degree, and we may not understand it, but, boy, the potential is huge. How are us old guys able to develop a system and then actually embrace these kids and their technology while still directing it, even though we may not speak the language as our primary source?

Mr. DRABKIN. Actually, I am very lucky to be at GSA, because at GSA, we have a culture that has adopted and continues to adopt the changes in the IT world and in the way we approach our business.

We are able to attract folks right out of college. We use collaborative tools. We are into cloud computing. We are on the edge. Our people have the most current and up-to-date electronic devices and access to them. We have a process.

Because of the problem of the hiring in the 1990's, we are advancing people now that would never be advanced at this stage in their career. We don't have a choice. We have to have people to do the work. And so somebody who has between 5 and 10 years experience is now getting a chance to do things that they never would have gotten a chance to do if we had had a complete cadre of people with that kind of experience.

It kind of reminds of me of what the Army was like when I came in, in 1978, at the end of the Vietnam War. As a young captain who never tried a case in my life, I showed up and was made the chief of military justice. I mean, those kinds of opportunities exist today, and we are able to take advantage of those and leverage those in GSA.

We are a much smaller agency than DOD, but I think you will find if you talk to any of our young people who come in the intern

program that we have, that they will tell you that GSA is taking advantage and knows how to talk to them. They are using the social Web sites and the social, and all of these other tools, not only to attract people to come and work with us but to keep them interested while they are working with us. I would like to point out——

Ms. WATSON. Mr. Bilbray, will you yield?

Mr. BILBRAY. Yes.

Ms. WATSON. You said in your opening statement that one of the problems you suffered from was the lack of being able to hire well-trained, well-skilled, well-educated people.

Do we see within your budget the opportunity to bring on the people with the skill sets that are needed? And I am listening very carefully because I know there has been much debate in our House about our budget deficit and endangering the future lives and so on.

Mr. Bilbray brings a very thoughtful point, and that is, we are in a culture of technology and use the example of President Barack Obama; he used technology to its highest level, and that's how he surprised a Nation and won.

There's a lot of talent up there, out there. Are we going to be able to capture that? Will you have the budget? Will you be able to bring on the kinds of people that you know can advance the agency?

Mr. DRABKIN. Well, first of all, in our career field, in the acquisition career field, there are very few people in the private sector who we can hire and put to work immediately because of the very nature of government procurement, all of our rules, all of our processes, which are unique.

We don't find them in the private sector. Even the county of Fairfax doesn't have the same level—I used to be a resident of the county—doesn't have the same level of regulation and process that we provide the Federal Government.

So when we hire somebody, typically we have to train them, and that training process takes somewhere between 1½ to 2 years before we can even put them out on their own to begin doing the kind of work that we do.

Ms. WATSON. Are we in that process?

Mr. DRABKIN. We are in the process of hiring them. In GSA, and we are different from other agencies, because, as you know, Congress appropriates very little—no money for the operation of our Federal Acquisition Service and very little money for the operation of our Public Building Service. We earn, through revenue, through sales to other agencies, the money we then use to reinvest in our work force and our tools.

We, in GSA, have the flexibility to acquire more people. If you talk to my colleagues in the other civilian agencies, I think you would hear a different story. They require an appropriated budget in order to increase the number of FTE, full-time equivalents, they need in the acquisition work force.

But I am not sure that the question is really increase the acquisition work force so much—well, I am sure you have to increase the acquisition work force. I don't know that the answer is that we have to increase the work force as a whole, and I can't speak for other people, but I certainly think we ought to have a business

process that looks at, where are the competencies and skills that we need to have in-house to do our work? And those people we should hire. And where are the competencies and skills that we can buy from the private sector to get our work done and are not essential to the government's performance of its mission? And those we can buy.

And those are the kinds of decisions that I know are difficult; I know that this committee and others will be discussing. I realize they also have issues relevant to political party platforms.

I am a career civil servant. I don't get in those discussions. What I am concerned about is making sure that we have enough people to manage the $556 billion worth of contracts that we awarded last year.

By the way, in 1991, we had 33,700 of 1102s in the whole Federal Government. And an 1102 is a contract specialist; it's a person we hire and train to award contracts.

Last year, we had 28,700 of 1102s. In 1990, we awarded $150 billion worth of contracts. Last year, we awarded $556 billion worth of contracts. Do the math.

Mr. BILBRAY. Mr. Drabkin, in other words, what happened was, we did—and all of us who were participating, except for the gentleman from Fairfax—that reduction during the 1990's, and then we hit the crisis of 9/11, and all at once, we saw a huge ratcheting up of contracting.

The question I really get to is that we are approaching—you know, we are in a crisis mode now, and there's opportunity, obviously, in the crisis. Just as the military during tough times, traditionally, as always, had the ability to cherry pick for that level of employee and the training and the different entry level. We actually are in a unique situation like now, at least indications coming from out of the universities, is that you now have people, especially in IT, that normally would not be available for government service now are looking to government service for that stability. That never was considered for a long time.

You know, going back to, I guess, 1979, I guess is the closest time we have seen, and even then it may not be. So right now, the word is, as these kids are coming out in June, they are looking to work for Washington. They are looking to work for government right now. And now is the opportunity for us to do the cherry picking and be very aggressive at grabbing these kids while we can and get them into the system, and hopefully, we will be able to lock them into a career before the economy starts recovering, and they start seeing opportunities other places.

Ms. WATSON. Yes. I am going to go to our next Member, Mr. Connolly, and then if you want to respond to Mr. Bilbray's comment, you can do it, along with answering his questions.

Mr. CONNOLLY. I thank the Chairlady.

I want to thank my colleague, my friend from California, I am so glad he began by asking about the internship program, because it's a concern I have based on testimony we have heard in previous hearings before the subcommittee and the full committee.

And I am going to be introducing some legislation, and I would welcome sharing that in draft form with my colleagues to see if it is of interest to them that would try to systematize an internship

program and look at reporting in terms of outcome so we have a better handle on that and certain elements, mentoring rotation, evaluation, streamlining, so it may make it easier if you are an intern, it's easier to get into the Federal service as we move out to the future.

So I would welcome sharing that draft legislation with my colleagues to get their reaction. But I do think we have to do something to encourage model programs of internship. Because we have heard both the good and the bad about internship programs. It seems to me that if somebody wants to be an intern with the Federal Government, they ought to be leave highly motivated to want to continue to serve in the Federal service.

There may be lots of reasons why one elects not to, but I would hope one of those reasons is never because it was a negative experience. And we have heard stories where, in some agencies, that is, unfortunately, the case.

Let me go back to acquisition, because, I think, Mr. Drabkin, you were giving some great numbers there. And I think clearly what you showed was that while the value of large acquisition contracts were going up, the number of qualified contract officers to the Federal Government were going on. And so, when you, as you said, do the math, we actually saw a significant loss of skill sets in the Federal Government in just sheer numbers.

But even if you go behind those numbers, what I am concerned about, having watched it from the other side, is that it's not just the actual number; it's also the skill set. We increasingly face a challenge in the Federal Government of, do we have the requisite skill set to manage very large, complex technological contracts that are multiyear; that's No. 1, and I would like you to address that.

Second, what about internal processes? I mean, we talk about cost overruns. But frankly, sometimes, we, the Federal Government, we are responsible for those cost overruns because we change, in effect, the scope of the original work.

I can think of one contract I am familiar with where over the life of a 2 or 3-year contract, this particular contractor had 14 Federal project managers, contract managers, each of whom, formally or informally, had his or her own view of the scope or what could or should be added. And by the end of the contract, it looked a lot different, unfortunately, than what originally was agreed to. And the contractor was in a tough spot in trying to deal with the client. And so is the rotational system we have within the Federal Government part of the problem? Can it, should it be changed?

Mr. ASSAD. Let me first talk to the work force itself, Mr. Congressman.

We went through, and I know some of the other Federal agencies have done some competency modeling, but we have gone through and done some of the most comprehensive competency modeling of the contracting work force, frankly, not only in the Federal Government but across industry. We had approximately 18,000 employees participate voluntarily in a competency modeling that examined their competencies in a very detailed and specific way. So we understand not only by every particular organization, but across each Department, Army, Navy, Air Force, as well as the other defense

agencies, what our capability gaps are, and we understand what it is we have to do about it.

In terms of our growth and our work force, we are specifically going to hire about 5,300 contracting officers, 2,500 defense contract management agency personnel, 700 auditors, 800 pricing people, 300 procurement and acquisition lawyers. So we understand very well what our capability gaps are and we are very focused on improving those.

With regard to the competency modeling itself, I think that is a tool that everybody needs to use. I know GSA has—Dave and his team have a very good system that they use over at GSA. But we really do need to institute that across the Department in a very significant way so we can understand our capabilities across the work force.

In terms of rotations, rotations can be a positive thing because you get a specific degree of experience across a wide variety of resources. Having said that, one of the things that we are doing now is, we are requiring our program managers to sign term agreements to say that they are going to stay on for a specific period of time because, as you know, given your past experience, when you have major weapons systems, it is not unusual for that to take 7, 8, 9 years from initiation to absolute fielding; and you might have two or three major program managers participating in a program along the way. And sometimes a program manager inherits decisions that weren't his to make. So we are looking very seriously at that, about extending the terms of our program managers, especially on our major programs.

I think that with our term agreements, our program managers will go a long way to do that.

Mr. DRABKIN. Let me begin with one of the last things you talked about, but is one of the most important things for any acquisition, and that is the requirement.

I believe you are absolutely correct that in many cases when you look at why a contract changed over time or why a program changed over time, you will find that at least in part it was attributable to requirements creep, we call it. The requirements started out as being an automobile, and before you finish it is a jet aircraft.

And by the way, if you start out to buy an automobile, you are going to get a lousy jet aircraft when you are done. But our community, the acquisition community, does not control the requirements side of the house. We respond to it.

The second most important thing is what we do once we get that requirement, and that is the acquisition planning process, which has been codified and institutionalized for many, many years, but which still today, because of lack of time, because of lack of people, and because of a lack of management direction or interest, the acquisition planning process in many cases across the government gets left out.

But it is during that process where you look at the requirements again, you make sure you redefine the requirements, you do your best to make sure that it is nailed down and all of the changes you can anticipate are taken care of and then how you decide to satisfy those requirements through the acquisition process, including justifying what kind of contract you are going to write based upon the

nature of those requirements, or how you are going to define the competition because all requirements don't compete equally in the marketplace.

When you get to rotational assignments, I do agree that there is a problem with the fact that we have both contracting officers and project managers who, during the course of their careers, change jobs. At GSA, we don't have the ability to direct someone not to go somewhere else. We can avoid internal management reassignments, but if they get an opportunity to work for another Department, if they decide that they have had enough and don't want to work for the Federal Government anymore, we have no ability to keep them in one place, although we are looking at ways to retain them, things that we can do to incentivize them to stay in one place and complete a project until its very end, although some of our projects are quite long. Not as long as in the Department of Defense, but when you are building a major courthouse, you don't do it in 12 months, and making sure that you hold the team together to get that courthouse done—and GSA builds a lot of courthouses—is something that we are looking at.

Finally, the level of competency and difficulty has changed in what we buy. It is different than what most State and local governments do in terms of buying.

In the Federal Government, we decided back in the 1990's we would buy best value, we would stop buying low price. It was Secretary Perry, who was then the Secretary of Defense, who came to this body and reported to this body that it was costing the Department of Defense a fortune to buy low price, because you would buy something that was the lowest price, and it would wear out sooner than something else, and you would have to go out and rebuy it, and there were costs associated with all of that. In addition, we were buying from companies that weren't performing well.

And so we went to best value. Best value requires a level of competency and skill which is different than picking the low price.

Mr. CONNOLLY. And judgment.

Mr. DRABKIN. That is part of the competency and skill. And the ability not only to figure out what best value is, but then because of our system and because of our requirements of transparency, to be able to describe what that best value is so that my grandmother in northwest Alabama will understand what "best value" means. And believe me, that is hard to do.

That requirement has changed, and it has made it more difficult for our work force.

I would like to address a couple of other things that Mr. Bilbray said. First of all, we don't need people to come to Washington. They can work from other places. One of the great things about GSA is, we can hire people from all over the country, and they can work for us from wherever they are.

We are looking at those kinds of opportunities because once this economic situation resolves itself, coming to Washington——

Mr. CONNOLLY. Reclaiming my time, Madam Chair, because I have to be on the floor shortly.

Forgive me, Mr. Drabkin, but I know Mr. Bilbray will have another opportunity.

I take your points about rotation. There is a positive aspect to that, keeping somebody fresh and wanting new challenges. You don't want someone to get stale, and certainly once in a while you want a fresh look at a contract. No question about that.

But on the other hand, if you have not an 8 or 10 or 12-year project, but you have a 2 or 3-year project that has a clear beginning and a clear end with, I hope, a clear mission, clear objectives, there is something not only satisfying but desirable, it seems for me, for somebody to take that on as his or her project and see it through to its end. It is incumbent, it seems to me, on Federal managers to create an environment and a system of incentives that allows for that.

I think both of you would agree that if you are looking at a 3 or 4-year contract with 14 project managers, that is a recipe for discontinuity and, frankly, dysfunctionality, in outcomes.

Mr. ASSAD. I agree with you, Mr. Congressman, and that is a function, in most cases, of capacity and people. That is why of those 20,000 folks we are increasing, approximately 10,000 will be program managers, systems engineers, logistics managers, because we realize that not only do we have to increase the capability of that particular side of the work force, but there has to be a steadying capacity to deal with our programs.

Ms. WATSON. I want to conclude the testimony for this panel. I thank you very, very much. We will be back with you. I think that your statements have given us a lot of food for thought. I do have followup questions, but we will get them to you in writing.

Thank you so much for your testimony, and you are excused.

Mr. CONNOLLY. We are just sad that Mr. Drabkin apparently is no longer with Fairfax County.

Mr. DRABKIN. I am now Ms. Norton's constituent.

Ms. WATSON. I now invite our second panel of witnesses to come forward. It is the policy of the Committee on Oversight and Government Reform that we swear in all witnesses before they testify. I would like all of you to stand and raise your right hands.

[Witnesses sworn.]

Ms. WATSON. Let the record show that the witnesses answered in the affirmative.

I will now take a moment to introduce our distinguished panelists. First, we have Mr. William Gormley, who serves as the chairman of the Coalition for Government Procurement and as president and chief executive officer of the Washington Management Group. Prior to his current post, he served as the Assistant Commissioner for the Office of Acquisition, Federal Supply Service at the General Services Administration.

Next, we have Mr. Philip Bond, the president of TechAmerica. Mr. Bond is also president of the World Information Technology and Services Alliance, a network of industry associates and associations representing seven high tech trade groups around the world. Previously, Mr. Bond served as the Under Secretary of the U.S. Department of Commerce for Technology. And from 2002 and 2003, he served concurrently as chief of staff to Commerce Secretary Donald Evans.

Mr. John McNerney serves as the general counsel for the Mechanical Contractors Association of America. There, he works on

numerous labor-management relations issues, along with issues associated with the legislative advocacy public procurement and a variety of other public and private contracting policy issues.

Ms. Karen L. Manos is the Chair-elect of the Procurement Planning Committee of the National Defense Industry Association and is a partner with the law firm of Gibson, Dunn & Crutcher, LLP, where she is co-Chair of the firm's Government and Commercial Contracts Practice Group.

Next, Ms. Kara M. Sacilotto is a partner with the law firm Wiley Rein, LLP, and there she focuses on litigation matters relating to government contracts and has represented government contract clients in both protest claims litigation, prime contractor disputes, and trade secret misappropriation litigation.

Ms. Marcia Madsen is a partner of the law firm Mayer Brown, LLP. There she focuses on multiple issues associated with government contracts and litigation. She also served as the Chair of the Acquisition Advisory Panel authorized under the Service Acquisition Reform Act of 2003, which provided 89 specific reforms to Federal procurement laws and regulations.

Finally, Mr. Scott Amey is the general counsel for the Project on Government Oversight. There he directs POGO's contract oversight investigations, including reviews of Federal spending on goods and services, the responsibility of top Federal contractors, and conflicts of interest and ethics concerns that have led to questionable contract awards.

I will ask that each one of the witnesses just give a very, very brief introduction of yourself and what you do; and we are going to cut the time. I am hoping that other Members will come, but we want to finish by 11 a.m., so we are going to go very quickly.

Mr. Gormley, please proceed.

STATEMENTS OF WILLIAM GORMLEY, CHAIRMAN, COALITION FOR GOVERNMENT PROCUREMENT; PHILIP BOND, PRESIDENT, TECHAMERICA; JOHN McNERNEY, GENERAL COUNSEL, MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA; KAREN L. MANOS, CHAIR-ELECT, PROCUREMENT PLANING COMMITTEE, NATIONAL DEFENSE INDUSTRY ASSOCIATION; KARA M. SACILOTTO, PARTNER, WILEY REIN, LLP; MARCIA G. MADSEN, PARTNER, MAYER BROWN, LLP; AND SCOTT AMEY, GENERAL COUNSEL, PROJECT ON GOVERNMENT OVERSIGHT

STATEMENT OF WILLIAM GORMLEY

Mr. GORMLEY. Thank you, Madam Chairman, Ranking Member Bilbray, and members of the committee.

After listening to the dialog you had with Mr. Drabkin and Mr. Assad, I am one of those rare birds; I actually spent 30 years in government acquisitions. Maybe we can talk about what it takes to stay in during the course, or as we have more time today. I hope my experience will be of value to the committee.

The Coalition for Government Procurement members represent the commercial sector of services and supplies, and they interact with the Federal Government. I had prepared 5-minute remarks,

but I will honor the request to shorten that and come back to it as we have time.

[The prepared statement of Mr. Gormley follows:]

Subcommittee on Management, Organization, and Procurement

Committee on Oversight and Government Reform

"The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"

June 16, 2009

Bill Gormley
Chairman, The Coalition for Government Procurement
President & CEO of The Washington Management Group and Federal Sources, Inc.

Madam Chair, Ranking Member, and Members of the Committee, thank you for the opportunity to testify this morning on opportunities and challenges for strengthening government procurement and acquisition policies. I am the Chairman of the Coalition for Government Procurement and President & CEO of The Washington Management Group and Federal Sources, Inc. I have over 30 years of experience in government acquisition, including serving as the Assistant Commissioner for the Office of Acquisition, Federal Supply Service, GSA, and 10 years of work in private sector. I hope my experience on both sides of the procurement spectrum will be of value to your committee.

The Coalition for Government Procurement is a non-profit association of companies that sell commercial services and products to the federal government primarily through multiple award schedule (MAS) contracts and government wide acquisition contracts (GWAC's). Our member companies are comprised of both large and small businesses and account for 70% of sales on the GSA schedules and 50% of commercial item acquisition in the federal marketplace. The Coalition's mission is to protect the interest of its members by providing valuable information on issues affecting the government market and by constantly advocating common sense in government procurement policy. We have worked with government to achieve this goal for 30 years.

The Coalition believes that there are many issues that need addressing in today's federal market. Issues such as strengthening and improving the federal acquisition workforce, balancing transparency vs. the need to protect the legitimate proprietary information of both the government and private sector, and the need to ensure proper oversight while still ensuring that the federal market continues to attract the best solutions from as many contractor partners as possible must all be weighed and carefully balanced to ensure that government agencies can meet the ever-increasing missions we as citizens expect of them.

The Coalition recommends that Congress and the Administration provide the same focus and resources on "front-end" needs such as acquisition workforce training and enhancement, as has recently been given to "back-end" outputs such as increased inspector general resources and the creation of what are now multiple special contract oversight boards. Simply put, no one can expect to have the type of federal acquisition we all want without giving equal weight and attention to all parts of the process.

We believe that the best place to start creating a better environment is the acquisition workforce. The Coalition has a long history of supporting both an increase in the total number of acquisition professionals and an enhanced business advisor role for the federal acquisition workforce. We are currently recommending to the General Services Administration and others the creation of an acquisition executive corps that acts as true acquisition/business relationship managers using acquisition expertise and industry knowledge to create solutions that achieve government missions, save tax dollars and enhance the relationship between government and business.

In our "1102 NextGen" white paper we call for the creation of a career path and related incentives for contracting professionals to not only negotiate and award contracts, but to develop strategies and truly manage contracts, from a contracting officer perspective, that they or others put in place. Further, the Coalition is calling for the de-segmenting of the contracting function so that all contracting professionals will have a total 360 degree view of the business process. This step will enhance the role of acquisition professionals and give them the experience needed to be better strategic business advisors to their internal customers. We believe that this will have a profound, positive impact on acquisition and will also increase the attractiveness of the federal acquisition field, ensuring that the hiring of new contracting officials keeps pace with the changing and more demanding missions of government agencies.

These acquisition professionals must also have the resources and time necessary to conduct sound acquisition planning. From our experience in working with the SARA Panel and, more recently, the Multiple Award Schedule Improvement Panel, we have seen first-hand that proper acquisition planning at the outset of a project leads to a better explanation of the government's needs, better contractor responses, a smoother contract operation phase, and less of a need to rely on oversight mechanisms that inherently only catch problems after damage has been done. The Coalition believes that the additional resources in people and training that this recommendation requires will actually cost the government less than a continued emphasis on fixing mistakes that have already occurred. Only by improving the front-end can anyone reasonably expect to have fewer mistakes to begin with.

The Coalition is also a strong supporter of making government acquisition of commercial solutions as free as possible from government-unique requirements. We have worked for our entire 30 year existence for common sense acquisition policies that allow the government to take advantage of the same solutions, with the same market-driven competition, as is available to the private sector. We believe that these policies have generally served the government well. Innovative businesses are able to enter the market, increasing competition and enhancing the operation of government with knowledge gained in other areas.

The Federal Acquisition Streamlining Act, Clinger-Cohen Act, and Services Acquisition Reform Act were all based on this premise. Each of these acts passed Congress by wide margins, indicating broad-based support for market-driven innovation. Collectively, they helped create a government that works better and costs less.

The Coalition is concerned, however, that the recent trend is to implement an increasingly burdensome succession of new, government-unique rules for commercial solution acquisition. While these laws are well-intended and were created in response to problems created by a few wrong doers, we believe that the overall impact may create a hostile marketplace where all government contractors are considered not as business partners, but Cold War adversaries not to be trusted.

Several provisions of The American Recovery & Reinvestment Act (ARRA), for example, are a cause for concern for not only what they mean for ARRA-funded procurements, but the trend they could indicate for new rules that could come next for all procurements.

The Recovery Accountability and Transparency Board created by ARRA was set up specifically with the mission to punish wrong-doing before any business had taken place. The Board has an initial $84 million appropriation for 2.5 years. While the Coalition understands that proper oversight and pursuit of wrong-doers is important, the creation of a discreet board, enhancement of agency inspectors general and the Government Accountability Office, and the exclusion of any funding to improve the front-end of the acquisition process sends a clear message that all but the most careful of contractors should steer clear of ARRA-funded projects.

In addition, the special reporting requirements to accept Recovery Act funds are causing much confusion within industry. What to report and when is not always clear. We have fielded literally dozens of calls, some from experienced contractors, on what the rules mean under a variety of scenarios. Contractors are concerned that they will be found in non-compliance even if they make a good faith effort to report. As a result, several have said again that they may not compete for ARRA-funded projects.

One more example of government unique requirements is the new contractor ethics reporting mandate that went into effect in December of 2008. This rule requires for the first time that contractors with "credible evidence" of wrong doing report on themselves not just to their contracting officer, but to agency IG's as well. This rule alone has led for several people we know to recommend that their businesses get out of the government market. It is not a question of ethics. Most contractors are ethical and who take their compliance responsibilities seriously. There are also substantial ethics and compliance rules that were already in place before this new rule. It is rather an indication that a company could face even more severe penalties than otherwise would if some mistake were made and not reported. In this environment it is already assumed by many that there is no such thing as an "honest contractor mistake".

These steps, along with similar regulatory and policy changes, help create an atmosphere that causes distrust, discourages communication, and brings innovative thinking on government needs to a halt. Continuing this trend will increase costs not just for industry, but for government as well.

Particularly hardest hit will be small businesses and those with various socio-economic designations. These are the companies that the government is trying to attract the most, yet may be discouraging from participating in federal business as they do not have the infrastructure necessary to ensure compliance with an ever-changing set of government-specific rules. Expending scarce resources on successively newer and more invasive rules takes away the ability to grow a business, pursue new opportunities and thrive.

Companies of all sizes are in business to do business and the more rules that there are to abide by, the less incentive there is to participate both because of reduced profit opportunities and the probable negative publicity when wrong-doings, no matter how inadvertent, are eagerly exploited in the media.

The Coalition is concerned that this climate may lead to the unintended consequence of driving small businesses out of the federal marketplace. At very least, these new rules will make it successively more difficult for the government to meet its 23% small business goal.

We are even concerned that larger commercial companies with $20, $40, or even $80 million dollars in government sales may elect to leave the market or sell only through traditional government contractors. These are companies that are inherently commercial and, while their government sales may look big, the cost to maintain them may become disproportional to their other business.

Taken together, these small and predominantly commercial, firms employ thousands of people in Congressional districts throughout the country. These are jobs that may be reduced or even lost if government unique mandates continue to be required of their firms.

Only those firms that are mostly, if not entirely, established to do government business will be left to compete for contracts. The government will lose out on the competition and innovation that has existed for the past 15 plus years in the commercial solutions sector.

Another trend of note to the Coalition is the current drive to promote firm, fixed price contracts. Government acquisition professionals today generally do not have sufficient knowledge of, or time to stay abreast of, the latest technology developments, innovations in service provision, or other similar commercial market trends. FASA, Clinger-Cohen and the like promoted discussions with industry and enabled the government to have a better understanding of what was available. This was one way acquisition professionals could stay on top of the innovations they needed to know about to be effective buyers. Now, however, such discussions are far less frequent.

An over-burdened, less well-informed acquisition workforce cannot be expected to craft a Request For Proposals with requirements sufficiently defined so as to enable good use of firm, fixed price contracting. Bids on ill-defined requirements will inherently be higher than they would for better defined projects as contractors attempt to mitigate their own risk. The government will end up paying more for a solution than it otherwise would if another contract type had been used.

The Coalition is a strong supporter of GSA's Multiple Award Schedule program. We believe this program is the government's best commercial solution acquisition method. It consistently provides the latest commercial solutions at great values from businesses of

all sizes. We support moves to eliminate duplicative contract methods and the enhancement of GSA's role in acquisition.

The Coalition has consistently recommended the elimination of the schedules Price Reductions Clause (PRC). The PRC no longer serves as a mechanism to ensure fair and reasonable schedule pricing. Competition in the federal market has long surpassed the PRC for that purpose. Today the PRC serves mainly as a "gotcha" mechanism to trip up even the most conscientious contractor. We believe that a commercial-item contract should reflect the commercial marketplace as closely as possible. The penalties associated with the PRC are far from that.

We are aware that the MAS Improvement Panel may soon recommend the elimination of the PRC from the schedules program. This is a move the Coalition strongly supports.

The Coalition also recommends bringing the entire schedules program under one, centralized management structure. The GSA MAS program generates over $37 billion in annual sales. It is a large and multi-faceted program. We support the initiative taken by GSA in 2008 to establish a Schedules Program Office. This office has already brought about greater consistency and accountability across all schedules.

We recommend taking the next logical step and combining the operational and policy aspects of the program under one program management office. Today, at least three separate entities are responsible for various parts of the program. This led to the interesting specter at last week's GSA Expo of having two parts of the program brief contractors without the vital third part – the actual program office. If the MAS program is to continue to have consistent rules, a clear face to the federal customer, and sustained opportunities for growth it must be centrally managed.

The issues facing government acquisition today are substantial, but manageable if industry and government can continue to work together not as adversaries, but as partners working on the same mission from different perspectives. We have the capability to continue the evolution of an acquisition system that is already the envy of most of the world. With rational and sound leadership from all stakeholders we can turn down the hype and truly focus on ensuring that the business of government is done wisely and well.

The Coalition appreciates this opportunity to testify. We look forward to working with you, Madam Chairman, and the other members of the Committee on these important issues. I will be happy to answer your questions.

1102 NextGen –Professional Acquisition Executives

Objective: To create a acquisition executive corps that acts as true acquisition/business relationship managers using acquisition expertise and industry knowledge to create solutions that achieve government missions, save tax dollars and enhance the relationship between government and business. Create a career path and career incentives for contracting professionals to not only negotiate and award contracts, but to develop strategies and manage contracts, from a contracting officer perspective, that they or others put in place. To de-segment the contracting function so that all contracting professionals have a total 360 degree view of the business process. To ensure that the hiring of new contracting officials does not result in merely the recreation of what is already being done, but enhances the role of acquisition professionals as members of an acquisition/business management team. "New people, new training".

Concept: Educate, train, and assign new contracting officers on the 1102 NextGen Program. This program will 1. require contracting officers to act as both contract awarders/negotiators and as contract business managers during their careers. 2. create a cadre of potential acquisition executives to develop, manage and direct major federal acquisition programs; Yet, 1102 NextGen envisions that contracting officers will act either in a traditional role or as contract program manager at any given time. For example, when an 1102 is assigned to manage contracts, s/he is not awarding or negotiating new deals until such time as the management assignment is complete. Upon completion of that assignment, the contracting officer could be re-assigned to a negotiation and award role.

In their contract management role, contracting officers will be responsible for managing a specific book of business – i.e., the contracts to which they are assigned. The contracting officer will have the responsibility to assure good contract use. The contracting officer will provide acquisition expertise and support to customers on all contract-related issues necessary to the successful fulfillment of a given project. These include, but are not limited to, answering questions/providing guidance on proper contract use, ensuring that the contract is being used appropriately for its contract type and scope, assisting the customer and contractor in making any necessary modifications, and acting as a member of the total program management team.

In order to be considered for grade or in-step promotions past a certain level (to be determined), contracting officers will be required to have successfully performed at least one contract management assignment of a dollar threshold considered appropriate for their current job level. This requirement could be repeated at various career intervals to ensure the development and retention of the skills needed to be a senior level 21st century contracting officer.

Required Support: In order for this program to be successful, senior agency leaders must make the enhancement of the contracting corp. a key, strategic priority for their agencies. Too often, contracting officers are viewed as serving in a narrow, largely behind the scenes, manner. Under 1102 NextGen, contracting officers will be business

advisors with real responsibility for the successful performance of their contracts, not just the successful implementation of them. Senior agency leaders must recognize and support this.

Additionally, the 1102 NextGen program will work only if the total acquisition workforce is staffed and supported at the appropriate level. There is broad agreement that the acquisition workforce must be increased. This is undeniably the case. 1102 NextGen will, however, make better use of these important personnel resources by ensuring that they are not all put to work doing the same things, but acting in a variety of roles to ensure that acquisition has a true "cradle to grave" role with every project. In this manner, the government will realize a significantly improved return on the investment it will make when hiring new contracting personnel. There is a cost in hiring people, yet 1102 NextGen ensures that those costs are used in developing a multi-disciplined work force.

Possible Specific Features:

- There should be a career path to GS 15
- It should be geared to executive leadership in the acquisition area, not just how to award or manage a contract
- Training/experience should include industry and a good dose of managing business relationships in an internet/im/electronic world.
- Assignments should include more than one agency and various contract types
- Participants should not be entitled to permanent assignment until program completion
- Ideally OFPP should administer this program so that they can assure that the participants aren't diverted to satisfy some agency need.

Existing Acquisition Workforce: In parallel with the 1102 NextGen program, the government should also initiate steps to identify the best existing procurement practices and train current contracting officers on them. It is important that the current workforce receive training on these practices so that the government implements a consistent, efficient acquisition program. Recognizing and encouraging the replication of Centers of Excellence will be an important bridge to the 1102 NextGen program and give that effort a sound foundation on which to build.

Benefits: In addition to the benefits noted above of having a well-trained, multi-disciplined workforce, the 1102 NextGen program will ensure the better management of government spending. Because trained contracting officers will be part of the management team, potential problems can be identified and addressed before they become problems. Those problems that may still develop can be corrected more easily while the contract is still in place. The government will have better contract outcomes, get more for its contracting dollar, and realize a reduction in fraud, waste and abuse. Solutions will be available in a more timely and efficient manner, improving the overall

operation of government. In short, the investment in the 1102 NextGen program will save the government money by driving better contract processes and outcomes.

Another benefit is the attraction and retention of a skilled, motivated, and challenged acquisition workforce. If new contracting professionals know that they will have the opportunity to experience the entire business process, be employed as true acquisition/business advisors, and not be expected to perform a limited, well-known, set of tasks through out their career, the government will be able to attract and retain the type of people necessary to make 1102 NextGen work as envisioned. The government will reduce turn-over, increase stability, and have greater opportunity to be seen as an employer of choice for those interested in the acquisition profession.

Conclusion: OMB and OPM must work together to implement the 1102 NextGen program. The government needs the benefits of this program today and should begin implementing it as increases in the acquisition workforce are being made. In addition, individual agencies may seek authority to proceed with the 1102 NextGen program as a pilot program. The results of such pilots can be used to identify "best in class" practices for adoption through out government.

STATEMENT OF PHILIP BOND

Mr. BOND. Madam Chairman and Ranking Member Bilbray, that is a very difficult to follow; it was very brief.

It is a pleasure to be here, and congratulations on launching what I think is a vitally important series of hearings. On behalf of the technology industry, I will try to summarize quickly and give you our view.

I think one is that we understand and appreciate the fact that this Congress and this administration "get" technology. All you have to do is look at the stimulus bill to see that.

We are concerned that we don't, in the name of reform, have some unintended consequences that will end up chasing away small, medium or even large companies from the government marketplace, and thereby, undermine competition, innovation and small business contracts. Unfortunately, there are some proposals that may have that impact.

The stimulus dollars do come with strings and reporting requirements. They apply the rules even to commercial, off-the-shelf contract items, which we think is perhaps counterproductive.

Contractors will be required to report on subcontracts, which may chase away some subcontractors. They require public disclosure of information which goes beyond Freedom of Information Act or other requirements. And they grant GAO the authority to interview individual employees without, as far as we can see, any rules around the rights of those individual employees. So all this makes companies stop, pause and rethink whether they want to be in this marketplace.

And, obviously, we embrace competition. I represent 1,500 companies, hundreds of which sell to the government, and so we certainly embrace competition.

The President's memorandum on contracting also has some rhetoric that sometimes raises eyebrows in our community. However, it targets and identifies very laudable things, including eliminating wasteful and inefficient contracts. It shows a clear preference for fixed-price contracts.

They also talk about the appropriate times for government to outsource services. The industry embraces that. We would benefit from a clear definition of when to outsource and some clarity around the fixed-price contracts versus others. However, we do believe that sometimes national security or the ability for a national industrial base in some critical area may call for some flexibility in contracting and not always fixed price.

We do believe the administration is right to look at these, and we just ask that they do so with an eye toward flexibility in the name of national security and industrial base issues. And we hope that Congress will let the administration move along this path a little bit before changing the rules.

I want to rattle off a few others very quickly. On the in sourcing issues, fundamentally we believe in a blended work force that is going to take advantage of the skill sets in government, the best of the public sector with the best of the private sector.

The work force that Mr. Connolly and Mr. Bilbray raised, there are too few professionals with too little experience writing contracts

that are very big and complex. With billions coming in recovery funds, that problem potentially is going to get a whole lot worse.

Transparency has been referenced, especially the great examples that were shown by the Obama Campaign for President. We certainly embrace that, and we think that, for example, OPM has to write some rules that will tell employees what they can and cannot use in terms of some of the new social networking capabilities.

We want to make sure that as we pursue transparency, we don't require companies to file information that would unfairly give advantage to their competitors overseas, or would go beyond the Freedom of Information Act.

In conclusion, the committee has launched an important series of hearings. The goals the administration has laid out for participatory democracy, greater access, openness, transparency, all of those will demand modernization; and we hope that the committee will consider ways to reform the policies, remove barriers, and encourage more innovation.

We remain confident that together, the best of the public sector and the best of the private sector, that we can meet the mission for both the government and the taxpayers. Thank you.

Ms. WATSON. Thank you.

[The prepared statement of Mr. Bond follows:]

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Written Testimony of

Phillip J. Bond
President, TechAmerica

Before the

The Subcommittee on Government Management, Organization, and Procurement of the Committee on Oversight and Government Reform of the House of Representatives

on

The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies

Chairwoman Watson, Ranking Member Bilbray, distinguished members of the subcommittee, my name is Phil Bond and I am president of TechAmerica. Thank you for giving us this opportunity to testify today and to provide technology industry's perspective on the state of government contracting.

TechAmerica is a trade association formed by the January merger of three major technology industry associations – the Information Technology Association of America (ITAA), AeA (formerly the American Electronics Association), and the Government Electronics and IT Association (GEIA). The new entity brings together over 1,500 member companies in an alliance that spans the grass-roots – with operations in nearly every U.S. state -- and the global, with relationships with over 70 national IT associations around the globe. TechAmerica is the largest advocacy organization for the U.S. technology industry, which is the driving force behind productivity, growth and jobs creation in the United States and the foundation of the global innovation economy.

Today, I am here to highlight the opportunities within government to increase use of new technologies and management practices based on the concepts of collaboration, transparency, and connection and to discuss some of the contracting issues inherent in the public sector.

Just as change was the watchword of last year's Presidential campaign, so it is the watchword for government technology in 2009. Words like stimulus, transparency and Government 2.0 are radically altering the landscape.

The President has appointed both the first-ever federal Chief Technology Officer and the first-ever federal Chief Information Officer. He made cyber-security a top national security issue on the campaign trail and followed through by creating a White House coordinator last week. And in the stimulus package, the President put technology to work to address some of the greatest challenges of our time.

The Obama Administration also follows eight years of a Republican Presidency in part marked by a few very high profile problems involving contractors during Katrina and in Iraq. In view of this history, he shares with this Congress a strong desire for oversight and transparency. These are all things the contracting community embraces, but they often result in well-intentioned proposals that carry unintended consequences. So it's with a mixture of enthusiasm and caution that we approach the mid-point of 2009.

Maintaining Government Access to Commercial Products and Services

The foremost message our members wanted me to deliver to you today regarding contracting in the Federal government is that in pursuit of reform, we must take caution not to change the public sector market so drastically as to drown out competition, prevent access to innovation, preclude small business contracting opportunities and increase costs for the taxpayer. Government contracting used to be very structured until the mid-90's when reforms opened the government market to commercial companies for goods and services. I'd dare say that today, the government is justifiably very reliant upon those commercial goods and services to meet its mission and serve the American public. A key factor in opening up the markets, however, was that the government had to acquire the commercial goods and services in a commercial fashion – meaning not a lot of government-unique requirements imposed in the transaction or on the products or services. Unfortunately, there is a feeling in our sector that we are seeing a whole host of government unique requirements either imposed or proposed and some companies are beginning to examine the business case for staying in the government market.

Stimulus Dollars Come with Strings Attached

In crafting the American Recovery and Reinvestment Act, the President and Congress clearly realized that technology is the answer to nearly all of our nation's greatest challenges. Wisely, the President and Congress are very interested in transparency and accountability as these funds are spent. As a result, about six weeks after the legislation passed, the Federal Acquisition Councils issued five interim rules that would impose unprecedented disclosure requirements for federal contractors and their subcontractors. These rules are effective as of March 31, but subject to change following a comment period that closed recently. They currently apply to all procurement contracts, existing and new, funded by the Recovery Act. These include commercial item and commercially available off-the-shelf contracts and contracts below the simplified acquisition threshold – Areas of federal contracting that historically have been relatively free of red tape.

Should these regulations stand as they are, TechAmerica thinks they would represent a significant step backwards for the government's ability to tap the brightest minds and best solutions of the private sector to support its various missions. And those five interim requirements present five chief causes for concern:

1. To begin with, they impose expanded one-time reporting requirements on prime contractors calling for disclosure of information such as executive compensation and detailed information on first-tier subcontracts worth more than $25,000. The compensation requirements apply to any entity receiving 80% or more of annual gross revenue and $25M in annual gross revenues from federal funding in the prior fiscal year. They call for compensation not otherwise disclosed to the Security and Exchange Commission or the Internal Revenue Service and even apply to privately held firms not currently required to report such information to the SEC.

2. They also call for quarterly reports including detailed information on the receipt and use of Recovery Act funds including amounts invoiced and progress reports.

3. While they don't apply to subcontractors specifically, these requirements will result in disclosure of subcontractor information. Prime contractors must report detailed information on subcontracts awarded with Recovery Act funds, including the name and address of subcontractor, amount of subcontract, description of products or services provided, and primary place of performance.

4. These disclosures will be posted on a public web site and will provide an unprecedented level of information to competitors; information that has been previously been considered proprietary information protected by Freedom of Information and Trade Secrets Acts.

5. The proposed rules also give the Government Accountability Office authority to interview subcontractor employees regarding transactions related to funded projects; agency Inspector General's do not currently have similar authority. They do not address a prime contractor's rights with respect to GAO and IG access to its employees and subcontractors, nor does it address the protection of employee rights and procedural due process. TechAmerica has filed comments outlining these concerns, and we hope to work with the government to address them in a way that supports the overall objectives, but does not drive commercial companies away from these opportunities.

Some other provisions in the Act itself mean that there will be more strings to come. For example, the Recovery Act contains a new requirement that, "to maximum extent practicable," agencies must award contracts as fixed-price

contracts using competitive procedures. We are concerned that this could cause agencies to further disfavor T&M and cost reimbursement contracts.

While in the short term, it may be possible to avoid accepting Recovery Act funds, and thus implicitly agreeing to Recovery Act requirements, but eventually contractors likely will be required to make "take it or leave it" decision. For example, GSA Multiple Award Schedule contracts are to be updated through mass modifications to include new clauses similar to the requirements for ARRA funding; contractors who refuse modification could be excluded from the schedule program.

President's Memorandum on Contracting

Also in March, the President ordered a review of existing contracts in order to identify contracts that are "wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner." It also expressed a clear preference for fixed-price contract vehicles, questioned exceptions to the competitive process for awarding work and asked OMB to clarify "when governmental outsourcing for services is and is not appropriate." The OMB was tasked with issuing guidelines for agencies to conduct this review by July 1.

According to the memorandum, corrective actions may include modifying or canceling such contracts. The industry would benefit from improved clarity on many of these points, but we are concerned with the rhetoric and the implicit notion that contracting is rife with waste, fraud and abuse. There is also much potential in this process for arbitrary moratoria or goals for rolling back outsourcing – moves that could be devastating to meeting the government mission.

In the view of many of our members, the memo implies a lack of appreciation for the complexities of the procurement process. For example, I think we'd all like more fixed-price contracts because the risks are reduced, but as you all know, it is not always the most appropriate contract type to ensure that the government's long-term technological needs are met. At TechAmerica, we hold that it is critical to maintain some degree of flexibility in contract types.

Our industry has also consistently supported the government's imperative to promote full and open competition throughout the Federal procurement process. But we argue that on occasion there are special circumstances related to national security and maintaining a vital national industrial base that override the competitive process.

The most effective way to address the complexities in this issue is to follow a public rulemaking process to develop a focused definition of "inherently governmental function" that could be applied across federal agencies. We need a series of guidelines that individual agencies could use to identify critical positions that would be restricted for performance by Government employees to ensure effective and sustained control of agency missions and operations.

For all the concerns expressed about the President's memorandum, we believe that the Administration has taken the right approach to thoughtfully examine these issues. Much of that approach is in furtherance of Congressional direction from the FY09 Defense Authorization Act. TechAmerica believes that Congress should take caution to step in and try to change the game mid-field and instead allow the course the Administration has laid out to proceed.

Insourcing

Recent proposals, including the FY10 Budget documents, require that functions currently being performed under contract should be "insourced" and the positions converted to a federal employee. This is in addition to the review required for "inherently governmental" functions mentioned above. Industry is concerned that this effort would arbitrarily convert jobs for the sake of converting jobs, without any real evaluation to make sure the agency could meet its' mission. Equally concerning is the absence of cost as an evaluation criteria in the Budget provisions.

Just as the previous administration is criticized for using quotas and metrics for "outsourcing" jobs, we are worried the same could be true if we start "insourcing" positions. We must strike a balance in the blended workforce that makes sense for the mission, provides the government the skills it needs and is the best investment of the taxpayers' dollars.

Workforce

I'd be remiss if I didn't state that industry strongly believes so many of the problems we face with contracting today are symptoms of the shortage of management and acquisition talent and experience in federal departments and agencies. There are simply too few professionals possessing too little experience to adequately identify requirements, write statements of work, and execute contracts in ever increasing values and to manage the important work that needs to be done. And with billions in recovery funds to spend just on technology, that problem is poised to get a whole lot worse.

The most effective implementation will require that each agency adopt an integrated approach to manpower planning, considering positions that government employees will fill and services to be performed by contractors. Workforce is one of the issues that will be address in a public hearing OMB is scheduled to hold in two days.

Transparency

We believe that proposals to publicly disclose contracting data, while well-intentioned, could have unintended consequences that lead to revelation of national security and proprietary information and could negatively impact competition by

exposing American intellectual property to economic competitors. For example, classified information about the location of work and the capabilities the government is acquiring would have been exposed under previous proposals. Additionally, requiring commercial companies doing business with the government to disclose proprietary information could drive them from the government market, thereby preventing taxpayers from getting the best value and latest innovation. We request that any future proposals to provide information about contracting be limited to existing FOIA disclosures.

Better Technology for Government through Acquisition Reforms

To bring us back where I started, I wanted to leave the Committee with the thought that it holds the key to modernizing our acquisition practices and policies to align with 21st Century technology acquisition and use. For example, the goals that this Administration has laid out for participatory democracy and greater access to government information will be much harder to achieve without acquisition reform. Currently, Government acquisition practices do not allow agencies to keep up with the pace of technology innovation. The government's inability to quickly and nimbly purchase products often leaves it with out-dated technologies. Other acquisition restrictions inhibit the adoption of new technologies like social networking and cloud computing. In today's environment, technology is constantly evolving; in fact, the refresh life span of many technologies is less than 18 months. A technology that is cutting edge today will almost certainly be surpassed by new innovations within a two-year period. Most government acquisition policies do not allow agencies to keep up with the rapidly changing face of technology and need reform.

We are now living in an age of the empowered citizen, voter, and worker. This is a global phenomenon, propelled first by the establishment of telecommunications networks and mass-market hardware, made possible by the growth of the Internet, and now reaching critical mass with widespread adoption of peer networks and Web 2.0 technologies, and the increased use of social software and networking.[1]

TechAmerica believes that the federal government, as well as its state and local partners, have important roles to play in spurring further innovation in, and adoption of, these technologies. The Committee should consider ways reform acquisition policies to encourage the use of new communications tools and adoption of management practices to help governments be more responsive to citizens, employees, and other stakeholders. The Committee can also play a critical role in

[1] A near-comprehensive overview of social computing technologies is available on Wikipedia.org - http://en.wikipedia.org/wiki/Social_software_(computer_software)

reducing stovepipes and barriers within the Federal government that slow down the adoption of these newer technologies.

Conclusion

TechAmerica has been and will continue to educate policy makers on industry's questions, concerns and best ideas for solving the issues we face. 2009 has already been an interesting year for the public-private partnership for innovation. We remain confident that we can work through these issues and help our industry cooperate with the federal government to meet the greatest challenges of our time.

Thank you and I'm happy to take any questions.

Ms. WATSON. Mr. McNerney, you may proceed.

STATEMENT OF JOHN McNERNEY

Mr. MCNERNEY. Good morning, Madam Chairwoman. I am pleased to be here. I am representing here today five construction trade associations: the Mechanical Contractors Association; the Sheet Metal and Air Conditioning Contractors' National Association; The Association of Union Constructors; the International Council of Employers of Bricklayers and Allied Craftworkers; and the Finishing Contractors Association.

Madam Chairwoman, our committees have come up with 10 construction procurement recommendations that respond in one way or another to the various aspects of the discussion today; and in the interest of time, I am going to rattle them off by name.

Our No. 1 priority is, we think that the committee—even though this is a fiscal committee matter, this committee, we would respectfully submit, should take cognizance of this new 3 percent withholding tax which is going to affect public contracts in 2012. But the agencies are going to have to start spending their procurement resources to gear up for this probably next fiscal year.

DOD has estimated it will cost their procurement budget $17 billion over 5 years to change their payment programming systems personnel and to add the financing costs in their contracts for that measure. So we would ask respectfully that the committee take cognizance of that and see what impact it might have on the procurement agencies overall.

If tax delinquency is a problem for public contractors, then we think the rapid deployment of the contractor legal compliance data base is a better way to keep tax delinquents out of the procurement programs.

We would also submit that because this raises payment issues, if the tax goes into effect, extending the Federal Prompt Payment law to federally assisted contracts would become all the more important. If there is going to be added withholding, we certainly want to ensure that the payment of the amounts of the invoices due is given more rapidly.

We also would submit that the regulators are going to have to be very careful that the 3 percent withholding tax doesn't go down the contracting chain to subcontractors. IRS agrees with that, but we think that the regs will have to be verycareful.

Some of our other procurement reforms, we think you should look at bid listing on low-bid, direct Federal construction contracts. We have heard a lot of talk here today about negotiated selection and other aspects of the contractor selection procedure. We think that a close look at the trends in procurement methods probably warrants now reconsideration of the idea that prime contractors ought to list their major subcontractors on low-bid awards. We think that you would improve both the level and quality of competition in the Federal market if you did that.

We are supporters of the Obama administration's initiative on allowing consideration by agencies, both direct Federal and federally assisted, of the use of project labor agreements on major construction projects. There is a lot of flexibility in that order. Even now, OMB and DOL are considering ways to shape that, and we would

urge this committee to take some cognizance of that and see if you can help the agency find ways to use the benefits.

We represent union signatory specialty contractors. We have an interest in project labor agreements and we also know that they work very well and the taxpayers are well served by them when they are used.

Finally, back to the low bid, we would like this committee to consider enacting again, proposing again to outlaw Internet reverse auction for construction procurement. That was a bad idea when it was proposed. The U.S. Army Corps of Engineers roundly condemned it, and we would hope Congress would enact the Corps' recommendation and legislate against it in Federal procurement. Some agencies still do it.

Finally, we would like you to consider and protect, especially, the construction industry. The Federal Government over the next 20 years is going to make all of its facilities and building stock net zero energy, carbon neutral over 20 years. That is going to require a tremendous amount of building operations, maintenance, commissioning energy service contracting, energy auditing; and we would like to suggest that we protect that and continue to outsource that and not bring that work that is not inherently governmental back in-house in an in-sourcing review.

Thank you, Madam Chairwoman, and that concludes my remarks.

Ms. WATSON. Thank you.

[The prepared statement of Mr. McNerney follows:]

U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Management, Organization, and Procurement

Statement for the Record on the hearing topic:

The State of Federal Contracting:
Opportunities and Challenges for Strengthening
Government Procurement and Acquisition Policies

Tuesday, June 16, 2009

Statement submitted by the Quality Construction Alliance, comprised of:

Mechanical Contractors Association of America (MCAA)

Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

The Association of Union Constructors (TAUC)

Finishing Contractors Association (FCA), and

International Council of Employers of Bricklayers and Allied Craftworkers (ICE-BAC)

Quality Construction Alliance

Quality Construction Alliance Sponsoring Organizations

According to an independent research body:

- ***Industry Predominance:*** These construction specialty groups represent more than 25% of the total building construction industry volume in this country.
- ***Market Share:*** Sponsoring specialties hold a market share of more than 60% of non-residential building construction.
- ***Industry Employment:*** Sponsoring trades employ more than 460,000 organized electricians, pipefitters, plumbers, painters and allied trades, steel erectors, masonry craft workers, sheet metal workers and other construction specialists. They include the leading specialty contracting firms in the nation.
- ***Investment in a Skilled Workforce:*** Contractors in the sponsoring organizations are leaders in training skilled workers in these highly technical fields. Over 127,000 apprentices are trained in classrooms and on-the-job every year as part of multi-year programs funded by sponsoring contractors in cooperation with their union partners. Over 250,000 skilled journeymen workers receive extended training in emerging technologies. Sponsoring contractors contribute over $204 million *each year* to provide this training - entirely with their own funds.

What is the Quality Construction Alliance?

The *Quality Construction Alliance* is a coalition of five premier construction specialty contracting associations formed to create awareness among national, state and local leaders, as well as the general public, of the value of quality construction. The *Alliance* targets local, state and national public policy to assure that taxpayers receive full value for their construction dollar. "Quality Construction" stands for high quality work - meeting or exceeding specifications - produced on-time, on budget using a well-trained, efficient, highly-skilled workforce, and at a competitive price. Sponsoring organizations and their members are dedicated to bringing construction buyers this kind of quality construction.

Who participates in the "Quality Construction Alliance"?

The Quality Construction Alliance is sponsored by the five leading construction specialty trade associations, which, together, represent industries comprised of more than 22,000 contractors doing mechanical, electrical, sheet metal, plumbing, air conditioning, steel erection, trowel trades, painting and allied trades work, using well-trained and highly skilled workers from the organized building trades.

Contractors supporting the Quality Construction Alliance make a significant investment every day to bring this nation the highest quality, most cost effective construction, while providing for a safe, carefully-trained, highly-skilled, well-paid workforce. It all adds up to true ***Quality Construction***.

For More Information Visit *www.qualityconstructionalliance.org!*

The State of Federal Contracting:
Opportunities and Challenges for Strengthening
Government Procurement and Acquisition Policies

Statement submitted by the Quality Construction Alliance
Tuesday, June 16, 2009

The construction industry groups that comprise the membership of the five Quality Construction Alliance (QCA) employer trade associations – MCAA, SMACNA, TAUC, FCA, and ICE-BAC are very grateful to Chairwoman Watson and the members of the subcommittee for the invitation to participate in this hearing.

The comprehensive set of issues and recommendations that follow are drawn from the perspectives of a broad cross- section of the high-skill specialty construction industry employers in the five associations. QCA member firms perform a wide variety of construction services, from large power and industrial projects- both new construction and maintenance, through commercial and institutional buildings, residential and multi-family housing projects, and including building heating/ ventilating/air conditioning services, operations and maintenance, and energy savings performance contracting services, in both the private and public sectors nationwide.

Many QCA–member companies perform large volumes of direct Federal construction work, variously contracting either as prime contractors with the Federal agencies or as subcontractors to prime contractors. QCA member firms have a broad perspective on the Federal construction contracting process from the frames of reference of both prime contractor and subcontractor.

The comprehensive set of regulatory and legislative recommendations that follow issue from that dual perspective. These suggestions are intended to help begin answering the questions posed for this hearing – what challenges do the Federal acquisition and procurement workforce trends pose for Federal construction procurement programs generally, and what opportunities are there for the Committee to help shape reforms that will strengthen those programs.

These recommendations are meant to provide constructive topics for consideration in that context. Some recommendations answer immediate challenges with rather immediate legislative action recommended – repeal of the 3% withholding tax, for example. Others address longer-term procurement trends and issues, and suggest reforms that will improve the Federal market over time and eventually address agency workforce/administrative challenges by raising the level of competition and performance on projects overall. All, however, are offered in the spirit of engaging in good faith, in-depth analysis of systemic reforms in the sole interest of improving Federal construction procurement programs for the benefit of the Federal agency procurement and program missions, the construction industry overall, and ultimately taxpayers and the public generally.

Overall, the context of these recommendations is based on rapid changes and developments in the construction industry in general, including technological and business practice changes, and workforce challenges facing both public and private sector employers alike. The leading Defense and Civilian agency construction procurement agencies and the professionals who work in those programs are top performing professionals, QCA employers attest, and compare most favorably with their counterparts in the private sector. Too often they don't get the credit they deserve for their professionalism and service to the government and taxpayer. QCA members most assuredly respect their professionalism and service. Still, some systemic issues in Federal procedures continue to warrant review and analysis as related in the recommendations that follow.

It is beyond question that top-flight Federal construction programs, ranging from the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the U. S. General Services Administration and the Department of Veterans Affairs among others, have consistently over the years been among the leaders in the industry developing many beneficial industry changes, ranging from Partnering concepts, project dispute avoidance programs, design excellence, and now through to Building Information Modeling (BIM), and Green and sustainable high performance building policies. Professional judgment and leadership is not a problem with agency procurement programs, rather it is restrictions and systemic barriers that linger from older formal legal and regulatory constraints that need to be reviewed, analyzed and removed, if warranted.

1. Contractor qualification/responsibility determination procedures.
The QCA submits that more comprehensive prospective contractor responsibility, legal compliance, and past performance reviews (for both prime contractors and subcontractors) in the contract award/selection process will pay dividends in avoiding problems in project performance and save in consequent workforce and administrative overhead that unavoidably follows from not screening out poor performers in the contract pre-award screening process.

1.1 Develop and use contractor legal compliance database – The QCA supports timely regulatory implementation of the legal compliance database created in the Contractors and Federal Spending Accountability Act and enacted in late 2008. Especially with the vast amounts of resources being expended now in the stimulus program, Federal agencies should have available the new legal compliance database to make sure resources are being spent only with legally compliant and reliable contractors. The cliché about an ounce of prevention being better than a pound of cure is most apt now in the context of the stimulus program, as even the vast amount of public disclosure contemplated in the administration of the stimulus program will not necessarily lead to effective vigilance before the fact of award in many cases. Problem avoidance in the first place is the aim of the quick development and consistent use of the legal compliance database in the pre-award screening/ responsibility determination process. On the question of public disclosure of the database, the QCA position has been neutral, preferring to focus instead on making sure that contracting officers use the data in the first place to make reliable and supportable contractor responsibility determinations in the interest of fair and high-quality competition for awards and ultimately better project performance because of that.

1.2 Evaluate major subcontractor performance for pre-award reviews – The QCA also supports regulatory reforms and oversight to promote more regular use of post-contract evaluation reviews in awarding future work. QCA also recommends that regulators find a way to routinely evaluate subcontractor performance in greater relevant detail on Federal projects to be used in future contract award responsibility determinations for both prime contractors and subcontractors. In making this recommendation, QCA is aware that issues of prime contract and subcontract relations, and separation or privity of contract relations, may act as a barrier to comprehensive evaluations of subcontractor performance by contracting officers. However, it may be that this issue is part and parcel of the pronounced trend away from low-bid selection methods and the now predominant use of negotiated contractor selection methods to avoid the manifold performance problems stemming from the low-bid system. This is not to say that QCA opposes more discerning best-value negotiated selection methods. On the contrary, QCA has long been a proponent of best-value selection procedures. In that type of award process, the superior performance abilities and records of QCA firms and their workforces are evaluated and valued more appropriately in the overall team selection process. That's a competitive advantage that benefits project performance, the agency mission and top-flight performing contractors and subcontractors. Still nevertheless, QCA also strongly supports badly needed changes in the low-bid (price-only) contractor selection procedures, so that the invitation-for-bids (IFBs) selection system remains viable for projects of limited scope.

2. Construction contractor selection reforms. One of the primary areas of reform in Federal construction contractor selection procedures came in 1984 with the Competition in Contracting Act (CICA), when competitive negotiation selection procedures (RFPs) were finally permitted to be used by agencies on a par with the low-bid system, which up until then had been the predominant selection method. Over time, and because of the many performance and administrative problems that stemmed from low-bid, price-only selection, Federal agencies have moved away from low-bid selection substantially. (See graphs below.) In the main, that shift remains a very beneficial sea change for the industry and agency procurement programs. Still in all, the move away from the low-bid system blunted the motivation for agencies to face up to the need to enact reforms in the low-bid system for it to remain viable and beneficial. In short, instead of fixing the system, agencies largely just abandoned it. So, even now, where IFBs remain in use on projects of limited scope, the old problems persist unaddressed. In fact, with the advent of the internet purchasing systems, for a brief time several years ago, there was a fad to yet compound the systemic problems of low-bid selection – by using a publicly disclosed low-bid internet reverse auction system. Fortunately, the U.S. Army Corps of Engineers was called in to examine the process – and roundly and unequivocally condemned it for construction services procurement (not so for commodities, however).

2.1 Enact U.S. Army Corps of Engineers' recommendation to ban internet reverse auctions for construction contract selections – In FY 2003, the USACE test piloted use of internet reverse auctions for construction contract bidding. After pilot testing the internet publicly disclosed low-bid auction method on 5 projects, the USACE recommended unequivocally in its final report that : USACE would "not use reverse auctions for construction services"; adding that: "Reverse auctions have no valid method to measure savings, . . . are very labor intensive, [and] reverse auctions show no real return on investment."

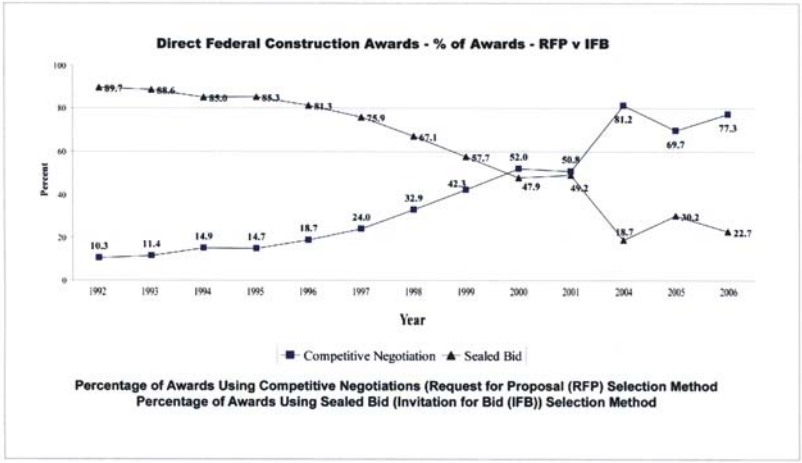
Section 812 of H.R. 1815 in the 109th Congress attempted to enact the Corps' recommended ban in the bill passed by the House, but the measure was dropped in conference committee on the final National Defense Authorization Act for FY 2006. Action on this item remains necessary, however, as some agencies still occasionally attempt to use reverse auctions for construction services. (Final Report Regarding the U.S. Army Corps of Engineers Pilot Program on Reverse Auctioning, LTC A.J. Castaldo, Program Manager and Deputy PARC [not dated].)

2.2 Block agencies from procuring construction services as though they were standard off-the-shelf commercial items. On July 3, 2003, the Administrator of the Office of Federal Procurement Policy (Director Angela Styles) issued a Memorandum directing senior procurement executives to review their agency guidance on commercial item procurement (Part 12 procedures) and rescind any guidance, memo, or authority that would encourage purchasing construction services as commercial items under

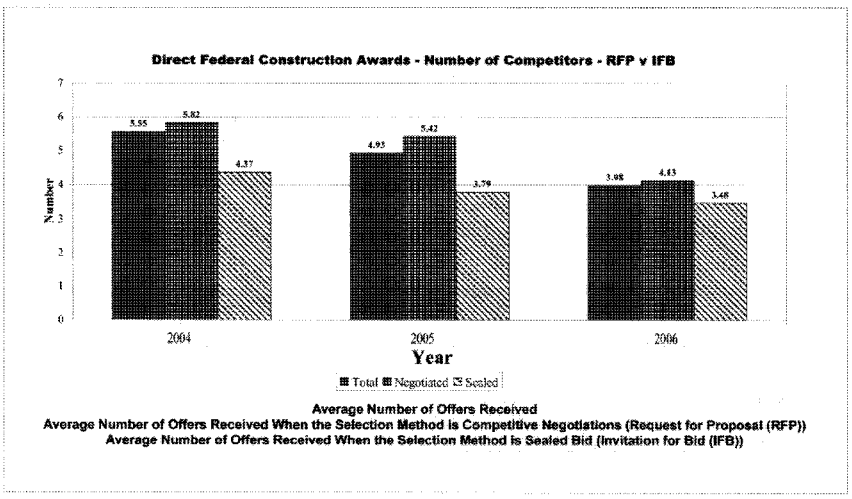
Part 12 of the FAR, and to make sure that construction services are procured under Part 36 of the FAR for construction purchasing. The Committee should again encourage and back up that directive as the reasons for it are even more compelling now with the stimulus bill spending unprecedented resources on construction, and with even more sophisticated "green building" projects, which are anything but commercial item procurements. Moreover, construction projects of various types have unique types of risks and issues (*e.g.*,unforeseen conditions, progress payments, warranties, etc) that aren't adequately addressed in the FAR commercial items contract terms. (OFPP Memorandum for Agency Senior Procurement Executives, Angela B. Styles, Administrator, Applicability of FAR Part 12 to Construction Acquisitions, July 3, 2003.)

2.3 Require listing of major subcontractor bids on low-bid prime contractor selection procedures – Of all the problems inherent in the low-bid construction prime contractor selection procedures (among them poor design and bidding documents), none is more systemic and pervasive than the cascading adverse consequences that flow from post-award bid shopping and bid peddling. Virtually all prime contractor and subcontractor groups and professional services organizations roundly condemn the practice – yet even so, by most all accounts, bid shopping and bid peddling remain pervasive. No other single business practice/abuse does more to erode successful project performance and diminish taxpayer value and agency mission performance than having significant projects plagued by the consequences of post-award bid shopping auctions, with the successful prime contractor selling the project to the unfortunate subcontractor who is willing to go lowest after the prime contract has been awarded at a fixed price. The catalogue of abuses is long and well-recognized, including: substitutions of materials and poor performance, contract disputes and defensive contract administration, and claims and litigation taking value out of the agency's procurement program and putting it into legal overhead. In fact, since the 1984 Competition in Contracting Act permitted negotiated contractor selection procedures on a par with low-bid selection, Federal agencies have voted with their feet and moved away from low-bid selection almost entirely for construction projects of any size or scope.

In FY 2006, according to data from the Federal Procurement Data Service (FPDS), low-bid direct Federal construction project awards comprised only 22.7% of all contract actions (just 11.1% of all dollar volume), as compared with negotiated selection procedures comprising 77.3% of all awards (amounting to 88.8% of dollar volume). Clearly agencies prefer negotiated selection procedures to get best value for the taxpayer, rather than the low-bid system that is so vulnerable to problems stemming from price-only awards and bid shopping and bid peddling. To be fair, other business practice changes also contributed to that trend as well: primarily, the development of design-build project collaboration that involves all performing contractors more closely in design and project planning, so the agency gains the full value of prime and subcontractor professional expertise that is invested in the project from the beginning.


Direct Federal Construction Awards - % of Awards - RFP v IFB
Percent
Year
Competitive Negotiation
Sealed Bid
Percentage of Awards Using Competitive Negotiations (Request for Proposal (RFP) Selection Method
Percentage of Awards Using Sealed Bid (Invitation for Bid (IFB)) Selection Method

Direct Federal Construction Awards - $ Amounts - RFP v IFB
Percent
Year
Competitive Negotiation
Sealed Bid
Percentage of Dollars Awarded Using Competitive Negotiations (Request for proposal (RFP)) Selection Method
Percentage of Dollars Awarded Using Sealed Bid (Invitation for Bid (IFB)) Selection Method



Nevertheless, the one surest way to moderate the velocity of this trend away from low-bid selection, and to preserve that system for the limited-scope projects, is to require bid listing of major subcontractors. If bid listing were required on IFBs, the prime contract bidders would have to list the sub bids it relied on in making its successful prime contract bid, and then award the work to the listed subcontractor at that price, with exceptions and substitution allowed only in exceptional circumstances -- in the manner set out in the Construction Quality Assurance Act (H.R. 3854) last introduced by Representative Kanjorski in the 110th Congress. If the subcontractor's work, proprietary judgments, and substantial expenses incurred in estimating the subcontract work are respected in this way in the post-award process, the project is already on a good start toward successful completion. If not, and bid shopping and peddling are allowed in a post award auction by the prime, almost always, significant adverse consequences for the project and the agency and taxpayer follow.

In the past, some agencies have opposed the use of bid listing on mainly administrative inconvenience grounds. That is, when virtually all projects were low bid, the bid listing process was seen as an administrative hindrance, even despite the fact that GSA used the process for some 20 years before rescinding it by rulemaking in 1983 (before CICA was enacted in 1984 notably). Also, in the past, prime contractors have raised arguments against bid listing based on privity of contract arguments. That is, the argument went, the Government was best served by exercising judgment and cognizance over just a single prime contract, and that the performance of major subcontractors actually performing most of the work on the project was somehow legally, if however inappropriately, beyond the ken of the procuring agency.

QCA submits that that position too has now been surpassed and superseded by current procurement law, selection procedures and practices, and new contracting patterns and procedures as well.

With the trend away from low-bid selection and the need to conserve Federal agency workforce resources, the time for bid listing has now arrived, as it could well save the use of price-only selection procedures and in so doing conserve agency contracting and project oversight resources. Moreover, the old fashioned privity of contract concept for construction projects has been abandoned now in the private sector with integrated project delivery contracting methods and other "relational" contracting patterns. Also, GSA and other agencies have adopted closely analogous procedures with agency "partnering", and design-build approaches to recognize the early participation of subcontractors in project design and planning to gain their expertise and added-value input, rather than losing that benefit for the project and the taxpayers in the old hierarchical privity of contract, stove-pipe contracting patterns.

3. Construction contract payment reforms. QCA's payment reform proposals address one very new and one rather older set of proposals – both of which would help construction program agencies realize the project performance benefits of prompt and fair payment procedures. It is axiomatic and proven that prompt payment processing and cash flow are key to successful project administration. The FAR recognized this when it eliminated routine payment withholding/retainage, and Congress did so in its Prompt Payment laws. That policy recognition should be reasserted and expanded.

3.1. Repeal the public contract 3% withholding tax well before it drains resources in planning for implementation in 2012 – In 2006, the Conference Report for the Tax Increase Prevention and Reconciliation Act (P.L. 109-22) included a new 3% withholding tax on all public contracts with public agencies with procurement budgets of $100 million or more. That new business withholding tax is now slated to take effect for contracts beginning in 2012. The law and proposed new Internal Revenue Service (IRS) regulations would require procurement agencies to hold 3% of every invoice of $10,000 or more and remit those funds to the Treasury, to be reclaimed later by covered prime contractors who establish tax compliance. While the Senate Finance Committee intended to score the measure as a way to gain revenue and close the tax gap by some tax delinquent public contractors, it is overbroad, and now unfortunately ensnares all covered prime contractors, those who are tax compliant and those who are not. Moreover, the non-dynamic budget scoring failed to take into consideration the enormous implementation costs for procurement agencies involved in implementing the measure that would draw down agency procurement budgets to act as IRS tax collector. In sum, the measure is badly flawed fiscal policy, and even worse procurement

policy. In two Federal prompt payment laws, Congress and the government operations/ procurement committees have long recognized that quick and reliable payment processing is one of the key ways agencies ensure successful project completion. The new 3% withholding tax militates against that established policy fundamentally.

DoD alone has estimated that the payment processing programming adjustments and financing costs stemming from the withholding would cost its procurement program budget some several billions of dollars over five years. The Internal Revenue Service has begun proposed regulations, gearing up for implementation in case Congress doesn't repeal this bit of mistaken procurement policy in time for regulatory implementation. Soon agencies will have to begin reprogramming payment systems to put the law into effect in 2012. IRS has so far limited the 3% withholding to invoices of $10,000 or more. Moreover, IRS has agreed that the withholding can't be passed through from prime contractors to subcontractors.

However, FAR regulators will have to write careful payment regulations to make sure this added IRS retainage is not held by primes against subcontract invoice amounts too. OFPP and the FAR Council should weigh in with IRS and OMB with a dynamic scoring of the cost of the withholding measure with all its implementation costs across direct federal agencies and grant programs to get a true measure of the overbearing compliance expense and costs as compared with a relatively meager IRS revenue gains.

QCA strongly urges the committee to take cognizance of current 3% withholding tax repeal bills, H.R. 275 and S. 292, and assert co-equal jurisdiction over the measure as a matter of adverse procurement policy.

3.2 Extend Federal construction prompt payment rules to federally assisted construction projects – When Congress enacted the Federal construction project prompt payment rules in 1987, it stopped short of extending the direct Federal rules to federally assisted contracts, as was originally proposed. Since then, the benefits of reliable payment processing have been recognized by reformed retainage policy too, disallowing standard payment retention on Federal contracts. Given the widely recognized project benefits of enhanced payment rules, the time is now appropriate for the Committee to propose extending the beneficial rules to federally assisted construction projects as well, as last proposed in S. 878 in the 103rd Congress. See also, GAO Report AFMD-89-33BR, March 10, 1989, *Prompt Payment: State Laws Are Similar to the Federal Act but Less Comprehensive.*

4. Construction project workforce issues – ensuring lawful employment of highly skilled workers, as a matter of project performance and security.
QCA members collectively bargain the highest workforce development, pay, training, and pension and health and welfare benefits in the industry. Virtually all QCA employer jobsite workers

are apprenticeship trained in mostly college-accredited training programs. The employment documentation, workforce stability and skills, and project security benefits of that employment model are of great benefit to agency procurement programs. QCA encourages the subcommittee and FAR regulators to consider a number of measures that would take maximum benefit of that advantage for the benefit of agency programs, industry workforce standards, and the taxpayers.

4.1 Issue specific regulatory guidance encouraging agencies to use project labor agreements on projects of significant size and scope to ensure a reliable supply of skilled construction craft workers – The QCA is a strong supporter of the Obama Administration's Executive Order (EO 13502,) permitting and encouraging Federal agencies to consider the benefits of project labor agreements (PLAs) to ensure the availability and benefits of a high-skill, legally employable workforce on direct Federal construction projects. We encourage the agencies to set a realistic threshold of project size and complexity as a guideline for PLA use, but also to allow consideration of special needs for particular projects of any size or scope because of special area conditions or otherwise exceptional project characteristics. Similarly, the QCA would encourage Federal agencies to include broad-based support for the collective bargaining systems in the geographic areas where any PLA is used. The workforce development, skills training, and employee benefits systems that develop and maintain the high-skill workforce relied on by a PLA are the direct result of local area collective bargaining agreements. For example, much of the Federal Green Jobs training programs that are part of the Administration's Green Jobs and Emerald Cities PLA programs rely on local jointly administered labor and management apprenticeship and training programs that stem from local area union and multiemployer collective bargaining systems.

4.2 Require use of E-Verify employment eligibility verification as a matter of workforce competence and project security – The QCA also supports the former Bush Administration's Executive Order requiring agencies to use E-Verify to check the lawful employment status of all workers on Federal projects and on contractor's payrolls generally as a matter of sound executive purchasing proprietary judgment. It is good business for agencies to make sure that taxpayer resources on those projects are being spent with legally compliant employers, so the projects don't suffer disruption in performance because of immigration enforcement. In fact, the Bush Administration EO, calling for effective safeguards against unlawful employment on projects in the first instance by use of E-Verify, merely enhances a prior Clinton Administration EO that called for debarment in instances of illegal employment violation. Both remain necessary elements of policy. QCA is discouraged by repeated delays in implementing that policy by the current Administration. However, QCA is encouraged too by the Department of Homeland Security's recent verbal support for E-Verify.

QCA also recognizes that E-Verify and the development of widespread use of Personal Identity Verification procedures on Federal projects and installations make background and project security procedures a virtual inevitability going forward. Now, project and site security too come into play with lawful employment verification. Unfortunately, unlawful employment and the closely coincident misclassification of workers on construction projects are fairly commonplace in the construction industry overall – much to the detriment of project performance, fair competition for projects among legally compliant employers, and the taxpayers generally. With improved funding reauthorization of E-Verify from Congress and steady improvements in its reliability, legally compliant firms are not disadvantaged by required use of an electronic system to make sure all firms on a project are following lawful employment policies. Executive Orders spanning the last two Administrations have long recognized that sound procurement policy requires vigilance with respect to lawful employment policies on direct Federal construction projects. QCA would urge the Committee to push for the deployment of the E-Verify rules on Federal projects in this Administration as well, and support reauthorization and full funding for E-Verify well into the indefinite future.

4.3 Consider contracting out for implementation of operations and maintenance on high-performance Federal buildings – QCA employers are actively engaged in developing Green Jobs training and workforce development programs. The jointly administered labor/management apprenticeship and training systems developed in our local collective bargaining systems are without parallel in this respect in all of the U.S. economy. The Federal Government's intention, to achieve a net-zero-energy and carbon neutral Federal building inventory over the next 20 years, is a highly laudable and necessary goal as a matter of national energy policy and building operations sustainability too. However, those ambitious goals will stretch the operations and maintenance workforce skills and abilities of government agency employees, even as the Federal government, like most employers, faces an adverse workforce demographic (the workforce is retiring faster than it is replenished) and skills deficit within its own ranks. QCA employers, as the leading suppliers of Green Jobs training and workforce development, should be relied on to an even greater degree by Federal facilities managers in contracting out for high performance building energy audits, metering, operations and maintenance, building systems commissioning, energy savings performance contracting and other services to help meet the Federal energy policy goals with respect to the government building stock – both leased and owned facilities. High performance building operations and maintenance is not an inherently governmental function and should be contracted out for the mutual benefit of agency budgets, the taxpayers, and the private sector.

Respectfully submitted – QCA employers associations.

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Ms. WATSON. Ms. Manos, you may proceed.

STATEMENT OF KAREN L. MANOS

Ms. MANOS. Madam Chair and members of the subcommittee, thank you very much for the opportunity to appear before you. And I applaud your efforts in launching this important series of hearings.

I am here both in my personal capacity and representing the National Defense Industry Association. I have been practicing in this area for 28 years, since I graduated from the Air Force Academy, and I hope I offer a balanced perspective.

I spent 14 years in the Air Force as a contract negotiator and then a judge advocate, and for the last 14 years have represented mostly major defense contractors. My entire professional life has been spent in the area of government contracting, and I have a deep and abiding and personal and professional interest in it.

I think if we step back, though, and look at what we have done, beginning with the Reagan administration and then picking up greater steam during the Clinton administration, there was this bipartisan effort to kind of unwind Federal procurement and get rid of what had grown up over the years. It was like barnacles, and it just made it very expensive to do anything.

Unfortunately, as a part of the quid pro quo for doing that, we also cut the acquisition work force dramatically. In hindsight, I think that was a mistake, but I am concerned that Congress, by reacting to things, may layer on additional layers of statutes and regulations that just add to the burdens that we had in the past.

If you think back to President Clinton's signing statement when he signed the Federal Acquisition Streamlining Act, he mentioned the fact that during Desert Storm we couldn't buy the Motorola two-way radios that we needed for our troops and we had to turn to the Japanese to buy them for us and to give them to us.

We wrap ourselves up into knots, and there is a cost in doing that. I am concerned that if you don't have that perspective and just react to the crisis of the day or the scandal of the day, and we just add these layers, it is really misguided oversight.

What I have highlighted in my written testimony are three areas where I think there are sort of intractable problems, from my perspective.

The first is the Defense Contract Audit Agency, which I think has completely lost its path. It has lost its understanding of what Congress directed it to do, the statutes it is directed to do, and it is focusing on areas that really just bollix up the procurement system with no good end. It is adding cost, but it is not really bringing value to the taxpayer.

The second is the acquisition work force, which is a huge problem. In the acquisition work force, you need to have trained, motivated contracting officers in order to make the acquisition process work. Unfortunately, we have lost that balance and lost the training. They are not motivated, and they are certainly not appreciated. And now with the Defense Contract Audit Agency, we have them intimidating them.

And then the final area is the contracts disputes process, which was intended by Congress, with the enactment of the Contract Dis-

putes Act, to be a quick, effective way of resolving disputes; and it has turned out not to be that at all. It is a very laborious, time-consuming process that is not good for contractors.

Those are three areas where I think Congress could do some good to weigh in and to try to resolve things.

Thank you for the opportunity to appear.

Ms. WATSON. Thank you.

[The prepared statement of Ms. Manos follows:]

GIBSON, DUNN & CRUTCHER LLP

WRITTEN TESTIMONY OF KAREN L. MANOS

Before the U.S. House Committee on Oversight and Government Reform

Subcommittee on Management, Organization, and Procurement

"The State of Federal Contracting: Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"

June 16, 2009

Ms. Chairwoman and Members of the Subcommittee,

Thank you for inviting me to appear before your Subcommittee. I am pleased and honored to have the opportunity to submit this written testimony.

I have a deep and abiding interest in the state of Federal contracting, having worked in this area since I graduated from the Air Force Academy twenty-eight years ago. I hope that I am able to offer a balanced perspective. I spent fourteen years on active duty in the Air Force, first as a contract negotiator and later a judge advocate, and, for the past fourteen years, I have been an attorney in private practice. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP, and Co-Partner in Charge of that firm's Washington, DC office and Co-Chair of its Government and Commercial Contracts practice. My practice is devoted exclusively to the area of Government contracts, and my clients range from major defense contractors to bio-tech firms and non-profits. I believe I have a good understanding of the challenges currently facing government procurement. I have been ranked by *Legal Times* as one of the top twelve government contracts lawyers in the Washington, DC area, and nationally ranked by *Chambers USA* as one of the top three government contracts lawyers specializing in the area of Government Contracts: Costs Disputes. I currently serve as Chair Elect of the American Bar Association Section of Public Contract Law and Editor-in-Chief of both the *Public Contract Law Journal* and the *Cost, Pricing and Accounting Report*. I am also the author of the two-volume text, *Government Contract Costs & Pricing*, the second edition (and third volume) of which is scheduled for publication this summer by Thomson-Reuters. Last but not least, I am the Vice-Chair and Chair-nominee of the National Defense Industrial Association Procurement Policy Committee. I appear before you today both in my personal capacity and as a representative of NDIA.

I would like to take this opportunity to bring to the Subcommittee's attention three of what I believe to be the most significant challenges facing public procurement today: (1) the Defense Contract Audit Agency, (2) the Government's overworked, under-trained and under-appreciated acquisition workforce, and (3) the contract disputes system. The common theme underlying these challenges is that each adds to the cost, difficulty and uncertainty in doing business with the Government, and, for that reason, presents an opportunity for strengthening Government procurement.

Defense Contract Audit Agency

Over the past several months, the Defense Contract Audit Agency (or "DCAA" as it is more commonly known), has adopted aggressive new audit policies that are wreaking havoc on the Government procurement world. DCAA, of course, has a very important mission of performing contract audits and providing accounting and financial advisory services to the Department of Defense and a number of other agencies. I do not take issue with that, and to the contrary, believe that DCAA should focus on its mission. However, DCAA has strayed far a field of its primary mission, and appears to be focusing its efforts on "systems" audits that are time-consuming and disruptive and often have little if anything to do with actually protecting the Government against unallowable costs.

On December 19, 2008, DCAA issued new guidance to its auditors on reporting audit opinions on contractors' internal control systems. Internal controls are a component of DCAA's standard audit programs for all of a contractor's business systems, including, for example, accounting, billing, estimating and purchasing systems. Previously, it was DCAA policy to report a "significant deficiency" or "material weakness" in a contractor's internal controls only when all of the following conditions applied: (1) the deficiency adversely affected the contractor's ability to initiate, authorize, record, process or report Government contract costs in accordance with applicable Government contract laws and regulations, (2) the deficiency resulted in a reasonable possibility that unallowable costs will be charged to the Government, and (3) the potential unallowable cost is not clearly immaterial. Under the previous policy, even when a DCAA auditor identified a "significant deficiency" or "material weakness," the auditor was still free to issue an audit opinion that the system under review was "inadequate in part" rather than "inadequate."

The December 19th guidance requires auditors to report a significant deficiency/material weakness whenever the contractor fails to accomplish *any* control objective tested for in DCAA's internal control audits, regardless of whether the control objective is directly related to charging costs to Government contracts, and even when the deficiency has not resulted in *any* questioned costs. In addition, the guidance states that whenever an auditor finds a significant deficiency/material weakness, the audit report *must* include an opinion that the system is inadequate. The guidance expressly prohibits DCAA auditors from issuing "inadequate in part" opinions.

There are a number of problems with this guidance. First, there is no statutory, regulatory or contractual basis for many of the "control objectives" that DCAA uses to conduct its audits. For example, DCAA's "Internal Control Matrix for Audit of Billing System Controls" has a control objective for "Management Reviews" which includes an audit procedure for evaluating the contractor's record of completed internal audits. In performing this audit step, DCAA auditors frequently demand access to internal audit reports, despite the holding in *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988), that DCAA lacks authority to compel production of internal audit reports. The Fourth Circuit observed that, "Cost verification data, not the work product of internal auditors, is the proper subject of a DCAA subpoena. DCAA performs a critical auditing mission, but it is not running the company." 837 F.2d at 170. As another example, DCAA's "Internal Control Matrix for Control Environment and Overall Accounting System Controls" has a control objective for "Integrity and

Ethical Values" which includes an audit procedure for verifying "that the contractor performs periodic reviews of company business practices, procedures, and internal controls for compliance with standards of conduct." In performing this audit step, DCAA auditors frequently demand access to reports of internal investigations even when the reports are subject to the attorney-client privilege or attorney work product doctrine. A contractor's understandable (and perfectly legitimate) refusal to provide access to this information is reported as a significant weakness/material deficiency in internal controls.

Second, many of DCAA's control objectives are subjective, and reasonable minds can differ about what is or is not adequate. For example, there is a "Policies and Procedures" control objective in the "Internal Control Matrix for Audit of Billing System Controls" that includes the contractor's policies and procedures for evaluating and monitoring subcontractors' accounting and billing systems. Setting aside the fact that nothing in the Federal Acquisition Regulation ("FAR") requires contractors to evaluate and monitor their subcontractors' accounting and billing systems, there is no objective means of measuring whether the contractor's policies and procedures for doing so are adequate. However, any inadequacy, no matter how trivial, could result in an audit opinion that the contractor's billing system inadequate.

Third, a DCAA opinion that one of a contractor's business systems is inadequate can have serious consequences for the contractor. Perhaps most significantly, some Government officials have interpreted FAR 16.301-3(a)(1) to mean that a contractor with an "inadequate" accounting system is ineligible for award of a Government cost reimbursement contract. *See* 48 C.F.R. § 16.301-3(a)(1) ("A cost-reimbursement contract may be used only when – The contractor's accounting system is adequate for determining costs applicable to the contract").

Ultimately, DCAA is merely an advisor to the contracting officer, and the cognizant administrative contracting officer – not DCAA – has the authority to determine whether a contractor's business systems are or are not adequate. Recently, however, DCAA has upset this system of checks-and-balances by issuing audit guidance that appears calculated to intimidate contracting officers. On March 13, 2009, DCAA published audit guidance on "Reporting Significant/Sensitive Unsatisfactory Conditions Related to Actions of Government Officials." According to the audit guidance, "Unsatisfactory conditions include actions by Government officials that appear to reflect mismanagement, a failure to comply with specific regulatory requirements or gross negligence in fulfilling his or her responsibility that result in substantial harm to the Government or taxpayers, or that frustrate public policy." It cites as an example a contracting officer "ignor[ing] a DCAA audit report and tak[ing] an action that is grossly inconsistent with procurement law and regulation." The audit guidance instructs auditors to report these "unsatisfactory conditions" directly to the Department of Defense Office of Inspector General ("DoD IG") rather than going through the Government official's chain of command. Lest there be any doubt about the DoD IG's view of the matter, on April 8, 2009, the DoD IG published its *Oversight Review: Defense Contract Management Agency Actions on Audits of Cost Accounting Standards and Internal Control Systems at DoD Contractors Involved in Iraq Reconstruction Activities (D-2009-6-004)*, which harshly criticizes administrative contracting officers for, among other things, disagreeing with DCAA audit reports containing internal control system recommendations and determining that contractors' business systems were adequate without waiting for DCAA to complete a follow-up review.

The net result of these new audit policies is that systems audits are consuming a tremendous amount of time and resources for both DCAA and contractors; contractors are trying desperately to avoid an audit opinion that their systems are "inadequate"; and contracting officers are afraid to disagree with DCAA – despite the fact that there is little if any discernable relationship between the systems audits and protecting the Government against unallowable costs. Moreover, widespread findings of inadequate accounting systems could seriously disrupt major procurements, and at the very least will provide a fertile source of bid protest issues. It would far better serve the taxpayers and strengthen Government procurement for DCAA to focus its efforts on performing high quality contract audits that enable the Government's acquisition professionals to award, administer and close-out Government contracts in a timely manner.

Government's Acquisition Workforce

The Government's acquisition workforce is another major challenge facing our procurement system. Beginning with the Reagan Administration and culminating in the Clinton Administration, the Federal Government embarked on a laudable, bipartisan effort to increase the effectiveness and efficiency of Government procurement by reducing administrative costs and other burdens which the procurement system imposes on both the Government and the private sector. One result of this acquisition streamlining effort that in hindsight has proven a mistake was the significant cuts that were made to the acquisition workforce. It is no surprise to anyone that there are now too few Government acquisition professionals. Equally if not more problematic from industry's perspective, many of today's acquisition professionals are untrained, overworked and poorly motivated.

Acquisition professionals play a key role in ensuring that Government procurement runs smoothly. Administrative contracting officers in particular are critical to the success of our procurement system. I respectfully submit that funds appropriated to increase the number of agency IGs would be better spent – and our procurement system far better served – by hiring, training and nurturing a professional cadre of acquisition professionals.

Contract Disputes Process

The contract disputes process is in many respects broken. The Contract Disputes Act was intended to provide for a cost-effective and efficient means of resolving contract disputes. In exchange for this benefit, government contractors forgo have that private contract litigants take for granted, including the right to stop work or seek an injunction. However, the Contract Disputes Act has not fulfilled its promise; it is frequently neither cost-effective nor efficient. Whether one chooses to litigate at a board of contract appeals or the U.S. Court of Federal Claims, the process is far too slow. Not infrequently, the U.S. Court of Appeals for the Federal Circuit and its predecessor courts have likened government contracts cases to *Jarndyce v. Jarndyce*, the interminable case in Dickens's *Bleak House*. *See, e.g., McDonnell Douglas Corp. v. United States*, 2009 WL 1515777 (Fed. Cir. June 2, 2009). The comparison is unfortunately an apt one – litigating a government contracts case often feels like being in Dickens's Court of Chancery.

Conclusion

Thank you again for the opportunity to appear before the Subcommittee. I would be pleased to answer any questions.

Respectfully submitted,

Karen L. Manos

Ms. WATSON. Ms. Sacilotto, you may proceed.

STATEMENT OF KARA M. SACILOTTO

Ms. SACILOTTO. Thank you very much for this opportunity to present my testimony here today.

As you mentioned Chairwoman Watson, I am an attorney in private practice, but I am also an Adjunct Professor of Government Contracts Law at George Mason University School of Law.

My written testimony details my view, and in the interest of keeping it short, I will try to just cover the highlights.

This morning we heard from Mr. Drabkin and from Ranking Member Bilbray that our procurement system is already a model for many other countries. It is an open procurement system. There are certainly regulatory controls in place today that are effective tools for regulating our procurement community.

So as this subcommittee continues on with its efforts to investigate ways of strengthening our procurement system, one option is to consider whether—instead of additional regulation, whether what we need is a renewed focus on execution of existing regulations and oversight mechanisms that are in place and whether our existing regulatory system can respond to the policy challenges that are being identified today.

Two that come to mind are cost reimbursement contracting and sole source contracting that were mentioned in President Obama's memorandum on government contracting. Today, we have an existing regulatory scheme in place that councils when to use cost reimbursement contracts and fixed price contracts. There is a place for both in our procurement system, and one size does not fit all.

Likewise, there are also tools in our existing Federal regulation system for promoting full and open competition and requiring justification when full and open competition is not used, and also addressing those exigent circumstances that the President identified in his memorandum when full and open competition might not be what serves the interest of the government best.

So one recommendation is to focus our attention on better execution of our existing regulations, which is entirely consistent with the testimony we heard today about increasing our acquisition work force so that we can better apply our regulations, better define requirements, and therefore exercise oversight in that manner.

My second recommendation is simply, if additional regulation is recommended, that we do so in a coordinated fashion so we maintain, to the extent possible and practical, uniformity in our regulatory system and not proceed down various different paths or continually, by death of a thousand cuts, add to the regulatory system. Coordinated, regulation, uniformity are hallmarks that scholars recognize of a strong procurement system.

Last, my final point is somewhat related to my first in that as this committee goes through and tries to gather information about what is effective for strengthening our procurement system, one of the data points that will be very valuable is experience under the recently enacted regulatory and legislative reform initiatives.

Many of those initiatives have just been passed into law. Some of them have only recently been put into regulation; some have not yet been put into regulation. None of them has the kind of track

record that we can see whether or not they have been effective and the cost and benefits have worked out positively.

So as Congress and this subcommittee thinks about ways to improve our system, it should wait and let the efforts it has already initiated, see if they bear fruit before determining if additional regulation is required.

Thank you very much.

Ms. WATSON. Thank you.

[The prepared statement of Ms. Sacilotto follows:]

STATEMENT OF KARA M. SACILOTTO, WILEY REIN LLP

BEFORE THE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION AND PROCUREMENT

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

"THE STATE OF FEDERAL CONTRACTING: OPPORTUNITIES AND CHALLENGES FOR STRENGTHENING GOVERNMENT PROCUREMENT AND ACQUISITION POLICIES"

JUNE 16, 2009

I. INTRODUCTION

Chairwoman Watson, Ranking Member Bilbray, members of the subcommittee, thank you for the invitation to participate in today's hearing. My name is Kara Sacilotto. I am a partner with the law firm Wiley Rein, LLP, and practice in the firm's government contracts practice group. I also have the privilege of teaching government contracts as an Adjunct Professor at George Mason University School of Law. My testimony today is not provided on behalf of any institution, organization or entity and represents solely my own personal views as a practitioner in the area of government contracting.

While the focus of today's hearing is strengthening the federal procurement system, my belief is that the federal procurement system is fundamentally sound. Statutes, such as the Competition in Contracting Act, Truth in Negotiations Act, Procurement Integrity Act, and Contract Disputes Act, as well as regulations issued by the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council (collectively "the Councils") and embodied in the Federal Acquisition Regulation ("FAR") that are the foundation for our procurement system are comprehensive, promote competition, provide a robust body of guidance, regulation, and oversight that, on the whole, serve the Government and the procurement community well.

A. Recent Reform Initiatives

Nevertheless, the past two years have seen a near-unprecedented growth in legislative and regulatory initiatives aimed at "reforming" federal procurement law. In late 2007 and 2008, the following legislative reforms were enacted:

- The Acquisition Improvement and Accountability Act of 2007, Title VIII to the FY08 National Defense Authorization Act.[1] This Act provided a host of reforms aimed at increased competition, transparency, and oversight. Notable provisions include:

[1] Pub. L. No. 110-181.

- Enhanced competition requirements for task and delivery order contracts over $5 million, restrictions on sole-source task and delivery orders over $100 million, and public disclosure of justification and approval documents for non-competitive contracts;[2]

- Revised requirements for Department of Defense ("DoD") procurements of commercial items and services and restrictions on its use of time-and-material contracts for commercial services;[3]

- Reporting to Congress by agency Inspectors General and the Defense Contract Audit Agency ("DCAA") of completed contract audits and significant audit findings;[4]

- Expanded protection of DoD contractor employee "whistleblowers;"[5]

- Requirements for certain former DoD officials seeking employment with defense contractors;[6]

- Reports by the Government Accountability Office ("GAO") to Congress regarding the internal ethics and compliance programs of major defense contractors;[7]

- Limits on the use of lead systems integrators for DoD programs;[8] and

- Additional oversight mechanisms and restrictions relating to contracts being performed in Iraq and Afghanistan and regulation of contracts for private security functions.[9]

• The Openness Promotes Effectiveness in our National ("OPEN") Government Act of 2007,[10] which amended the Freedom of Information Act to enhance transparency and expedite public requests for information.

• Mandatory reporting obligations relating to suspected violations of federal criminal law or overpayments on certain contracts and subcontracts as part of the Close the Contractor Fraud Loophole Act.[11]

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[2] *Id.*, §§ 843, 844.

[3] *Id.* § 805, 815, and 821.

[4] *Id.*, § 845.

[5] *Id.* § 846.

[6] *Id.* § 847.

[7] *Id.* § 848.

[8] *Id.* § 802.

[9] *Id.* §§ 841-42, 862-63.

[10] Pub. L. No. 110-175.

- Reform efforts related to cost-reimbursement contracts, performance of "inherently governmental functions" by contractors, and personal and organizational conflicts of interest as part of the FY09 National Defense Authorization Act ("FY09 NDAA").[12]

Thus far in 2009, Congress has passed and the President has signed into law the "Fraud Enforcement and Recovery Act of 2009" to amend the False Claims Act[13] and the "Weapon Systems Acquisition Reform Act of 2009" ("WSARA") to provide additional oversight and accountability with respect to major weapon systems programs.[14]

In addition to these legislative initiatives, the Councils have issued several substantive regulations implementing many of these efforts. One of the most significant recent reform initiatives requires certain contractors to establish and maintain business ethics policies and internal control systems and imposes mandatory reporting obligations regarding suspected civil or criminal False Claims Act violations, violations of other criminal laws, and overcharging on government contracts.[15]

B. Costs of Regulatory Change

Like any regulatory system, the federal procurement system can be improved. Regulatory change, however, even in the name of reform or improvement, comes at a cost. Repeated regulatory changes generate inefficiencies for industry and Government acquisition professionals who must track and modify their policies and processes to incorporate new legal requirements. There is no instant implementation. Regulatory change also creates instability for both Government and contractors by disrupting established practices and expectations. Furthermore, as former DoD officials with procurement and program management

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[11] Pub. L. No. 110-252, §§ 6101-03.

[12] Pub. L. No. 110-417, §§ 321, 841, 864.

[13] Pub. L. No. 111-21.

[14] Pub. L. No. 111-23.

[15] 73 Fed. Reg. 67064 (Nov. 12, 2008); 72 Fed. Reg. 65873 (Nov. 23, 2007).

responsibilities recently testified before the House Armed Services Committee Panel on Acquisition Reform, the current acquisition system is already complex, and acquisition officials are straining under existing oversight and reporting obligations.[16] Additional oversight and reporting obligations add to an already complex body of requirements.

Therefore, before embarking on additional legislative and regulatory initiatives that might be a reaction to discrete allegations of misconduct or perceived mismanagement, policymakers should assess whether additional legislative or regulatory reform is necessary to address the issue of concern and worth the costs that it imposes for both Government and industry. I offer three thoughts regarding the challenges in our current procurement system.

II. CONSIDERATIONS

A. More Regulation v. Better Implementation

First, policymakers should ensure that existing legislative and regulatory tools do not already address the concern at hand. In other words, is the reform that is necessary more regulation or, instead, a tighter focus on execution of existing legal requirements? Having its origins in the Armed Services Procurement Regulation, the Federal Procurement Regulations, and the Defense Acquisition Regulations, the FAR was created in 1984 and today is the result of years of input from agencies, industry, and other interested procurement professionals and is the authoritative source for guidance and regulatory requirements for procurement officials and contractors. Because the FAR has developed over time with input from affected parties, it is comprehensive and already addresses many of the procurement issues that are the subject of recent reform initiatives. For example, President Obama's March 4, 2009 Memorandum on

[16] Written Statement of Gordon England, Former Deputy Secretary of Defense, before the House Armed Services Committee Panel on Acquisition Reform, at 4-5 (June 3, 2009); *see also* Written Statement of Ronald T. Kadish, LTG, USAF(ret), before the House Armed Services Committee Panel on Acquisition Reform (June 3, 2009) (discussing complexities of existing acquisition system).

Government Contracting and recent legislation have expressed concern with the use of cost-reimbursement contract types based, in part, on reports of cost growth on certain weapons systems programs.[17] The President's Memorandum states that the Government has a preference for fixed-price type contracts and that "[c]ost-reimbursement contracts shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price contract."[18] FAR 16.301-2 today reiterates the same policy that "[c]ost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract." In addition, existing regulations provide that cost-reimbursement type contracts should not be used unless (i) the contractor has adequate accounting systems in place to measure costs and (ii) the Government has the resources to supervise performance to ensure that "efficient methods and effective cost controls are used."[19] FAR Part 16 further provides guidance on when various types of cost-reimbursement contracts are (and are not) appropriate to use. In other words, FAR Part 16 already expresses a public policy in favor of fixed-price contracts, provides guidance on when such contracts should and should not be used, and requires the Government to exercise additional oversight when using cost-reimbursement contracts.

While some cost-reimbursement contracts have experienced cost growth,[20] the FAR recognizes that cost-reimbursement contracts still serve a valuable purpose in government

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[17] *E.g.*, "Defense Acquisitions: Assessments of Selected Weapons Programs," GAO Report No. 09-326SP (Mar. 2009).

[18] Memorandum for the Heads of Executive Departments and Agencies on Government Contracting, dated March 4, 2009 and published in the Federal Register at 74 Fed. Reg. 9755 (Mar. 9, 2009) (hereafter cited as "President's Memorandum on Government Contracting").

[19] FAR 16.301-3.

[20] It is noteworthy that former DoD acquisition officials have taken issue with the Government Accountability Office's statistics on cost growth on major acquisition programs, arguing that the cost growth related to older Department of Defense programs. *See, e.g.*, Written Statement of Gordon England, Former Deputy Secretary of Defense, House Armed Services Committee Panel on Acquisition Reform, at 3 (June 3, 2009).

contracting. Procurements for state-of-the-art technologies are inherently risky, and development does not always follow a linear and predictable path. The recently-enacted WSARA reasonably focuses additional attention on managing technology risks for acquisitions of weapons systems, but the balance the FAR currently strikes between fixed-price and cost-reimbursement contracting should be retained.

This balance recognizes that fixed-price contracts involving highly complex system procurements or development effort may not result in cost-savings and, indeed, if history is any guide, could lead to delays and disputes. In the 1960s, concerns regarding cost growth on design and development programs and the difficulties of managing costs on such programs – concerns we hear repeated today – led to the development and use, endorsed by a predecessor of the FAR, of fixed-price contracts for design and development that included fixed-price options for production units.[21] The idea behind this type of procurement – called "total package procurement" – was that contractors would not agree to unrealistically low development cost estimates if both development and production were fixed-price. As scholars in the field note, however, "total package procurements" were highly unsuccessful, resulting in disputes and litigation, cost growth and staggering losses, and, as a result, were ultimately abandoned.[22]

Fixed-price development contracting had a resurgence in popularity in the 1980s, but in response to another wave of unsuccessful programs, Congress, in 1989, required DoD to issue regulations prohibiting the use of fixed-price contracts for development unless "(A) the level of program risk permits realistic pricing; and (B) the use of a fixed-price contract permits an

[21] Ralph C. Nash, John Cibinic, "Total Package Procurement: A Forgotten No-No," No. 8 Nash & Cibinic Reports ¶ 41 (Aug. 2005).

[22] *Id.* (citing Robert Palsy, "Unconventional Methods of Procurement," Briefing Papers No. 69-4 (Aug. 1969)).

equitable and sensible allocation of program risk between the United States and the contractor."[23] For contracts over $10 million for development of major systems, DoD could not issue a firm fixed-price contract without written permission from the Under Secretary of Defense for Acquisition.[24]

Therefore, before rushing to revise the FAR to further discourage cost-reimbursement contracting, it may be appropriate to heed the lessons of the past and retain existing provisions that encourage the use of fixed-price contracting when the Government can adequately define its requirements and the cost risks are predictable and focus reform efforts on more disciplined adherence to these existing regulations and better Government management of cost-type contracts when they are deemed appropriate to use.

Much of this is also true with respect to sole-source contracting. The President's March 4 Memorandum states that the Government must "strive for an open and competitive process" but should also have the flexibility to use sole-source contracts (contracts awarded to a single entity deemed to be the only source for the procurement item) and other non-competitively awarded contracts in "exigent circumstances."[25] The Competition in Contracting Act, passed in 1984, already reflects this policy.[26] Likewise, the FAR also affirms that it is the policy of the Government to promote and provide for full and open competition in soliciting and awarding contracts, "with certain limited exceptions."[27] FAR Subpart 6.3 provides policies and procedures

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[23] Pub. L. No. 100-456, § 807.

[24] *Id.*

[25] President's Memorandum on Government Contracting.

[26] Pub. L. No. 98-369. The Competition in Contracting Act amended various statutes, including aspects of the Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2304-2305, the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 253-253a, and the Office of Federal Procurement Policy Act, 41 U.S.C. § 401-424.

[27] FAR 6.101.

that must be followed in those "certain limited exceptions" when other than full and open competition is employed. Accordingly, just as with cost-reimbursement contracting, policymakers should assess whether a renewed focus on enforcement and application of existing regulations and restrictions will better address the current concerns than additional regulation or legislation.

B. Coordinated Filling Of The Regulatory Gaps

Second, where changes to the acquisition system are truly necessary, those changes should be coordinated. In 2008 and 2009, legislation requiring some form of review of organizational conflicts of interest ("OCIs") and personal conflicts of interest ("PCIs") was included in the FY09 NDAA and the WSARA. For example, the WSARA requires the Secretary of Defense to revise regulations dealing with OCIs to address conflicts that might arise from contracts using lead systems integrators, companies that have business units providing technical advice or assistance services on major weapons programs that also have business units competing for contracts on the program, and using contractors to perform technical evaluations on major defense acquisition programs.[28] The FY09 NDAA required rulemaking to address both PCIs and OCIs.

In 2008, GAO also issued a report urging DoD to develop Department-wide personal conflict of interest safeguards for contractors similar to those for federal employees, to be implemented through a required contract clause.[29] In response to GAO's findings, the Councils

[28] Pub. L. No. 111-23, § 207.

[29] "Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees," GAO Report No. 08-169 (Mar. 2008).

issued two advance notices of proposed rulemaking to solicit public comment on whether changes to the FAR are required with respect to OCIs and PCIs.[30]

Thus, efforts to address concerns regarding the growth of and mitigation of potential PCIs and OCIs are currently underway. Regulatory enhancements here may be appropriate. The FAR currently does not contain a uniform body of regulations relating to PCIs. FAR Part 9.5 does address OCIs and identifies the types of activities that may lead to an OCI. In its favor, FAR Part 9.5 promotes flexibility and encourages contracting officers to identify and timely mitigate potential OCIs, but not to delay procurements unreasonably or impose burdensome requirements. This balance is good: the competitive field should not be unnecessarily limited by overly-restrictive OCI requirements; nevertheless, competitions also must be conducted fairly and on even footing. Because the FAR arguably does not provide sufficient guidance on effective options for mitigating (or neutralizing) OCIs, determinations of whether mitigation efforts are successful are often determined in the context of a protest of a contract award, with the unsuccessful offeror challenging (and the agency defending) its mitigation efforts in a litigation setting and the GAO essentially filling the regulatory "gap" through its decisions.

As efforts to address PCIs and OCIs proceed, these efforts should be coordinated so that conflicting and unnecessary obligations are avoided. Reform through agency-specific regulations may not be appropriate where a concern or regulatory "gap" appears to be Government-wide. It is important to remember the goal of the FAR. The FAR was intended as a uniform body of procurement regulation to replace the then-existing agency-specific procurement regulations. Procurement experts recognize that uniformity is also good for industry and Government:

[30] FAR Case 2007-017, 73 Fed. Reg. 15961 (Mar. 26, 2008), and FAR Case 2007-018, 73 Fed. Reg. 15692 (Mar. 26, 2008).

> A uniform procurement system suggests that all government instrumentalities buy the same way, following the same laws, rules, and practices. Such a system is efficient because sellers do not need to learn new rules in order to do business with different agencies or departments. Further, it is much easier to train all of the government's buyers, and it permits buyers greater flexibility to work for various agencies or departments during their careers. In addition, if the government consistently uses standard provisions and clauses, the process operates more smoothly. Transactions become more routine. All parties to the transaction understand the rules to the game.[31]

Although agencies are permitted to supplement the FAR with agency-specific regulations, the FAR provides that supplemental regulations should be limited to those necessary for implementing the FAR and for satisfying specific agency needs.[32] When legislation affecting DoD requires DoD to modify its procurement practices, uniformity is threatened. Today, the DoD FAR Supplement ("DFARS") is nearly as thick as the FAR. While DoD admittedly has some mission-unique requirements, OCIs and PCIs are concerns that affect all agencies of Government. Thus, when ongoing efforts at regulatory reform are proceeding concurrently, at a minimum, the efforts should be coordinated to ensure that duplicative and conflicting regulatory requirements are not developed.

C. Allowing Prior Changes To Be Implemented

Finally, because regulatory churn increases costs, complexity, inefficiencies and instability, policymakers should take into account that the legislative and regulatory initiatives passed in 2008 and 2009 are relatively young and their efficacy has not been tested. Many of these reform efforts have only recently been incorporated into regulations, new solicitations, and contracts. Before expanding reform efforts, policy makers should consider allowing the current

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[31] Prof. Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," 11 Pub. Procurement L. Rev. 103, 109 (2002).

[32] FAR. 1.302.

legislative and regulatory efforts to take root and then assess whether their objectives have been met. By allowing new reform effort to be tested by Government and industry in practice, policy makers will have better information to evaluate what measures work (or do not work), where clarification may be warranted, and, if additional legislative or regulatory efforts are necessary, how to target them to aspects of the procurement system that still require improvement.

III. CONCLUSION

In summary, although the federal procurement system faces challenges and can be improved, there is also an existing framework of regulations that is flexible enough to respond to shifts in emphasis and policy. Where additional regulatory focus is required, requirements should be coordinated to preserve uniformity and promote clarity. Lastly, reform efforts need to take root before it is known whether they will bear fruit.

Chairwoman Watson and members of the Subcommittee, thank you again for this opportunity to share my thoughts.

Ms. WATSON. Ms. Madsen.

STATEMENT OF MARCIA G. MADSEN

Ms. MADSEN. Madam Chairwoman and Congressman Bilbray, I appreciate the opportunity to be here today to update you on the progress of implementing the recommendations of the Acquisition Advisory Panel. It is terrific to be on this side of the effort, I might add.

The panel's objective, as it was described in our report, was to provide meaningful improvements to the acquisition system that would allow agencies to obtain the benefit of commercial practices to better achieve their mission, and with recognition that a balance is necessary to achieve transparency and accountability necessary for the expenditure of public funds.

The panel's report was focused on giving the government and its acquisition work force improved capability to make wise decisions about expenditure of the taxpayers' money.

Many of the panel's recommendations have now been adopted in legislation and regulations, about 37, depending on how you count the bits and pieces. And I should note that the panel attempted to provide recommendations that could principally be implemented through regulation, although Congress has picked up a number of those and put them in legislation as well.

I just want to talk about a couple of key areas and maybe a couple of gaps.

The panel really put an emphasis on the importance of competition. There was some discussion earlier with Mr. Drabkin about whether the Federal Government actually is doing less competition than it was. I agree with him, based on the research we did, that the percentage of competition has been relatively consistent.

However, the panel looked at what best commercial practice was for competition and determined that the government's competitive practices didn't really measure up. We didn't have any good data on orders under large IDIQ multiple work contracts, and about a third of the contracts awarded of the data we did have were awarded noncompetitively. The private sector does much better, particularly in services and IT procurements than that.

We still don't today have good data on the amount of competition that is actually used in awarding orders under task and delivery order contracts. That is something that needs to be corrected very soon.

Our panel expressed very strong views on the need for greater emphasis on requirements development and acquisition planning. I still believe that is a gap. You see this thread in the Presidential memorandum and in the discussion of cost reimbursement contracting about, maybe, restrictions on cost reimbursement contracting.

But in order to make the system work to reduce costs, whether you are using cost-plus contracts or whether to make it possible to use more fixed price contracts, the bottom of that is requirements development; and it is what the private sector spends their money on, and it is what the government needs to do a better job on.

We made some suggestions about putting teeth in the requirements process, and those suggestions have not been picked up yet.

And I would be happy to talk to the committee more about them. As I said, a number of our suggestions have been enacted, and they are in my testimony and I won't go through them.

Something else we proposed was much better management of interagency contracts. Section 865 of the NDAA picks up on that.

With respect to the work force, again we recognize that there was a significant mismatch between the demands on the work force and the skills and competencies of the work force. I was struck—I was looking at the same Executive order I think Ms. Manos was looking at, the implementation of FASSA, just last week, and I was struck by the President's emphasis in that—President Clinton's emphasis in that memo of cutting 275,000 Federal jobs.

And obviously there is recovery here that needs to take place with respect to the work force. It is not just numbers, and I won't go through them, but if you look in the panel's report, one of the things you will see—and I think this is a gap—is, we recommended a consistent definition of the Federal work force and a consistent measurement and also a single data base for the Federal acquisition work force, so we can tell what the Federal acquisition work force is. There are at least three different counts that are used today and they produce widely varying numbers.

It is not only numbers, it is a definition. It is also getting the skills and competencies correct, as Mr. Assad testified.

I would be happy to respond regarding blended work force issues. The panel was the first to point out some of the complications associated there.

And I would like to make one final observation to the committee. As I said, our panel was focused on giving the government the tools to do a better job and make wise decisions. But there appears to have been developing in the last 2 years what may be piling on to enact sort of the latest investigative provisions, and many of these are overlapping. They are burdensome, and they really intrude on the ability of the government to manage its business.

I would like to encourage the subcommittee to undertake a review of these provisions and to assess where there is duplication and what the collective burden is that these provisions impose on the work force. Do we really need three new whistle-blower provisions that do the same thing?

Should contractors who make a mandatory disclosure under the mandatory disclosure also be subject to a Qui Tam suit for making that disclosure? There is a lot of overlap here, and I think it would be worth looking at whether you needed to check that and make some rationalization.

Ms. WATSON. Just keep in mind this is work in progress. We have all of your written statements, and we will look at your recommendations in a very sincere way.

[The prepared statement of Ms. Madsen follows:]

STATEMENT OF MARCIA G. MADSEN

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, ORGANIZATION, AND PROCUREMENT OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 16, 2009

Madam Chair, Congressman Bilbray and Members of the Subcommittee:

I appreciate the invitation to appear before the Subcommittee again to discuss the implementation of the Acquisition Advisory Panel's recommendations. Since I last testified before the Subcommittee in February 2008, substantial progress has been made in implementing those recommendations, as both Congress and the Executive Branch continue their work to address the Acquisition Advisory Panel's (the "Panel" or "AAP") Report. I also should observe that it is apparent the Panel's work - its research and findings - continues to inform the discussion of current acquisition policy.

Time simply will not permit a detailed analysis of the 89 multipart recommendations and more than 100 findings in the Report. Therefore, I intend to focus on the points that I think may be of greatest interest to the Subcommittee.

The Panel's Report was published in July 2007, but a draft was available in late 2006. As a result, several of the Panel's recommendations were picked up in the FY 2008 National Defense Authorization Act ("NDAA"). Other portions of the Panel's findings and recommendations are the subject of pending FAR cases, and have been incorporated in Memoranda issued by the Office of Federal Procurement Policy ("OFPP"). The FY 2009 NDAA included more of the Panel's work. There is some overlap between the legislative enactments and the FAR cases. In some instances, a FAR case was underway, but legislation was subsequently enacted.

The Panel's work highlighted issues that subsequently have become the subject of intense attention.

Acquisition reform in the mid-90s emphasized streamlining the procurement process, relying more on commercial items, services and processes, and a substantially reduced acquisition workforce. The Packard Commission (1986) and the Section 800 Panel (1993) both had emphasized the Government's need to attract technology and expertise from the private sector. The National Performance Review in 1993 provided a real impetus for these changes, which were enacted in the Federal Acquisition

Streamlining Act (FASA) and the Federal Acquisition Reform Act (FARA) in the mid-90s.

The Panel was asked to look at many of these issues - 10 years later. What we discovered was a complex landscape and some unintended consequences - including the huge growth in procurement spending as a result of both the War on Terror and Hurricane Katrina. (Federal procurement spending has increased from $219 billion in FY 2000 to more than $515 billion in FY 2008.) The Panel also determined that slightly more than 60% of the Government's acquisition dollars were spent on services - a fact that we realized had very significant implications for the acquisition system. Also, during the mid-90s, the downsizing of the acquisition workforce became a management mandate. For example, the NDAA for FY 1996 required DoD to reduce its acquisition workforce by 25% by the end of FY 2000. Furthering the trend, DoD's workforce in 2004 was less than half its acquisition workforce in 1990. Among the casualties of this reduction were government engineering capabilities and pricing expertise. In retrospect, the timing of the workforce reduction and the lack of investment in the acquisition workforce, could not have been worse.

With respect to the use of commercial practices, the evidence found by the Panel was that the Government's practices - despite the focus on adoption of government commercial practices and acquisition of commercial items and services - did not approach the rigor of the commercial market with respect to requirements development, use of competition, and use of fixed-priced, performance-based contracts.

The AAP was the first to draw attention to the implications of the "blended workforce" and the need to determine the appropriate role of contractors supporting the Government.

Commercial Practices - What the Panel Found

With respect to commercial practices, the Panel learned from commercial buyers of technology-related services that the keys to successful services contracting are early investment in requirements definition and competition. For FY 2004 (the Panel used FY 2004 FPDS-NG data for its analyses), we were able to determine that one-third of the Government's procurement dollars were awarded non-competitively, and even when competed, the percent of dollars awarded when only one offer was received had more than doubled from 9% in 2000 to 20% in 2005. We also believed that the amount of non-competitive awards was likely understated for orders under multiple award contracts available for interagency use. There was no meaningful data available on FPDS-NG regarding the extent to which competition was used for the award of orders under task and delivery order contracts - a fact that remains true today.

The Panel made a number of recommendations to improve requirements development and competition, particularly with respect to orders placed under interagency contracts, including:

- Establishment of more stringent competition requirements for large orders (in excess of $ 5 million) under interagency contracts. The Panel found that these large orders relied on a statement of work, contained rather detailed evaluation criteria, and were often made on a best value basis, but were not subject to basic requirements that typically govern negotiated best value acquisitions. This change is reflected in Section 843 of the FY2008 NDAA. FAR Case 2008-006.

- A requirement for government-wide application of enhanced "fair opportunity" competition procedures, as originally reflected in Section 803 of the FY 2002 NDAA for purchases above the simplified acquisition threshold. Section 863 of the FY 2009 NDAA revised and replaced 803 to provide enhanced fair opportunity procedures. FAR Case 2007-012 (redraft of earlier proposed rule). Also, OFPP issued a government-wide competition policy.

- A requirement for publication of a notice of sole-source task or delivery orders in excess of the simplified acquisition threshold placed against multiple award contracts within 14 days after such an order is placed. Section 863 (c) of the FY 2009 NDAA. FAR Case 2007-012.[1]

- Authorization of bid protests for large task or delivery orders (in excess of $10 million). Section 843 of the FY 2008 NDAA authorizes such protests for a period of three years at the Government Accountability Office.

The Panel made additional recommendations as well to improve competition - which are reflected, if not adopted expressly, in other issued policies or pending actions.

OFPP Competition Memoranda issued on May 31, 2007, and July 18, 2008.

The Panel proposed a new competitive information technology schedule under the GSA Multiple Award Schedule program under which prices for each order would be established by competition, and not based on posted rates. GSA's MAS panel has been actively considering a similar recommendation.

[1] The Panel believed that the notice requirement could be implemented through a change to the FAR, and recommended a regulatory change. FAR Case 2007-012 began the implementation of that change before it was picked up in legislation. The Panel recommendation also included another separate suggestion for notice of sole-source awards of orders under Blanket Purchase Agreements.

In addition, the Panel strongly recommended a greater emphasis on requirements development and acquisition planning to facilitate fixed-price contracts, where possible, and to improve competition. The Panel pointed to the need for expertise in requirements analysis and development, and for "teeth" in the requirements process to assure that all relevant stakeholders agree on the requirements. While this recommendation, unfortunately, has not been adopted, echoes of it can be discerned in Section 864 of the FY 2009 NDAA which discusses the need for further guidance regarding use of cost-reimbursement contracts (and by implication, more fixed-price contracts), and in the President's March 4, 2009 Memorandum. *See* FAR Case 2008-030.

Interagency Contracting

In addition to the competition recommendations, the AAP also recommended a number of steps to improve the management of and accountability for interagency contracts.

The Panel's findings recognize that interagency contracts are important to helping agencies meet their missions, but there are significant issues that the Panel addressed in its report regarding the proliferation of these contracts and the exercise of proper management responsibilities between agencies holding the contracts and agencies ordering from them. We had significant problems even obtaining any reliable data about how many of these contracts there are and where they are located. The Panel recommended that OMB establish policies governing the use of such vehicles, to include management of these vehicles, training in their use and relative advantages/disadvantages, and whether a business case exists for the creation or continuation of any such contract. OMB promptly initiated a study group, even before the Panel's working group had reported its findings. Section 865 of the FY 2009 NDAA implements this recommendation. FAR Case 2008-032.

Federal Acquisition Workforce

Although not called out in the statute creating the Panel, it was readily apparent to us that the Government's ability to make the acquisition process - and any recommendations - work, was dependent on the federal acquisition workforce. The AAP set up a special working group to examine workforce issues.

The Panel determined that there is a significant mismatch between the demands placed on the acquisition workforce and the personnel and skills available to meet those demands. The Panel realized, however, that there was not reliable information about the ***size, composition,*** and ***competencies*** of the federal acquisition workforce - or the role of contractors in supporting that workforce. One cannot understand the trends that have affected the workforce, or its needs, without reliable data.

The Panel commissioned a study that analyzed available data about the acquisition workforce, and gaps in that data. The data we analyzed goes back to the 1960s and is contained on 9 CDs.

Our Recommendations focused in four areas aimed at prompt and aggressive action to improve the workforce: (1) definition and measurement; (2) human capital planning; (3) training and development; and (4) recruitment and hiring.

(1) The AAP's first recommendation focused on establishment of a consistent definition and method for measuring the acquisition workforce. This was the first recommendation because our study showed that varying definitions of the acquisition workforce produce widely varied numbers. The Panel recommended that this effort be completed within one year.

Consistent with the need for reliable data, the Panel recommended the creation by OFPP of a *single* government-wide database using that consistent definition to facilitate determination of how many professionals really are in the acquisition workforce. The Panel noted that we did not have data regarding the role of contractors in the acquisition workforce.

To focus attention on the acquisition workforce, the Panel recommended the creation of a senior-level position within OFPP with government-wide responsibility for acquisition workforce policy. The Panel recommended that OFPP be delegated OMB's authority to review agency acquisition workforce strategic plans. Section 855 of the FY 2008 NDAA created the position of Associate Administrator for Acquisition Workforce Programs. The new Associate Administrator will have authority to coordinate with Chief Acquisition Officers and Chief Human Capital Officers to develop a strategic human capital plan for the government-wide acquisition workforce, and for reviewing individual agency workforce succession plans. The authority is less robust than envisioned in the Panel's recommendation. In addition, recommendations regarding acquisition workforce data have not been specifically addressed.

(2) With respect to human capital planning, the Panel recommended creation of a focus specifically on the acquisition workforce. The Panel recommended that each agency should undertake human capital planning for the acquisition workforce immediately, if not already underway. Specifically, the Panel recommended that the Chief Acquisition Officer should be responsible for the acquisition workforce planning. The recommendation included assessing the role of contractors supporting the acquisition workforce.

Section 851 of the FY 2008 NDAA requires that, for DOD, a separate section in the strategic human capital plan must be focused on the acquisition workforce, including skill gaps. The plan also is required to provide an identification of funding for defense acquisition workforce improvements and how it will be used.

Section 869 of the FY 2009 NDAA authorizes an "Acquisition Workforce Development Strategic Plan" for non-DoD agencies that must be completed within one year. The new Associate Administrator of OFPP is responsible for the Plan, which is to include, among other things at a minimum: an assessment of the nature of the acquisition work and the skills to carry out that work; the development of a funding model for recruitment, training, and retention of an appropriate acquisition workforce, including the implications of interagency funding, and how the DoD fund might be applied to civilian agencies; necessary strategic human capital planning; a method to project future workforce needs; training; and an apparent mandate to increase the acquisition workforce by 25% within 5 years.

(3) The Panel noted the need for consistent and reliable funding that was protected to assure that training would be available. Specifically, the Panel recommended reauthorization of the SARA Training Fund and director appropriations for that fund. Section 854 of the FY 2008 NDAA repealed the sunset of the Acquisition Workforce Training Fund (41 U.S.C. § 433(h)(3)). The Acquisition Workforce Training Fund is used to pay for the development of government-wide acquisition training that is developed and implemented by the Federal Acquisition Institute.

In addition, Section 852 of the FY 2008 NDAA created a DOD Workforce Development Fund for recruitment, training, and retention of acquisition personnel - including credits to the fund and limiting the funds for this purpose.

(4) The Panel also recommended an examination of steps to facilitate hiring and retention of a capable acquisition workforce to include a government-wide internship program, hiring streamlining, and incentives to retain senior acquisition staff. Section 855 of the FY 2008 NDAA addresses human capital succession planning to address recruitment and retention. This provision includes potential use of tuition assistance programs and intern programs. As noted above, Section 869 of the FY 2009 NDAA also addresses, more generally, recruitment and retention.

The Panel did NOT recommend that agencies rush out and hire scores of new acquisition professionals - because we did not have enough information to tell the relationship between numbers of acquisition professionals, competencies of those people, gaps in competencies, and use of contractors. But we stated that a flexible planning process should be used and begun ***immediately*** so that changes could be made as soon as information becomes available. While much has been done in this regard, the data gaps are significant. The tasks facing the workforce, particularly in the acquisition of complex services, are new and involve technical as well as business skills.

Implications of the "Blended Workforce"

The Panel also undertook what I believe is the first effort to define and analyze issues surrounding the so-called "blended workforce" - and to make recommendations

in that regard. When the Panel began its review of the acquisition workforce, an early question related to data regarding the numbers of contractors providing services to the Government, the types of services, and management responsibility for those contractors. Such data was not available, and is not available today. Consequently, it is difficult to make informed decisions about the appropriate role of contractors, where it makes sense to "in-source" expertise, and where flexibility to obtain needed skills and cost weigh in favor of using contractors.

The Panel recommended that OFPP provide updated principles to apply in determining what functions must be performed by government employees. The Panel also believed it was important that agencies determine which functions were core functions for their mission, and to see that those functions are appropriately staffed with government personnel. In this regard, the Panel noted that the term "inherently governmental" was too broad and applied inconsistently across agencies.

Section 321 of the FY 2009 NDAA directs OMB to review the current definitions of "inherently governmental function" in law and regulation to determine whether the definitions are sufficiently focused to ensure that only officers or employees of the Government or members of the Armed Forces perform inherently governmental functions or other critical functions necessary for an agency's mission. OMB also is charged with developing a single consistent definition for "inherently governmental function." OMB is to develop criteria to be used by the head of each department or agency to identify critical agency functions and any positions that, although not inherently governmental, nevertheless should be performed by government personnel. These criteria also are to identify positions that ensure the Government maintains sufficient organic expertise and technical capability. OMB also is to see that agencies develop staffing guidance. The President's March 4, 2009 Memorandum also addressed the question of inherently governmental function, and referenced Section 321.

The Panel was concerned that the phrase "inherently governmental" was too imprecise, overused, and confusing. Perhaps the new OMB effort will help agencies better focus on their core missions and the skills they need to manage that work Again, however, the Panel's concern for data and a consistent definition has not been expressly addressed. It will be difficult to separate work that must be performed in-house from skills that are better obtained outside the Government without an understanding of the work that contractors are performing today, and the cost and quality of that work.

The Panel also recognized that current regulatory structures regarding Organizational Conflicts of Interest ("OCIs") and (Personal Conflicts of Interest ("PCIs") needed attention in light of the large number of contractors performing services for the Government. The Panel reviewed existing laws and regulations and recommended that new contract clauses be developed that would give contracting officials flexibility to address specific situations.

On March 26, 2008, the FAR Council took a first step towards addressing PCIs when an Advanced Notice of Proposed Rulemaking ("ANPR") was issued for FAR Case 2007-017. The purpose of the notice was to seek public comments regarding "if, when, and how service contractor employees' personal conflicts of interest need to be addressed and whether greater disclosure of contractor practices, specific prohibitions, or reliance on specified principles would be most effective and efficient in promoting ethical behavior." The comment period closed on July 17, 2008. To date, the FAR Council has taken no further steps regarding the ANPR.

The FAR Council's inaction is likely due to the ANPR being overtaken by Congressional action. Section 841 of the FY 2009 NDAA directs OMB to develop and implement new policies addressing PCIs and OCIs. Section 841(a) requires that OFPP develop and issue standard policies, within 270 days of enactment of the provision, regarding contractor employee PCIs. The policy must define the term PCI as it relates to contractor employees performing acquisition functions closely associated with inherently governmental functions. It also requires contractors whose employees perform such functions to: (1) identify and prevent PCIs; (2) prohibit employees who have access to non-public government information obtained while performing such functions from using the information for personal gain; (3) report any PCI violation by an employee to the Contracting Officer; (4) maintain effective oversight; (5) have procedures in place to screen for PCIs; and (6) take appropriate disciplinary action against any employee who fails to comply with the PCI policy.

The FAR also is required to include a contract clause or set of clauses for use in solicitations and contracts that (i) incorporates the PCI policies developed under Section 841 pertaining to contractor employees performing acquisition functions closely associated with inherently governmental functions, and (ii) sets out the contractor's responsibilities in monitoring its employees. The new FAR clauses likely will operate both as performance requirements and *implied certifications* regarding a contractor's PCI compliance.

Section 841(b) requires that OFPP and the Office of Government Ethics ("OGE") review the FAR to: (1) identify contracting methods, types, and services that raise heightened concerns for potential PCIs and OCIs; (2) determine whether revisions to the FAR are necessary to address PCIs with respect to functions other than acquisition functions associated with inherently governmental functions; and (3) determine whether revisions to the FAR are necessary to achieve sufficiently rigorous comprehensive and uniform policies to prevent and mitigate OCIs. OFPP and OGE must complete their review of the FAR and make their determinations within 12 months. Finally, Section 841(c) requires that OFPP and OGE develop a Best Practices Repository for the prevention and mitigation of OCIs and PCIs.

Despite the provisions of Section 841, the Weapons System Acquisition Reform Act of 2009 (which became law on May 22, 2009) includes provisions that will alter the

approach to OCIs for DoD and may lead to a new government-wide approach. Section 207 of the Act calls for substantial restrictions on the use of systems engineering and technical assistance ("SETA") contractors that are affiliated with competitors for major defense acquisition programs, as well as other restrictions related to the role of contractors (and their affiliates) in such programs. The Act calls for consideration of recommendations by (i) the Panel on Contracting Integrity established by Section 813 of the FY 2007 NDAA regarding measures to eliminate or mitigate OCIs in the acquisition of major defense acquisition programs, as well as (ii) the Administrator for Federal Procurement Policy and the Director of Government Ethics pursuant to Section 841(b) of the NDAA for FY2009.

The AAP discussed, but did not adopt rigid prescriptive procedures for PCIs and OCIs. Rather, the Panel stated that PCIs may be more of an issue for some agencies and some types of contracts than for others. The Panel recommended efforts to identify the types of contracts where the potential for PCIs may be a concern - an approach adopted in Section 841. The Panel also found that given the wide variation in agency missions, types of federal contracts, and contractors, it would not be appropriate to impose a single set of definitions or requirements on all agencies and contractors. Instead, the Panel recommended development of contract clauses and a fact-based analysis of the situation to allow the contracting agency to determine the appropriate level of restriction.

With respect to OCIs, the AAP concluded that the existing regulations - which call for a case-by-case analysis of the conflict and possible mitigation plan that is consistent with the agency's needs - employed the right approach. However, the Panel also concluded that the existing FAR 9.5 regulations were outdated in some respects. For example, the Panel noted that OCIs could arise in various time frames (before, during, and after award of a contract), and that they could arise in a variety of contexts, such as a potential unfair competitive advantage (*e.g.*, using information obtained in performance of a contract to enhance the opportunity to obtain a future contract), or impaired objectivity (*e.g.*, reviewing the performance of an affiliate or of a potential competitor for a future contract).

The Panel was concerned about over-regulation and unnecessarily circumscribing the discretion of the agencies deal with the facts in a particular case. The Panel's recommendation, therefore, focused on updating the regulations and clauses - but retaining the basic approach.

Conclusion

The AAP's work presents an ambitious agenda for improvements in the federal acquisition system - improvements that are aimed at helping the Government's

acquisition process be more capable of supporting the mission of the federal departments and agencies, with recognition of the importance of making good use of taxpayer dollars. The AAP report tried to give the Government and its acquisition workforce improved capability to make wise decisions in the use of taxpayer funds.

I would be pleased to respond to any questions that you may have.

Ms. WATSON. Mr. Amey, you may proceed.

STATEMENT OF SCOTT AMEY

Mr. AMEY. Thank you for inviting me to testify, and I hope to meet your deadline here.

I am the general counsel of the Project on Government Oversight [POGO]. Throughout its 28-year history, POGO has worked to remedy waste, fraud and abuse in government spending in order to achieve a more effective, accountable, open and ethical Federal Government. POGO has a keen interest in government contracting matters, and I am pleased to share my abbreviated thoughts with you this morning.

Many contracting experts and government officials have blamed the inadequate size and training of the acquisition work force for today's contracting problems. The work force reductions are a major problem, but we believe additional problems deserve equal attention. These problems are inadequate competition, deficient accountability, lack of transparency, and risky contracting vehicles, including some which have been mentioned today: sole source contracts, commercial item contracts, cost-reimbursement contracts, and time-and-materials, labor-hour contracts.

I want to provide you with one example that kind of hits all four of those subject areas. In my full testimony, I provide 22 recommendations that we think can be implemented to help improve the contracting process, but this is a 2006 IG report from the Department of Defense on a commercial contract for noncompetitive spare parts. It was a $860 million contract, and this is just the abbreviated results section.

The Air Force negotiating team used questionable promotional item determination that exempted the contractor—and I won't name them because I don't want to call them out on this; it is an internal problem—but from the requirement of submitting cost or pricing data on an $860 million commercial item contract for noncompetitive spare parts used by the Department's weapons system. As a result, the Air Force negotiating team classified basically all contractors' noncompetitive spare parts as exempt items.

It goes on to conclude that contractor refused to negotiate catalog prices for commercial items based on price analysis of previous cost-based prices, refused to provide DLA contracting officers with uncertified cost or pricing data for commercial catalog items, and terminated government access to the contractors' cost history system.

When Ranking Member Bilbray in his opening remarks used the term "adversarial system," I think it goes past what goes on necessarily between offices within the Federal Government, but this is also a problem with the government. The government doesn't have the tools necessary to get fair and reasonable prices in certain circumstances.

Thank you again for allowing me to testify. I will be more than happy to work with the subcommittee and the full committee as we proceed.

[The prepared statement of Mr. Amey follows:]

Testimony of
Scott Amey, General Counsel
Project On Government Oversight (POGO)
before the
House Committee on Oversight and Government Reform
Subcommittee on Management, Organization, and Procurement
on
"The State of Federal Contracting Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"

June 16, 2009

Thank you for inviting me to testify today. I am the General Counsel of the Project On Government Oversight, also known as POGO.[1] POGO was founded in 1981 by Pentagon whistleblowers who were concerned about wasteful spending and weapons that did not work. Throughout its twenty-eight-year history, POGO has worked to remedy waste, fraud, and abuse in government spending in order to achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters, and I am pleased to share POGO's thoughts with the Subcommittee today.

Many events over the past fifteen years have called into question the effectiveness of the federal contracting system and highlighted how drastically the contracting landscape has changed. Contract spending has grown tremendously, exceeding $530 billion in fiscal year 2008;[2] oversight has decreased; the acquisition workforce has been stretched thin and been supplemented by contractors; and spending on services now outpaces spending on goods. This new emphasis on services has also increased the risk of waste, fraud, and abuse in contracts, as it is more difficult to assess value on services than returns on goods. Some acquisition reforms created have significantly reduced contract oversight and made it difficult for government investigators and auditors to identify and recover wasteful or fraudulent spending. These reforms have also created contracting vehicles that often place public funds at risk.[3] In short, poor contracting decisions are placing taxpayer dollars – and sometimes lives – at risk.

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[1] For additional information about POGO, please visit www.pogo.org.
[2] http://www.fpdsng.com/downloads/agency_data_submit_list.htm.
[3] The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform Act of 1996 (FARA) (Public Law 104-106), and the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136) have removed taxpayer protections.

On a positive note, interest in improving the federal contracting system has grown significantly in recent years. Congress created the Commission on Wartime Contracting in Iraq and Afghanistan,[4] which recently released an interim report that was critical of many government and contractor contracting processes. Additionally, the Senate and House have created committees to dig deep into the contracting weeds.[5] These moves follow efforts in the two most recent National Defense Authorization Acts to improve federal contracting.[6]

The contract oversight bug has also hit President Obama's administration. Within his first 100 days in office, President Obama issued a contracting memorandum outlining the government's obligation to contract wisely by increasing competition and eliminating wasteful spending.[7] The President's budget also mentions concerns with risky contract types, wasteful spending, and contracts awarded without full and open competition.[8]

So far, Congress and the President seem to be well on their way to implementing contracting improvements. On May 22, the President signed the "Weapons Systems Acquisition Reform Act" which he described as "a bill that will eliminate some of the waste and inefficiency in our defense projects -- reforms that will better protect our nation, better protect our troops, and may save taxpayers tens of billions of dollars."[9] Additional legislation is moving through the Senate and the House.

At the same time, numerous Government Accountability Office (GAO) and Inspector General (IG) reports are surfacing that highlight contracting deficiencies and recommend ways to correct them.[10] One useful report is the DoD IG report "Summary of DoD Office

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[4] According to the Commission on Wartime Contracting in Iraq and Afghanistan, approximately $830 billion dollars has been spent since 2001 to fund U.S. operations in Iraq and Afghanistan.

[5] Commission on Wartime Contracting in Iraq and Afghanistan, "At What Cost? Contingency Contracting In Iraq and Afghanistan," p. 1, June 2009. http://www.wartimecontracting.gov/download/documents/reports/CWC_Interim_Report_At_What_Cost_06-10-09.pdf.

[6] The 2008 and 2009 National Defense Authorization acts have including many contract-related provisions. *See* Pub. Laws 110-181 (January 28, 2008) and 110-417 (October 14, 2008). http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf and http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

[7] Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting, March 4, 2009. http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/. See http://www.whitehouse.gov/blog/09/03/04/priorities_not-lining-the-Pockets-of-Contractors/.

[8] Office of Management and Budget, *A New Era of Responsibility: Renewing America's Promise*, pps. 15, 35, 38-39, 2009. http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf.

[9] The White House, Office of the Press Secretary, Remarks by the President at Signing of the Weapons Systems Acquisition Reform Act, May 22, 2009. http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-signing-of-the-Weapons-Systems-Acquisition-Reform-Act/.

[10] GAO, *Defense Acquisitions: Actions Needed to Ensure Value for Service Contracts*, GAO-09-643T, April 23, 2009. http://www.gao.gov/new.items/d09643t.pdf. Treasury IG for Tax Administration, *Current Practices Might Be Preventing Use of the Most Advantageous Contractual Methods to Acquire Goods and Services*, 2009-10-037, February 10, 2009.

of Inspector General Audits of Acquisition and Contract Administration," dated April 22, 2009.[11] This report reviewed 142 previous DoD IG reports and grouped contracting deficiencies into 12 issue areas, some of which are reasons why management of federal contracts at several agencies remains on GAO's "high risk" list.[12]

Federal contracting has also been the subject of industry reports criticizing the current system. The Grant Thornton consulting firm's *14th Annual Government Contractor Survey*, released in January 2009,[13] showed that cost reimbursable contracts are used more frequently than fixed price contracts. Cost-reimbursable contracts have been a subject of concern for both the White House and Members of Congress, and the survey stated that it "is difficult to equate the high use of cost reimbursable contracts with the notion that the government is attempting to use more commercial processes to streamline federal procurement."[14]

Many contracting experts and government officials blame the inadequate size and training of the acquisition workforce for the problems in today's contracting system. POGO agrees that workforce reductions are a major problem, but we believe additional problems deserve equal attention. Theses problems are:

1. Inadequate Competition
2. Deficient Accountability
3. Lack of Transparency
4. Risky Contracting Vehicles

I will discuss all of these issues in detail and provide realistic recommendations that will improve the way federal contracts are awarded, monitored, and reviewed.

Inadequate Competition

To better evaluate goods and services and get the best value for taxpayers, the government must encourage genuine competition. At first glance, it may seem that federal agencies frequently award contracts competitively. For example, the Department of Defense (DoD) claims that 64 percent of its contract obligations were competitive in 2008,[15] and federal contracting data shows that the Department of Homeland Security

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http://www.treas.gov/tigta/auditreports/2009reports/200910037fr.html.

[11] http://www.dodig.mil/audit/reports/fy09/09-071.pdf.

[12] GAO, *High-Risk Series*, GAO-09-271, pps. 77-84, January 2009. http://www.gao.gov/new.items/d09271.pdf.

[13] Grant Thornton, *14th Annual Government Contractor Industry Highlights Book -- Industry survey highlights 2008*, January 26, 2009. http://www.grantthornton.com/staticfiles//GTCom/files/Industries/Government%20contractor/14th_Gov_Con_Highlights_011409small.pdf. Grant Thornton is an international consulting company that provides services to public and private clients.

[14] Id., at p. 8.

[15] http://www.acq.osd.mil/dpap/cpic/cp/docs/dodfy2008competitionreport.pdf and USAspending.gov http://www.usaspending.gov/fpds/fpds.php?sortby=u&maj_agency_cat=97&reptype=r&database=fpds&fiscal_year=2008&detail=-1&datype=T&submit=GO.

competes approximately 70 percent of its contracts.[16] These numbers, however, do not tell the entire story. The "competitive" label includes contracts awarded through less than full and open competition, including competitions within a selected pool of contractors, and offers on which only a single-bid was received.

The 110th Congress limited the length of certain noncompetitive contracts and mandated competitive procedures at the task and delivery level,[17] but the government must do more to ensure that full and open competition involving multiple bidders is the rule, not the exception. Consequently, the definition of "competitive bidding" should be revised to apply only to contracts on which more than one bid was received.

In addition to redefining competition, federal agencies must:

1. Reverse the philosophy of quantity over quality. Acquisition is now about speed, and competition is considered a burden, which is a recipe for waste, fraud and abuse.

2. Debundle contract requirements to invite more contractors to the table. Contracts that lump together multiple goods and services exclude smaller businesses that could successfully provide one good or service, but are incapable of managing massive multi-part contracts. Breaking apart multi-supply or service contracts would also assist the government in reducing the multiple layers of subcontracting now prevalent in federal contracting that can drive up costs while adding little value.[18]

3. Update USAspending.gov to include a searchable, sortable, and user-friendly centralized database of all contracts and delivery/task orders awarded without full and open competition, including all sole source awards. The database would enhance the requirement created by the National Defense Authorization Act of 2008 to disclose justification and approval documents for noncompetitive contracts.[19]

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[16] USAspending.gov reports 70.4 percent of DHS contract were subject to competition in 2008 http://www.usaspending.gov/fpds/fpds.php?sortby=u&maj_agency_cat=70&reptype=r&database=fpds&fiscal_year=2008&detail=-1&datype=T&submit=GO.

[17] Pub. Law 110-181, Sec. 843, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. Pub. Law 110-417, Sec. 862, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

[18] The 2009 Defense Authorization bill directed DoD to minimize the excessive use of multiple layers of subcontractors that add no or negligible value to a contract. Pub. Law 110-417, Sec. 866, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

[19] Pub. Law 110-181, Sec. 844, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. On January 15, 2009, a Federal Register notice was issued creating an interim rule and requesting public comment on the proposed public database of justification and approval documents for noncompetitive contracts. 74 Fed. Reg. 2731. http://edocket.access.gpo.gov/2009/pdf/E9-555.pdf.

4. Ensure that waivers of competition requirements for task and delivery orders issued under multiple-award contracts or the federal supply schedule program are granted infrequently.[20]

5. Make the revolving door database of senior level DoD acquisition officials publicly available.[21] The revolving door increases the likelihood of unfair bias and conflicts of interest in contract awards decisions.

6. Increase emphasis on sealed bidding to receive the lowest prices.[22]

7. Use reverse auctions more frequently. In a Department of Energy reverse auction for pagers, two companies submitted initial bids for $43 and $51 per pager. At the close of bidding, the government awarded the contract at the low price of $38 per pager.[23]

Why is competition in contracting important? In a nutshell, genuine competition between contractors means the government gets the best quality goods and services at the best price. Competition also prevents waste, fraud, and abuse because contractors know they must perform at a high level or else be replaced.

Deficient Accountability

Through the years, the government has placed a premium on speeding up the contracting process and cutting red tape. Those policies led to the downsizing of the acquisition workforce and the gutting of the oversight community. When considering the large-scale increase in procurement spending during this past decade, the contracting and oversight communities lack sufficient resources to watch the money as it goes out the door.

Many acquisition reforms also eliminated essential taxpayer protections. For example, under certain types of contracts, one "reform" made it so federal contracting officials now lack the cost or pricing data necessary to ensure that the government is getting the best value. Commercial item contracts, which prevent government negotiators and auditors from examining a contractor's cost or pricing data, might make sense when buying computers, office supplies, or landscaping services. However, this contracting vehicle has been exploited in some cases, for example the C-130J cargo planes procured by the Air Force. It would have been helpful if auditors had been allowed to review Lockheed Martin's cost and pricing data, but, because the C-130J was determined to be a

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[20] See GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874, July 30, 2004. http://www.gao.gov/new.items/d04874.pdf.

[21] Pub. Law 110-181, Sec. 847, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. On January 15, 2009, DoD issued an interim rule implementing the federal statute and requesting comments on it. 74 Fed. Reg. 2408. http://edocket.access.gpo.gov/2009/pdf/E9-679.pdf.

[22] Sealed bidding is a method of contracting that employs competitive bids and the contract is then awarded by the agency to the low bidder who is determined to be responsive to the government's requirements. FAR Subpart 6.4 and Part 14.

[23] http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/9654.

commercial item, government auditors were literally not allowed to have access to that information. After Senator McCain forced the Air Force to convert the contract back to a traditional contracting vehicle, the taxpayers saved $168 million.[24]

POGO believes that Congress should:

1. Appropriate money to GSA to end its reliance on the fees collected from vendors on Schedule and Governmentwide Acquisition Contracts (GWACs) sales. GSA charges a .75 percent Industrial Funding Fee for all schedule orders. This system creates an apparent conflict and perverse incentive to keep costs or prices high. Stated differently, GSA might not be receiving the best prices because the Schedule program revenue will be lost.[25]

2. Require contractors to provide cost or pricing data to the government for all contracts, except those where the actual goods or services being provided are sold in substantial quantities in the commercial marketplace.

3. Provide enforcement tools needed to prevent, detect, and remedy waste, fraud, and abuse in federal spending, including more frequent pre-award and post-award audits to prevent defective pricing.[26] Specifically, the General Services Administration (GSA) Inspector General should have post-award authority to audit cost or pricing information submitted to GSA for the award of Multiple Award Schedule (MAS) contracts.[27]

4. Eliminate the Right to Financial Privacy Act requirement requiring IGs to notify contractors prior to obtaining the companies financial records. This requirement "tips off" contractors and can harm the government's ability to investigate federal contracts.[28]

5. Realize that audits are worth the investment. On average, all IGs appointed by the President return $9.49 for each dollar appropriated to their budgets.[29]

6. Enhance the acquisition workforce through improvements in hiring, pay, training, and retention.[30]

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[24] Secretary of the Air Force, Office of Public Affairs, Press Release (051006), *AF announces C-130J contract conversion*, October 25, 2006. http://www.af.mil/information/transcripts/story.asp?id=123029927.
[25] In 2004, the Industrial Funding Fee was reduced from 1 percent to .75 percent to fall in line with the actual costs of running the program.
[26] National Procurement Fraud Task Force, Legislation Committee, *Procurement Fraud: Legislative and Regulatory Reform Proposals*, June 9, 2008. http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf.
[27] Statement of Brian Miller, Inspector General, GSA, before the Senate Ad Hoc Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, pps. 6-7, April 21, 2009. http://hsgac.senate.gov/public/_files/MillerTestimony.pdf.
[28] Id., at pps. 4-5.
[29] GAO, *Inspector General: Actions Needed to Improve Audit Coverage of NASA*, GAO-09-88, p. 5, December 2008. http://www.gao.gov/new.items/d0988.pdf.
[30] Expedited hiring authority was granted for the defense acquisition workforce last year (Pub. Law 110-

7. Require comprehensive agency reviews of outsourcing practices, especially for contract-related management and consulting services contracts.[31]

8. Pass the Contracting and Tax Accountability Act of 2009 (H.R. 572) prohibiting federal contracts from being awarded to contractors that have an outstanding tax liability.[32]

9. Hold agencies accountable when they divert small business contracts to large corporations and thereby skew small business procurement numbers.[33]

Through the years, measure to ensure government and contractor accountability have been viewed burdensome and unnecessary measures. This attitude needs to be replaced with one recognizing that accountability measures are essential to protecting taxpayers and should be seen as a normal cost of doing business with the federal government.

Lack of Transparency

To regain public faith in the contracting system, the government must provide open public access to information on the contracting process, including contractor data and contracting officers' decisions and justifications.

The following actions should be taken to provide the public with contracting information:

1. USAspending.gov should become the one-stop shop for government officials and the public for all spending information, including actual copies of each contract, delivery or task order, modification, amendment, other transaction agreement, grant, and lease. Additionally, proposals, solicitations, award decisions and justifications (including all documents related to contracts awarded with less than full and open competition and single bid contract awards), audits, performance and responsibility data, and other related government reports should be incorporated in USAspending.gov.

2. To better track the blended federal government workforce, Congress should require the government to account for the number of contractor employees working for the government using a process similar to FAIR Act inventories of government employees filed by federal agencies.

417, sec. 833), and therefore the civilian agencies should be granted the same authority.

[31] Alice Lipowicz, Federal Computer Week, *DHS draws flak for review of services contracts*, June 5, 2009. http://fcw.com/articles/2009/06/08/news-dhs-contracts.aspx.

[32] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h572ih.txt.pdf.

[33] Department of the Interior, Office of the Inspector General, *Interior Misstated Achievement of Small Business Goals by including Fortune 500 Companies*, W-EV-MOI-003-2008, July 2008. Carol D. Leonnig, Washington Post, *Agencies Counted Big Firms As Small SBA Says It Will Correct Data on Federal Contracts*, A1, October 22, 2008. http://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102989_pf.html.

Risky Contracting Vehicles

As previously mentioned in my testimony, POGO is concerned with the government's acceptance of limited competition in contracting as well as its over-reliance on cost-reimbursement and commercial item contracts. POGO realizes that there are benefits to these vehicles in certain circumstances, but we are not alone in voicing concerns about how these contract vehicles are used in practice.

A March 18, 2009 letter from Peter Orzag, the Director of the Office of Management and Budget, to Senator Lieberman stated that "cost-reimbursement contracts place substantial risk on the government."[34] The letter further stated that the use of "cost-reimbursement contracts calls into question whether these vehicles are being used excessively or without adequate justification, and whether agencies have the necessary skills and capacity – within both acquisition and program offices – to successfully administer these contracts."[35]

The Treasury IG for Tax Administration also recently reported that the "IRS' predisposition to use cost-reimbursement contracts could result in inefficient use or misuse of taxpayer funds."[36]

POGO has additional concerns with the government placing taxpayer dollars at risk by over-designating many items and services as commercial.[37] Designating an item or service as commercial when there is no actual commercial marketplace places the government at risk because the government doesn't have access to cost or pricing data that is essential for ensuring the contract is fair and reasonable. The changes to procurement law and regulation during the past fifteen years have been most stark in this area. Reduced to its essentials, the so-called "acquisition reform" movement has largely been about best practices when contractors buy from their vendors, and a different set of rules when those same contractors sell to the federal government. The government's failure or inability to obtain cost or pricing data has been nothing short of shocking, and has invited outright price gouging of the public fisc. It is in this area where POGO would expect contractors to most aggressively lobby. After all, who can blame them?

Likewise, time and material (T&M) contracts place agencies in a vulnerable position where they may not receive a benefit after a significant investment of taxpayer dollars.

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[34] Executive Office of the President, Office of Management and Budget, Letter to the Honorable Joseph I. Lieberman, Chairman Committee on Homeland Security and Governmental Affairs, p. 1, March 18, 2008. http://www.whitehouse.gov/omb/assets/procurement/cost_contracting_report_031809.pdf.

[35] Id., at p. 2.

[36] Treasury IG for Tax Administration, *Current Practices Might Be Preventing Use of the Most Advantageous Contractual Methods to Acquire Goods and Services*, 2009-10-037, p. 1, February 10, 2009. http://www.treas.gov/tigta/auditreports/2009reports/200910037fr.html.

[37] POGO Letter to Congress urging it to review Hamilton Sundstrand's 9-year no-bid commercial item spare parts contract, November 27, 2006. http://www.pogo.org/pogo-files/letters/contract-oversight/co-cfc-20061127.html. POGO has submitted public comments to proposed contracting regulations affecting time and material hour contracts. http://www.pogo.org/pogo-files/letters/contract-oversight/co-cas-20040127.html and http://www.pogo.org/pogo-files/letters/contract-oversight/co-cas-20060306.html.

Even the Federal Acquisition Regulation specifies that T&M contracts are to be used on a very limited basis because they provide "no positive profit incentive to the contractor for cost control or labor efficiency."[38] Worse, the Services Acquisition Reform Act (SARA) of 2003 actually expanded cost or pricing data exemptions for T&M contracts so that once a service is "deemed" to be commercial, contractors no longer have to supply the underlying basis for the proposed labor rate. As might be expected, contractors have flocked to T&M contracts because it is another way to reap enormous profits at taxpayer expense.

POGO believes that risky contracts can work in practice, but only if additional oversight protections are added, including:

1. For commercial item contracts, goods or services should be considered to be "commercial" only if there are substantial sales of the actual goods or services (not some sort of close "analog") to the general public. Otherwise, the goods or services should not be eligible for this favored contracting treatment.

2. The Truth in Negotiations Act (TINA) should be substantially revised to restore it to the common sense requirements that were in place prior to the "acquisition reform" era. Specifically, all contract awards over $500,000, except those where the goods or services are sold in substantial quantities to the general public in the commercial marketplace, should be subject to TINA. This small step would result in enormous improvements in contract pricing, negotiation and accountability, and save taxpayers billions of dollars per year.

3. All contracting opportunities in excess of $100,000 – including task or delivery orders, and regardless of whether the action is subject to full and open competition, award against a GSA Federal Supply Schedule or an agency Government Wide Acquisition Contract, or any other type of contacting vehicle -- should be required to be publicly announced for a reasonable period prior to award, unless public exigency or national security considerations dictate otherwise.

4. All contracting actions, including task and delivery orders, should be subject to the contract bid protest process at the Government Accountability Office (GAO). While POGO recognizes that many will decry this recommendation as adding "red tape" to the process, we believe it is the only meaningful way to ensure that contractors are treated on an even playing field, and that agency contract award decisions can be justified in a way that will instill public confidence.

Thank you for inviting me to testify today. I look forward to working with the Subcommittee to further explore how the government should improve the federal contracting system to better protect taxpayers.

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[38] FAR Subparts 16.601(c).
http://www.acquisition.gov/FAR/current/html/Subpart%2016_6.html#wp1080953.

Ms. WATSON. I want to thank you all of you for your testimony. We will move to the question period.

I will start it off and then recognize our ranking member, Mr. Bilbray.

In response to the comments offered from our first panel, are there particular issues discussed that you believe deserve specific emphasis or added amendments?

Let's start with Mr. Gormley, please.

Mr. GORMLEY. In regards to resources, resources is the key here. I listened to Dave Drabkin—and we interface with GSA through the coalition—and they have a tremendous number of vacancies there that for some reason the personnel process takes quite a long time to bring folks into government.

Three weeks ago I had the opportunity to go and visit the VA Acquisition Academy up in Frederick, Maryland—the VA stood up a VA Acquisition Academy; it is a 3-year program with about 27 interns in the program—and I thought, I think the committee would do well by taking a trip up here. It would be a good opportunity for you all to see some of the excitement in the acquisition field, and the VA is a leader in that.

Mr. BOND. Yes, I wanted to draw attention to one of the subcommittee members, and that was Mr. Connolly, who brings a unique combination of experience as a leader in both government and at a leading contracting company. And I would hope that the subcommittee and the committee, indeed all of Congress, would use him as a valuable sounding board.

Second, Mr. Bilbray hit a key point that bears a lot of thought, and that is how to attract and retain younger workers, making sure that they have the modern tools. Government wrestled for a long time with how to deal with e-mail, can you communicate with people outside the government? Is it personal? Is it business? We need the same thing for the social networking with other 2.0 technologies.

Mr. MCNERNEY. Madam Chairwoman, I was at a construction user roundtable meeting the other day, and a lot of the big design, engineering and procurement companies are having a lot of layoffs these days. And the procurement guy that was there from the DOD recruited a lot of people for his work force, for the construction project management program. So there is some work force availability in training people transferring over to the government now.

In terms of broader issues, we think some of our contracting reforms would raise the level of competition and the type of performers coming into your construction programs, and we think ultimately that would help the agencies.

Ms. MANOS. I would like to suggest that one thing that DOD could do a much better job of, and they mentioned, for example, using the Defense Contract Management Agency as their cost analysis group. I think it would send a much stronger message—they have currently gone from having a three-star flag officer or general officer in charge of the Defense Contract Management Agency to having a civilian; the message that sends to DOD is, we don't care about this, this is a backwater, it is not where we are going to put our best and brightest people—is to restore that so it is a three-

star or four-star billet, to show that you really do care about government contracting.

And the Defense Contract Management Agency is exactly where we need really bright people to be working.

Ms. SACILOTTO. Two aspects of the testimony this morning struck me: Obviously, the need to augment the acquisition work force. Whatever tools, whatever regulations you have in place, you cannot replace people with regulation. That is a key requirement that definitely needs emphasis.

And then the second was Mr. Drabkin and Mr. Assad both mentioned the need to adhere rigorously to requirements. Whether you have a cost reimbursement contract or a fixed-price contract, getting the requirements development process right is critical to that. There are efforts under way to ensure that is done, and those are efforts that should continue.

Ms. WATSON. Thank you.

Ms. MADSEN. Two things: One, I would like to echo requirements. I think those of us who have worked in this area for a long time realize there is a lot of talk about it, but there is a real skill set that is involved in doing it right; and it may need some encouragement from the committee and the subcommittee and some help to the agencies to understand that is a priority, and they need to put resources, technical resources, at that issue.

Second, we didn't get a chance to talk about inherently governmental. There is an effort under way, per section 321 of the 2009 NDAA in the President's memorandum, to define what is inherently governmental. If you look at the panel's report, we were concerned that not be a one-size-fits-all endeavor, but rather the agencies be allowed to define what is their core mission and where they need the people, and to make reasonable discretionary choices about where to contract and where to bring work in-house.

Thank you.

Ms. WATSON. Mr. Amey.

Mr. AMEY. I agree with my panelists.

I would also say as far as increasing competition, we should look at debundling contracts. These multiple services and multiple goods all compounded into one contract is problematic. That will not only increase competition but it will also remove this layer of subcontracting that we are seeing where we are down to three layers or four layers in the subcontracting world.

I would also like to see better tools in the acquisition work force's hands as far as cost or pricing data to make better pre-award and post-award decisions and also enhancing USA spending. I know there was some talk with Mr. Drabkin this morning about data bases that are out there. We are starting to see Congress create data bases, and POGO was behind one for the responsibility and performance data base.

But we now have an excluded party's list, we have USA spending, we need to somehow consolidate those into a one-stop shop for Federal contracting where you can get all information for members of the acquisition work force as well as the public.

Ms. WATSON. Thank you.

I would like to yield to our ranking member, Mr. Bilbray.

Mr. BILBRAY. Thank you. To sort of reflect your last comment about the bundling, the nonprofit contracts that were let in Afghanistan, we found that not only were they bundled, but then the winner of the bid went back and negotiated with the competitors that they had beaten for doing the subcontract work. That is something that we will have to look into.

Mr. Bond, I appreciate you identifying some of the challenges we have. I remember getting here in 1995, and coming from local government in California—and we are both Californians; and we are trying not to flaunt this too much, especially the state our State is in right now—but I was just blown out that you couldn't e-mail between congressional offices at a time when buckets of ice were being delivered to our offices 50 years after the invention of refrigeration, and we were burning coal to generate power for this facility.

I mean, in California you go to prison for burning coal. That was a whole culture shock.

I guess one of the things I want to get identified is some of these challenges that we arrange in our procedures. The parts issues is one of those things that sort of hits me.

I ran the trolley system for San Diego, and we had to negotiate for parts with Siemens Duewag. Now, you have to go to Siemens Duewag to get parts for Siemens Duewag, at least most of the time. The challenge we had was, how do you competitively negotiate with a company that has a monopoly on the parts that you need to operate.

I guess the innovative way we did in government was that we ordered so many cars, took a look at the parts, and basically the sale of the hardware is a loss leader and the parts department is where these guys make their money. What we ended up doing was, we figured out we were going to order more cars than we needed and then asked how much assembly cost, asked them to deduct the cost of assembly and just send us the cars unassembled.

Now that is the kind of thing you have to do when you have a monopoly, but how often is a government bureaucracy able to do that?

The challenge there, when we talk about things like the parts, what kind of innovative approaches can we go to when we look at that, or can we look at the fact when we buy the units and we go out to a bid—and let me clarify. There was a comment about local government doesn't have to operate at a certain level.

All I know is, in California, we are required to take the lowest responsible bid, and so there is a preference given to the lowest bidder; but then you disqualify those who are not responsible bidders and then move up the chain. At least there is a process you follow, rather than a wish list.

So as we go, these challenges, how do we integrate into our system—and I guess this is where the new young hotshots pull up IT information to be able to look at not just the unit price, but also the life expectancy/maintenance cost because parts are then included into that life cycle cost. Do we have the technology and do we have the process to be able to integrate that in when a bid comes in? Did I get too far out in left field on this one?

Mr. GORMLEY. Basically what you are approaching on that question is life cycle cost. And as one of the panel members earlier commented, there is an art to this. Regardless of the age of the contracting officer, someone does need time to understand the government's needs, what the life cycle is and needs to understand the industry they are buying from.

So it is not point, click, and buy here. I think the need to have a growing work force and for Congress to continue to support the acquisition community, such as today's fantastic hearing—the government needs this kind of oversight and action to come out of this committee.

On the other hand, the government has barriers up in OPM to bring these people in. Your point is life cycle costing. The government back in the 1980's was very high on life cycle costing and, in some cases, has gotten away from it, to your point.

Mr. BOND. I think implicit in your question, too, is whether or not we have the ability to tap all of these different data bases and pull them together in an intelligent way so you can make a decision.

The answer to that is, yes, with a caveat. The Federal Government is the largest enterprise that we know of in terms of business function, larger than any private company. And so the task would be vast if you were going to try to encompass the entire Federal Government and every aspect of it.

But pulling multiple data bases together into what is usually called a business intelligence module at the top, so you can see what is going on and compare roll-up costs and so forth, that is done in private and public sector settings today.

Mr. BILBRAY. I guess I shouldn't say this, but the fact is, one of the big determining factors of the success of Toyota was—has been, at least—the perception that the life cycle cost of owning this vehicle is much lower than vehicles that people have been familiar with, basically much lower cost, much longer life span and everything else. So the initial cost was not the issue that we had before.

It used to be that imports were cheaper to buy up front, but not overall. And what happened was, Toyota totally destroyed that perception, and all of a sudden it became the deal that here is the car you buy and you drive it until you are a grandma and pass it on to your grandchildren. That may not be the reality, but it is the perception that has driven the success of the Toyota model.

And that is one of those formulas that consumers make all the time, but does the bureaucracy have the ability to do that? And do be have the incentive to do it? That is always the tough part when we talk about the comparison between the private sector and its inherent efficiency as opposed to the public sector, is that vested interest in the decisionmaking.

Mr. BOND. If I might, so Toyota in that case has created real value; and in the government contracting setting, I think the fact that you can look for the best value is somewhat corresponding to that concern.

You talked about whether or not we have the incentive, and I think there the subcommittee might think about some creative approaches, and we would love to engage with staff and Members on that.

But one disincentive that you have right now is kind of the use-it-or-lose-it spending pattern with the annual appropriations and so forth. There is no real incentive to save some money on a really high value so you might then use that for something else. It may be a cross-cutting initiative. For instance, one idea we suggested is, if you saved some money on something because you went the extra mile and got the best value, you can use that saved money. It doesn't die, you can use it on cross-cutting Federal agency initiatives; or perhaps it could go into extraordinary compensation for really good contracting officers.

A really good contracting officer in the private sector, if they executed a multibillion dollar successful contract would get a much larger bonus than anybody in the public sector would realize.

Mr. BILBRAY. It is funny you say that, Mr. Bond. My father passed away when I was a sophomore in high school. He was a lifer, Mustang, in the Navy, and he always said communism would never work, eventually it would fail; but his explanation was, because countries don't have fantails to throw the hams overboard as you come into port. And that is based on the old concept that if it was in your inventory when you got into port, you didn't get that the next time out.

I guess what you really hit on there, that is inherently a challenge we have in the public sector that we have to figure out how to address. I appreciate that. I think that is one of those things that we need to go back and review.

I yield back.

Ms. WATSON. Because of time, I want to thank all of the witnesses. We have your statements, but we are going to mail out to you a series of questions, and we will try to categorize them with your background and experience in mind. We would appreciate the answers back, if you can, within 10 days.

We will be suggesting to the full committee certain policy changes, and I think the kind of testimony that you have offered today will be very, very helpful.

So if you will answer, we have a series of questions that would keep us here until 3 p.m., but we can't do that. I would appreciate you responding to us within 10 days of receipt of the questions.

Thank you very much. This panel is relieved, and the meeting is adjourned.

[Whereupon, at 11:17 a.m., the subcommittee was adjourned.]

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